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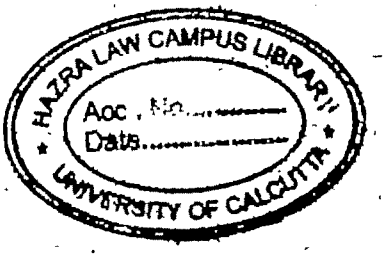
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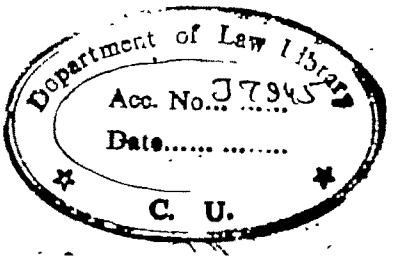
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51	Seth Radha Kishen v. Firm Ladha Mal ...	28	347	69	Bhagwan Kaur v. Harnam Kaur. .	26	490
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53	Gurmukh Singh v. Kanshi Ram .	27	681	71	Mehra v. Mangal Singh ..	27	393
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VOLUME XXVII.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 1337 OF 1911.
June 10, 1914.
Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice N. Chatterjea.
Musammat BIBI BAKHTUN—DEFENDANT—APPELLANT
versus
Syed AHMAD ISHAQUE AND OTHERS—PLAINTIFFS—RESPONDENTS.

Document—Genuineness—Co-owner in possession—Intention to cheat co-owners, whether extinguishes title—Ouster—Adverse possession—Prescription.

When a document is held by a Court of Justice to be 'genuine', what is intended to be held, and in fact is held, is that the document was duly executed and that it is an operative document.

Mere mental determination of a co-owner holding possession to cheat his fellow-owners is insufficient in law for extinguishing the title of the other co-owners. His possession being in law possession of all the co-owners, it is not possible to put an end to that possession by any secret intention in his mind, and nothing short of ouster or something equivalent to ouster can bring about that result.

Therefore, where there is no ouster or equivalent of ouster, the title is not extinguished

Corea v. *Appuhamy*, (1912) A. C. 230; 106 L. T. 836; 81 L. J. P. C. 151, followed.

Appeal against the decree of the District Judge, Saran, dated 7th March 1911, reversing that of the Officiating Sub-Judge at Chapra, dated 31st August 1909.

Moulvi *Khurshed Hussain*, for the Appellant.

Babu *D. L. Kastgir*, for the Respondents.

JUDGMENT.—The plaintiffs by this suit seek a declaration of their title and possession, not in respect of any specific piece of land and 16 annas in that piece of land, but in respect of 1-anna share of *Mouza* Bhikpur and that the plaintiffs may be declared entitled to get their names registered in respect thereof on expunction of the name of the defendant No. 1 and that their possession may be confirmed. There was an alternative prayer for possession, if it was thought that possession had been lost.

The learned Subordinate Judge dismissed the suit with costs.

From his decree an appeal was preferred and was heard by the District Judge of Saran, who has allowed the appeal and passed a decree in accordance with the plaintiffs' prayer.

Defendant No. 1 has appealed from this decree and there are two points raised by her. *First*, it is said that the document of the 28th May of 1850 was wrongly held to be genuine and, *secondly*, that, in any case, she is entitled to one-pie share.

To understand these contentions, reference must be made to the state of the family, which is indicated by the genealogical table

set out at page 18 of the lower Appellate Court's judgment. From that it appears that there was a common ancestor named Mir Dargahi. He left three sons, Nasar Ali, Fida Hussain and Tasaduq Hussain. Nasar Ali married one Moida. He died in 1859 and his widow in 1880. Fida Hussain, the second son, died in 1855: Tasaduq Hussain, the third son, died in 1860, being survived by his widow Walihan, The defendant-appellant is a sister of Walihan, and it is common ground before us that apart from any dispositions of the property, she, as the sister of Walihan, would have succeeded to the share of Tasaduq. Mir Dargahi, the common ancestor, had three-annas share; and, in the events which happened, one-anna devolved on each of his three sons. It is the case of the plaintiffs that by an instrument of the 28th of May 1850, 2 annas 9 pies, being the one anna of each brother less one pie in each share, were transferred to Moida, the wife of Nasar Ali. This is the instrument which is attacked by defendant No. 1. In my opinion that attack fails, in view of the definite finding of the lower Appellate Court that the transaction was genuine. It was suggested before us that in holding the transaction to be genuine the learned Judge merely affirmed its due execution and, it was said, that was beside the point, because the execution was never put in issue. The other passages in the judgment of the learned Judge, however, as indeed the word 'genuine' itself, clearly show that what was intended to be held, and in fact was held, was that not merely had the document been duly executed, but that it was an operative document, whereby the transfer was validly made in favour of the transferee, Moida. So far, I think, the appeal fails.

But it still remains for me to deal with the one-pie share of Tasaduq which was admittedly not comprised in the transfer of the 28th of May 1850.

In relation to that, as I have already explained, the appellant, as the sister of Walihan, apart from any disposition would be a co-owner with the other persons indicated in the genealogical table who are parties to this litigation.

The learned District Judge appears to have held that this one-pie share of Bibi Bakhtun, the appellant, was extinguished by the law of limitation. But in so holding I think he has not correctly appreciated what that law is in relation to co-owners. It has been recently defined by the Privy Council in the case of *Corea* v. *Appuhamy* (1). It is true that is not a decision on the Indian Limitation Act, but it is an exposition of the principles by which all decisions on that Act must be influenced. Lord Macnaghten at page 236 deals with the question involved; and refering to one Iseris, who was a co-owner, who claimed to be 'sole heir', his Lordship said that the "Courts had held that Iseris had entered as 'sole heir', apparently because he had it in his mind from the first to cheat his sisters." And then he proceeds: "Is such a conclusion possible in law? His possession was in law possession of his co-owners. It was not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or some strong equivalent to ouster could bring about that result." There is no finding of the lower Appellate Court that there was an ouster or the equivalent of an ouster. Nor can I find in the judgment any fact which would justify us in remanding the case with a view to ascertaining whether there was an ouster or its equivalent. It appears to me at most to be a case of a co-owner holding possession with a mental determination to cheat his fellow-owner. That is insufficient for the purpose of extinguishing the title of the co-owner and depriving him of the rights that would otherwise exist. From this it follows that as there was no ouster or the equivalent, of an ouster, the title of the appellant Bibi Bakhtun, to this one-pie share has not been extinguished and so far as the judgment of the lower Appellate Court treats it as extinguished, it is erroneous in law.

We must, therefore, modify the decree of the lower Appellate Court so far as it extends to this one-pie share of the

(1) (1912) A. C. 230; 105 L. T. 836, 81 L. J. P. C., 161.

appellant, and the utmost that can be declared in favour of the plaintiffs is a joint title and a right to joint possession with the defendant, Bibi Bakhtun.

The only question remains is as to costs. As there has been a partial success on each side, we think that the proper order is that each party should bear his or her own costs throughout.

Appeal allowed in part.

MADRAS HIGH COURT.

CIVIL APPEALS NOS. 39 AND 89 OF 1912.

November 13, 1914.

Present:—Sir John Edward Power Wallis, KT., Chief Justice, and Mr. Justice Seshagiri Aiyar.

IN No. 39 OF 1912

MUTHUSAMI NAICKER AND ANOTHER—DEFENDANTS NOS. 1 AND 3—APPELLANTS

versus

MUTHUSAMI NAICKER AND OTHERS—PLAINTIFFS—RESPONDENTS.

IN No. 89 OF 1912

R. M. V. R. A. VENKATACHALLAM CHETTIAR—DEFENDANT No. 6—APPELLANT

versus

MUTHUSAMI NAICKER AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 1 TO 4—RESPONDENTS.

Hindu Law—Partition—Agreement to divide income only, whether estops division by metes and bounds—Plea of impartibility, how maintained—Agreement to divide conclusive as to status.

The plea of impartibility of a *zemindari* can succeed only if the parties prove that such a custom existed in the family before the family acquired the *zemindari* lands. A provision in a deed between the members of a family that only the income of the *zemindari* is to be divided does not estop them from claiming a division by metes and bounds: such an agreement is not binding on the other members of the family, as it is opposed to the ordinary incidents of joint property.

Subbaraya Tavker v. *Raja Ram Tavker*, 25 M. 585; 12 M. L. J. 91; *K. Venkataramanna* v. *K. Brammanna Sastrulu*, 4 M. H. C. R. 345, followed.

Kumara Tirumalai Nait v. *Bingaru Tirumalai Sauri Nait*, 21 M. 310, distinguished.

Where a deed recites that there is no community of property or interest between the parties, it operates as a final deed of division and no Court should go behind it.

Sivagnana Tayar v. *Periasami*, 5 I. A. 61, 1 M. 312; 2 C. L. R. 81, 3 Sar. P. C. J. 795; 3 Suth. P. C. J. 508; *Moro Viswanath* v. *Ganesh Vithal*, 10 B. H. C. R. 444, followed.

Appeals against the decree of the District Court of Madura, in Original Suit No. 4 of 1910.

In A. S. No. 39 of 1912.

Messrs. *T. Rangachariar* and *K. Parthasarathy Aiyangar*, for the Appellants.

Messrs. *S. Srinivasa Aiyangar*, *K. Bhashyam Aiyangar*, *T. Rangaramanujachariar*, *G. S. Ramachandra Aiyar*, for the Respondents.

In A. S. No. 89 of 1912.

Mr. *G. S. Ramachandra Aiyar*, for the Appellants.

Mr. *T. Rangachariar*, for the Respondents.

These appeals and the memorandum of objections filed by respondents Nos. 1 to 12 and 14th in Appeal No. 39 of 1912 coming on for hearing on 1st and 2nd of October, the Court delivered the following

JUDGMENT.—The first ground taken in this Appeal No. 39 of 1912 is that the District Judge ought to have found the estate to be impartible. We think there are no grounds for so holding. It is alleged for the appellant that the estate was carved out of one of the old Dindigul Polliems which were resumed by Government at the beginning of the 19th century. In 1806 the assessment on the lands forming the estate, which include lands from one of the old Polliems as well as Government lands, was auctioned by Government, and was purchased by the ancestor of the parties who agreed to pay the highest rental. The family has continued in possession ever since, but did not obtain a *sanad* recognising the permanent character of the tenure until the year 1871. It is admitted that there was no custom of impartibility in the family before they acquired the estate, and it is difficult to see on what basis such a claim could be rested. It is, however, expressly negatived by the fact that in the year 1862 the four brothers who then represented the family partitioned the estate among themselves under Exhibit II (*a*).

The next question is whether, assuming the estate to have been partible and to have been partitioned, the 1st defendant is entitled to resist the claim for division by metes and bounds because of the provision

in Exhibit II (*a*) that only the income of the *semindari* is to be divided. Such an agreement has been held not to be binding even on the members of the family who were parties to it. *Subbaraya Tavker* v. *Rajaram Tavker* (1). As pointed out in *K. Venkataramanna* v. *K. Brammanna Sastrulu* (2), an estate cannot be made subject to a condition which is repugnant to one of its ordinary legal incidents. This is also the principle underlying the provisions of section 11 of the Transfer of Property Act and is not opposed to any rule of Hindu Law. The decision in *Kumara Tirumalai Naik* v. *Bangaru Tirumalai Sami Naik* (3) has, in our opinion, no bearing on the present case, as in that case the property had been held to be impartible by the decree of a competent Court.

Under the partition Exhibit II (*a*), the four bothers divided the property into five shares two of which were assigned to the senior brother, who it was recited was looking after the affairs of the *semindari*. It is now argued for the respondents that the descendants of the senior brother are not entitled to retain these two shares out of five in the partition by metes and bounds to be now directed. We cannot agree with this contention. Exhibit II (*a*) was clearly intended to be a final division of the estate and expressly provided that thereafter there should be only a community of friendship between the parties and no community of property or interest and there are other recitals to the same effect. We cannot accept the contention that the extra share was given to the eldest brother merely as wages of management or that it was based on a mistaken notion that the estate was impartible. In our opinion Exhibit II (*a*) was a family arrangement which was binding on the parties and those claiming under them. *Sivagnana Taver* v. *Periasami* (4) and *Moro Viswanath* v. *Ganesh Vithal* (5).

The 1st defendant relies on an arrangement referred to in paragraph 8 of the plaint, according to which his father enjoyed two out of four shares in the income payable to one of the brothers, who died in 1893; and contends that under this arrangement he is entitled in partition to add to his share half the share which would have fallen to the deceased. This arrangement was not embodied in writing and is opposed to the provisions of the deed of partition, Exhibit II (*a*). There is no question of prescription among co-tenants and we think the 1st defendant is not entitled to enhance his share in this way. The decree will be modified accordingly. The 4th defendant will get 7/30ths, defendants Nos. 1 to 3, 7/30ths, plaintiffs Nos. 1 to 4 and 5th defendant 8/30ths and the family of 5th and 6th plaintiffs 8/30ths of the whole, omitting moveables mentioned in paragraph 2 of the preliminary decree. Each of the plaintiffs Nos. 1 to 4 will have separate shares.

As regards the memoranda of objections, we think that having regard to the allegations in paragraphs 15 and 26 of the plaint, the plaintiff is entitled to have an account taken of the properties, if any, acquired by the 1st defendant's father and the 1st defendant with the common income of the estate under his management after the partition of 1862.

As to issue 14, we are not prepared to differ from the District Judge.

Under Exhibit II (*a*) we think the management of the charity was assigned to the branch of the family represented by the 4th and 1st defendants. Item 2 of schedule E has been found to be charity property and it is governed by the same considerations. The plaintiff claims it as private property and his claim fails. As regards the 6th defendant's appeal (No. 89 of 1912) it is enough to say that his rights under Exhibits A and B are not affected by the decree. In the schedule A to the decree, for the four items mentioned as due to the 6th defendant's father, the debt due under Exhibit 17 (*h*), which is a renewal of Exhibits 17 to 17 (*c*), will be substituted. Otherwise the 6th defendant's appeal is dismissed with no order as to costs, otherwise the costs of all the other parties will come out of the estate throughout.

These appeals having been posted "to be spoken" to this day the Court made the following

(1) 25 M. 585; 12 M. L. J. 91.
(2) 4 M. H. C. R. 345.
(3) 21 M. 310.
(4) 5 I. A. 6; 1 M. 312; 2 C. L. R. 81; 3 Sar. P. C. J. 795; 3 Suth P. C. J. 508.
(5) 10 B. H. C. R. 444.

ORDER.—As regards properties mentioned in lines 13 to 17 at page 162 of the documents "The Dhasaripatti tank-fed lands, Ayan Virupakshi Channel-fed lands, and Kongepathy tank-fed lands which are in the occupancy of the tenants," they are to be divided equally between the three branches.

Appeals dismissed.

CALCUTTA HIGH COURT.
FIRST CIVIL APPEAL No. 11 OF 1912.
SECOND CIVIL APPEAL No. 201 OF 1912.
June 25, 1914.
Present:—Mr. Justice Fletcher and Mr. Justice Richardson.
IN FIRST APPEAL No. 11 OF 1912.
NEMO DEO—PLAINTIFF—APPELLANT
versus
PARBATI KUMARI AND OTHERS—DEFENDANTS—RESPONDENTS.
IN SECOND APPEAL No. 201 OF 1912.
JAHALI DEO—PLAINTIFF—APPELLANT
versus
PARBATI KUMARI AND OTHERS—DEFENDANTS—RESPONDENTS.

Sonthal Parganas Settlement Regulation (III of 1872), ss. 25, 25A—Record of Rights when to be questioned in Civil Court—Zemindar or other proprietor—Suit for declaration of title in a share of a shikmi ghatwali khorposh grant, whether cognisable by Civil Court.

The provisions of Regulation III of 1872 make the Record of Rights conclusive proof of the rights and customs therein recorded and prohibit the record from being re-opened, until a fresh Settlement is made, without the previous sanction of the Local Government. The jurisdiction of the Civil Courts is absolutely excluded, except in cases specially provided for in section 25 A of the Regulation, which applies only in the case of 'a *zemindar* or other proprietor.'

A suit for declaration of title and for registration of the plaintiff's name in the Settlement Records, in a share of a *shikmi ghatwali khorposh* grant, where rent is payable to the Ghatwals and no land revenue is payable direct to the Government, though the land is not free from the Government revenue, is not cognisable by a Civil Court.

First appeal against a decree of the Subordinate Judge of Deoghur, dated 5th July 1911.

Second appeal against the decree of the District Judge of Dumka, dated the 13th September 1911, affirming that of the Subordinate Judge of Deoghar, dated the 5th July, 1911.

Babus *Mahendra Nath Roy* and *Surendra Nath Ghosal*, for the Appellants.

Babu *Nares Chandra Sinha*, for the Respondents.

JUDGMENT.

FLETCHER, J.—This is an appeal by the plaintiff against the judgment of the Subordinate Judge of Deoghur, dated the 5th of July 1911.

The plaintiff brought this suit for declaration of his title in a share in a certain *Mousa* Sankari and for the registration of his name in the Settlement Records in respect thereof. The Subordinate Judge dismissed the suit on the ground that it was not maintainable. It appears that many years ago the Rohini Ghatwals granted 25 villages as *khorposh shikmi ghatwali* tenures to the junior members of the family. In course of time these 25 villages were divided amongst the various junior members, and it is common ground that Barras Deo, the common ancestor of the parties, held an eight-annas share in the *Mousa* Sankari.

Subsequently Settlement proceedings were held under the provisions of the Sonthal Parganas Settlement Regulation (Regulation III of 1872). Barras Deo was then dead. The Record of Rights was published on the 13th of May 1904.

The entry so far as it relates to the eight-annas share of *Mousa* Sankari was taken before the Commissioner.

The dispute before the Commissioner was between Peary Deo, one of the descendants of Barras Deo, on the one hand and certain other members of the family on the other hand.

The Commissioner, by his order dated the 31st of October 1907, directed that the name of Peary Deo should be entered on the record as a *khorposhdar* and *shikmi ghatwal* of the eight-annas share of *Mousa* Sankari. According to the reasons given by the Commissioner, he came to this conclusion on the ground that "Peary Deo is the principal representative of the descendants of the third son of Parsi by that wife," that is, Barras Deo.

Peary having been recorded in respect of the eight-annas in *Mousa* Sankari, the plaintiff has brought this suit for declaration of his title and amendment of the Record of Rights.

The case has been argued before us solely on the question as to whether the present suit is maintainable, having regard to the

provisions of Regulation III of 1872. Section 11 of the Regulation enacts that, except as provided by section 25A, no suit shall lie in any Civil Court regarding any matter decided by a Settlement Officer, but the decisions and orders of Settlement Officers shall have the force of a decree of Court. By section 12 Settlement Officers are given jurisdiction to inquire into, to decide, and to record "any other landed rights to which by law or custom of the country or any tribe any person may have a legal or equitable claim."

Section 14 provides that the Settlement Officer is to give notice that he is about to prepare a Record of Rights, so that all persons may bring forward their claims. The Settlement Officer is, however, directed by the section to inquire into, settle and record all rights or claims, even though such claims or rights are not urged before him.

In addition, there are the provisions contained in sub-sections (1) and (3) of section 25. These provisions, so far as it is necessary to state them for the present purpose, make the Record of Rights conclusive proof of the rights and customs therein recorded, and prohibit the record from being re-opened until a fresh Settlement is made without the previous sanction of the Local Government. On these sections, I think, the jurisdiction of the Civil Courts is absolutely excluded, except in cases specially provided for in section 25A of the Regulation. Now, in order that the plaintiff's case should fall within the provisions of section 25A, it is essential for the plaintiff to show that he is a *zemindar* or other proprietor. It is not suggested that the plaintiff is a *zemindar*. Is he then a proprietor? The Regulation itself contains no definition of a proprietor. But when we consider the nature of the interest claimed, I think that the plaintiff is not a proprietor.

The plaintiff's claim is to a share of a *shikmi ghatwali khorposh* grant. Rent in respect of this is payable to the *ghatwals*, and no land revenue is payable direct to the Government, nor is it suggested the land is free from the Government revenue.

Such an interest in land does not, in my opinion, come within the description of a right of "a *zemindar* or other proprietor."

I think, therefore, that the Subordinate Judge came to a correct conclusion in dismissing the plaintiff's suit on the ground that it is not maintainable. The only remedy the plaintiff has is to apply to the Government, under section 25 of the Regulation, to direct the revision of the Record of Rights. It would appear from the Commissioner's judgment that he decided in favour of Peary Deo on the ground that he was the "principal representative of the descendants" of Barras Deo. The contest before the Commissioner was between Peary on the one hand as the principal descendant of Barras Deo and other members of the family on the other hand. It is nowhere suggested in the judgment of the Commissioner that he meant to give Peary Deo, as the principal representative of the descendants, the whole of the eight annas in *Mousa* Sankari to the exclusion of other descendants of Barras Deo. However that may be, that will be a matter for the consideration of the Government, if the plaintiff applies to them to direct the revision of the record under section 25. So far as our duties are concerned, all that we can say is that the present suit cannot be maintained in a Civil Court.

The present appeal, therefore, fails and must be dismissed with costs.

The judgment will also govern Second Appeal No. 201 of 1912 which will also be dismissed with costs.

RICHARDSON, J.—I agree, for the reasons indicated by my learned brother. The plaintiff cannot succeed in this suit without re-opening the Record of Rights. Under the provisions of the Regulation, therefore, the Civil Courts have no jurisdiction to give him the relief for which he seeks.

Appeals dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 369 OF 1913.

November 19, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Tyabji.

LINGAPPA CHETTIAR—RESPONDENT No. 2—APPELLANT

versus

W. P. NARASIMHA CHARIAR AND ANOTHER—PETITIONERS—RESPONDENTS.

Provincial Insolvency Act (III of 1907), s. 16 (2) (b)

KALI KANTA SAHA *v.* ISMAIL.

—Application by creditor after declaration of insolvency.

Once a person has been declared insolvent and a vesting order passed, no creditor can apply for any remedy against him without the leave of the Court.

Appeal against the order of the District Court of South Arcot, in Interlocutory Application No. 80 of 1913, in Insolvency Petition No. 12 of 1911.

Mr. *S. T. Sreenivasa Gopalachariar*, for the Appellant.

Mr. *M. N. Duraiswami Aiyangar*, for the Respondents,

JUDGMENT.—Section 16 (2) (*b*) of the Provincial Insolvency Act is clear against the right of a creditor to have any remedy against the insolvent or his estate or to commence any legal proceedings, except with the leave of the Court, after the insolvent has been adjudicated and his estate has vested in the Official Receiver. It is not alleged here that the first respondent obtained the leave of the Court. In these circumstances he had no right to present this application to the lower Court, and the appeal must, therefore, be allowed, the application being dismissed.

The objection is taken here for the first time. If it had been taken in the lower Court, the Official Receiver would perhaps have joined in the application. The appellant will pay the 1st respondent's costs throughout.

Appeal allowed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 361 OF 1912.

March 2, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

KALI KANTA SAHA—PLAINTIFF—APPELLANT

versus

ISMAIL—DEFENDANT—RESPONDENT.

Contract to deliver goods in particular month—Non-delivery till last day of month—Breach of contract—Late shipment—Construction of contract—Party relying upon exception—Measure of damages.

The defendant agreed to deliver to the plaintiff a certain quantity of Rangoon rice in the month of June. The contract provided, *inter alia*, that no objection would be raised by the purchaser if the delivery of the goods was delayed owing to late shipment at Rangoon. The goods were not delivered on or before the 30th June.

Held, (1) that there was a breach of the contract;

(2) that the term 'shipment' in the agreement included not merely the loading of goods on board the ship but also the starting of the ship;

(3) that the parties intended by the late shipment provision nothing more than this, that the goods should be put on board in such time as to make it possible to have them delivered to the purchaser at Calcutta on the date specified, if the ship started on such a day as to arrive in Calcutta in time; but that if for any reason for which the vendor was not responsible the ship could not start in time and consequently arrived in Calcutta too late to make it possible for the vendor to deliver to the purchaser the goods on the appointed day, the vendor was not to be held liable in damages;

(4) that, hence, it was obligatory on the defendant to establish that the delay was attributable to circumstances for which he was not responsible;

As soon as a contract has been broken, the obligation of the purchaser to take delivery vanishes, he is not bound to take the goods when they are delivered late;

The right measure of damages is the difference between the contract price and the market price on the date of delivery originally agreed upon by the parties.

Appeal against the decree of the District Judge of 24-Parganas, dated the 4th January 1912, reversing that of the Munsif of Sealdah, dated the 14th November 1910.

Babus *Satish Chunder Ghose* and *Smritis Chunder Ghose*, for the Appellant.

Babu *Provas Chunder Mitter*, for the Respondent.

JUDGMENT.—This is an appeal by the plaintiff in a suit for damages for breach of contract. The defendant entered into a contract with the plaintiff on the 19th February 1909 to deliver 50 tons of Rangoon rice in June 1909 and another 50 tons in July 1909. The contract was in these terms: "We have this day sold to you the undermentioned goods of the following description and condition, namely, one-hundred tons of No. 1 small mill rice of average quality of the season at the time of delivery, at Rs. 3-6 only per Bazar Maund, Bazar Dustoor nett and empty gunnies being packing of the said rice at Rs. 25 per cent. bags. Terms cash before delivery. Deliverable fifty tons in June and 50 tons in July 1909." There was a further clause in the contract to the following effect: "It is hereby likewise agreed that no objection is to be raised by

you in the case of the delivery of the goods being delayed by reason of the non-arrival in time of the steamer carrying the goods on account of the shallowness of water at Diamond Harbour, damage to the steam engine, accidents of the sea and other causes not under human control, as also owing to late shipment at Rangoon." The June consignment was not delivered on or before the 30th June. The result was that on the 30th June the plaintiff wrote to the defendant and tendered him the price for the consignment and intimated that if the defendant failed to deliver the rice in question within that date, he would be held liable for the difference of price. On the 6th July, the plaintiff again wrote to the defendant a letter in which he stated that the amount tendered had been refused, and that he consequently claimed damages to the extent of Rs. 510. On the 9th July the defendant replied to these letters. The position he took up was that under the terms and conditions of the contract, the plaintiff was not entitled to any damages for late delivery. The ground on which this defence was taken may be stated in his own words, namely, "that as the deliveries are subject to and controlled by the shipments during the months mentioned in the contract, there can be no question of any particular due date for delivery, and, therefore, no tender is possible on the part of the buyer." The defendant further intimated that the rice was on that date ready for delivery at Howrah Ghat. The plaintiff, however, took no notice of this letter and refused to accept delivery of the rice. As regards the July consignment, on the 30th July the plaintiff wrote again to the defendant and tendered the price thereof. He further stated that if the rice was not delivered in terms of the contract within 24 hours, that is, on or before the last day of July, the defendant would be held responsible for damages. The defendant in answer took up the position that under the terms of the contract the delivery was controlled by and made according to the shipments made at Rangoon during the month for which delivery was mentioned in the contract. On the 3rd August, the plaintiff claimed damages as on the previous occasion. On the next day, the defendant intimated to the plaintiff that the July shipment had arrived at port and was ready for delivery at Howrah Ghat. The plaintiff took no notice of this, and on the 27th September 1909 commenced the present action for damages for breach of contract.

The Court of first instance found that there had been a breach of the contract, made a decree in favour of the plaintiff, and estimated the damges at the difference between the contract price and the market rate when the goods were to be delivered. Upon appeal, the District Judge has reversed the decision of the Subordinate Judge and dismissed the suit. He has held that there was no breach of contract and that the plaintiff was not entitled to any damages. He has further found that whatever the real meaning of the contract might be, the plaintiff should have accepted the goods on the dates on which they were offered to him, as the market price was then the same as on the dates on which the goods were agreed to be delivered.

On the present appeal by the plaintiff, it has been argued that the contract has been broken. To determine the validity of this contention, it is necessary to interpret the contract. It is plain that the goods were to be delivered on or before the 30th June and 31st July 1909 respectively. It is admitted that the goods were not so delivered; *prima facie* there was thus a breach of the contract. The defendant, however, relies upon the clause already mentioned, which states that no objection would be raised by the purchaser in the case of the delivery of the goods being delayed owing to late shipment at Rangoon. It is plain that as the defendant relies upon the exception, the burden is upon him to establish that the case is covered by the exception upon which he relies. If any authority is needed for this self-evident position, reference may be made to the decision of the House of Lords in the case of *Frank Stewart Sandeman & Sons* v. *Tyzack and Branfoot Steamship Company Limited* (1), where Lord Loreburn observed that the burden of proving that the case comes within the exception lies upon the person who sets

(1) (1913) A. C. 680 at p. 689; 83 L. J. P. C. 23; 109 L. T. 580; 57 S. J. 752; 29 T. L. R. 694.

it up. To make this clause fit in with his case, the defendant seeks to interpret it in the manner following. He argues that according to this claim, liberally construed, he was at liberty to delay the shipment at Rangoon to any day within the month on the last day of which the goods were to be delivered to the purchaser, and that it is immaterial whether the delay was due to avoidable reasons or to circumstances over which he had no control. This construction strikes one as, on the face of it, eminently unreasonable. There has been considerable discussion at the bar as to the meaning of the expression 'late shipment;' but one point is absolutely plain, namely, that the term 'shipment' includes not merely the loading of goods on board the ship but also the starting of the ship. It could never have been intended by the parties that one of them, the purchaser, would be placed absolutely at the mercy of the vendor who was to be at liberty capriciously to delay the shipment of the goods at Rangoon to the detriment of the purchaser. What they clearly intended was that the goods should be put on board in such time as to make it possible to have them delivered to the purchaser at Calcutta on the dates specified if the ship started on such a day as to arrive in Calcutta in time, but that if for any reason for which the vendor was not responsible the ship could not start in time and consequently arrived in Calcutta too late to make it possible for the vendor to deliver to the purchaser the goods on the appointed day, the vendor was not to be held liable in damages. In this view of the matter, it would be obligatory upon the defendant to establish that the delay is attributable to circumstances for which he is not responsible. This indeed is clear from the decision of the Court of Appeal in the case of *Dunn* v. *Bucknall* (2), where it is stated that if a party relies upon an exception to take his case out of the contract, he must prove that the circumstances are not attributable to his negligence. In the case before us, there is no evidence in the record to show that the defendant is not responsible for the delay which actually took place. Indeed, his case has never been that the delay was unavoidable. Before the suit was commenced, as soon as the claim for damages was made against him, he took up the position that under the terms of the contract he was entitled to delay shipment up to the last day of the month in which the goods were to be delivered. This clearly he was not entitled to do upon a reasonable interpretation of the contract. The defendant has clearly failed to bring his case within the exception, and we must accordingly hold that there was a breach of the contract.

The question next arises, whether the plaintiff is entitled to damages. On behalf of the defendant the view taken by the District Judge has been reiterated before us, namely, that inasmuch as the market price had not varied between the dates on which the contract was to be performed and the dates on which the goods were actually offered, the plaintiff was bound to accept them. There is obviously no foundation for this contention. As was pointed out in the case of *Behn* v. *Burness* (3), as soon as the contract has been broken, the obligation of the purchaser to take delivery of the goods vanishes; he is not bound to accept the goods when they are delivered late In these circumstances, there can be no question, as was pointed out in the case of *Grenon* v. *Lachmi Narain Agurwala* (4), that the right measure of damages is the difference between the contract price and the market price on the date of delivery originally agreed upon by the parties. This was correctly accepted as the basis for the determination of damages by the Court of first instance.

The result is that this appeal is allowed, the decree of the District Judge set aside and that of the Court of first instance restored with costs both here and in the Court of Appeal below.

Appeal allowed.

(2) (1902) 2 K. B. 614 at p. 621; 71 L. J. K. B. 903; 87 L. T. 407; 51 W. R. 100; 8 Com. Cas. 33; 9 Asp. M. C. 336; 18 T. L. R. 807.

(3) (1863) 3 B. & S. 751 at p. 759; 32 L. J. Q. B. 204; 9 Jur. (N S) 620, 8 L. T. 207; 11 W.R. 496; 124 R. R. 794; 122 Eng. Rep. 281.

(4) 24 C. 8; 23 I. A. 119.

MADRAS HIGH COURT.
SECOND CIVIL APPEAL No. 151 OF 1913.
November 23, 1914.
Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Hannay.
UKKANDATH *alias* PARAMPARAMBATH KUNHI KRISHNA MENON —DEFENDANT No. 2—APPELLANT
versus
PULIYAKOT KUNHI KUTTAN THAMPAN AVERGAL, STYLED MOOTHA NAIR, AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 1 AND 3—RESPONDENTS.

Malabar Law—Anubhavam *tenure*—*Alienation to stranger, effect of.*

Alienation by an *anubhavam* tenant to a stranger puts an end to the tenure, and the land reverts to the grantor, even without an express clause in the grant providing for a re-entry.

Thoyyan Nair v. *Zamorin of Calicut*, 27 M. 202 at p. 204, followed.

Achutha Menon v. *Sankaran Nair*, 12 Ind Cas. 1007; 36 M. 380; (1911) 2 M. W. N. 520; 10 M. L. T. 521; 22 M. L. J. 118, distinguished.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Palghat, in Appeal Suit No. 202 of 1912, preferred against that of the District Munsif of Alatur, in Original Suit No. 60 of 1911.

Mr. *J. L. Rozario*, for the Appellant.

Mr. *C. V. Ananthakrishna Aiyar*, for the Respondents.

JUDGMENT.—We do not express any opinion on the question whether the lower Courts were right in their view that Exhibits A and XIII do not recognise an irredeemable hereditary *anubhavam* tenure in the plaint lands themselves as vesting in the 1st defendant.

Assuming that the lower Courts were right in that view and that the 1st defendant had an *anubhavam* tenure in the lands, his alienation of the lands to the 2nd defendant in 1909 under Exhibit VII put an end to that *anubhavam* tenure [see Moore's Malabar Law, page 308, and *Thoyyan Nair* v. *Zamorin of Calicut*(1)], as the right to enjoy was given only to the 1st defendant and his heirs and as soon as they ceased to enjoy the lands, the right of enjoyment reverted to the grantor even without any express clause in the grant providing for re-entry. The case of *Achutha Menon* v. *Sankaran Nair* (2), no doubt,

(1) 27 M. 202 at p. 204.
(2) 12 Ind. Cas. 1007; 36 M. 380; (1911) 2 M. W. N. 520; 10 M. L. T. 521; 22 M. L. J. 118.

related to *karankari* tenure, but the reasoning by which it was held that on alienation by the tenant holding under such a tenure the land reverted to the landlord even without an express clause giving the latter a right of re-entry, applies also to *anubhavam* tenures.

For the above reasons, we dismiss this second appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.
CIVIL RULE No. 431 OF 1914.
May 25, 1914.
Present:—Mr. Justice Woodroffe and Mr. Justice D. Chatterjee.
ADHAR CHANDRA GOPE—PETITIONER
versus
PULIN BEHARY SAHA—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss 42, 47, 104 (h), 145—Small Cause Court decree transferred for execution to Munsif—Order directing arrest of surety, whether appealable.

Where the decree of a Small Cause Court is sent for execution to a Munsif and the latter directs the arrest of the surety of the judgment-debtor, the order of arrest is appealable.

Civil Rule against the order of the District Judge of Dacca, in Miscellaneous Appeal No. 14 of 1914.

Babu *Rajendra Chandra Guha*, for the Petitioner.

Babu *Gopal Chandra Dass*, for the Respondent.

JUDGMENT.

WOODROFFE, J.—The first question which we have to decide in this case is whether or not there was an appeal from the Munsif to the District Judge. The latter has held that there is not.

We cannot go into the merits of this case as all the facts are not before us. Therefore, I limit my observations to the question whether the applicant was entitled to be heard before the District Judge.

I think he has made out his right of appeal to the District Judge, because although section 104, clause (*h*), excepts from appeal an order directing the arrest of a person in execution of a decree, we must also look at the

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other sections of the Code. Under section 42, the Court executing a decree sent to it has the same power in executing such decree as if it had been passed by itself and the order in executing such decree is subject to the same rules in respect of appeal as if the decree had been passed by itself. In the present case, the decree of the Small Cause Court was sent for execution to the Court of the Munsif. Now, there would have been an appeal from the order of the Munsif. Then, according to section 42, there would be an appeal from his order as a Court executing a decree. Further, under the provisions of section 145 of the Code, a surety is for the purposes of appeal to be deemed a party within the meaning of section 47 and an order under section 47 is an appealable decree.

Therefore I think that the Rule must be made absolute in so far as the order of the District Judge refusing to hear the appeal is hereby set aside and the matter must be reheard by him.

Pending the hearing of the appeal before the lower Appellate Court the petitioner will be released on the same security as before.

The applicant is entitled to his costs one gold *mohur*.

D. CHATTERJEE, J.—I agree.

Rule made absolute.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 173 OF 1914.

November 27, 1914.

Present:—Mr. Justice Ayling.

In re G. NARAYANASWAMI NAIDU GARU, RECEIVER, NIDADAVOLE AND MEDUR ESTATES—PLAINTIFF—PETITIONER.

Madras Estates Land Act (I of 1908), s. 189—Ryoti land—Jurisdiction of Civil Court—Equitable estoppel, whether creates jurisdiction.

Where the jurisdiction of a Civil Court is barred by section 189 of the Madras Estates Land Act, the fact that the defendant is equitably estopped from raising such an objection cannot give jurisdiction.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the order of the Court of the Subordinate Judge of Kristna at Ellore, in Small Cause Suit No. 59 of 1913.

Messrs. *P. Nagabhushanam* and *M. Purushotham Naidu*, for the Petitioner.

JUDGMENT.—If the land is *jerayati* (*ryoti*) land, the jurisdiction of the Civil Court is barred by section 189 of the Madras Estates Land Act. The Subordinate Judge states that the plaintiff admitted the land to be *jerayati*, and I must take it to be so.

If the Court had no jurisdiction, the fact that the defendant was equitably estopped from raising such an objection (even if this be so), will not give it jurisdiction.

The petition is dismissed.

Petition dismissed.

CALCUTTA HIGH COURT.

CIVIL RULE No. 449 OF 1914.

June 29, 1914.

Present:—Mr. Justice Fletcher and Mr. Justice Richardson.

LAKHI NARAIN GANGULI—JUDGMENT-DEBTOR—PETITIONER

versus

FELAMANI DASI AND OTHERS—DECREE-HOLDERS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXI, 2 (3)—'Certifying or recording', meaning of—Practice—Certifying of part-payments in application for execution—Limitation for certifying.

There is no definition of what certifying or recording under Order XXI, rule 2 (3), of the Code of Civil Procedure is, but the practice in this country is that the decree-holder certifies the part-payments in the application for execution and thereupon the Court, having recorded the whole of the petition, directs execution to issue for the balance.

There is no period of limitation fixed within which the decree-holder must certify, and, therefore, the decree-holder can certify the part-payments at any time and if the part-payment be within time to prevent the decree from being barred, an execution can issue for the balance.

Civil Rule issued in the matter of Judicial Miscellaneous Case No. 9 of 1914 of the Court of the Subordinate Judge at Bankura, exercising the powers of a Court of Small Causes.

Babu *Khitish Chandra Chakravarty*, for the Petitioner.

Babu *Bepin Behary Ghose*, for the Opposite Party.

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JUDGMENT.—This is a Rule obtained by the judgment-debtor calling upon the decree-holders to show cause why the order directing execution to issue should not be set aside. The decree was obtained as long ago as the 5th April 1909 and the application for execution was made on the 17th December 1913. Between these two dates on three occasions, as found by the learned Judge of the Court below, the judgment-debtor made part-payments to the decree-holders, namely, on the 6th March 1911, 18th March 1912 and the 21st February 1913. Receipt of each of these payments was endorsed on the back of an office copy of the decree, and thereupon the decree-holders applied on the 17th December 1913 for execution for the balance remaining due under the decree. They stated in their application the fact that there had been part-payments made and asked the Court to issue execution for the balance. The judgment-debtor stated that he did not make any part-payment and that the entries on the back of the copy of the decree rendering such payments were not genuine. There can be no doubt that these part-payments were genuine transactions and the learned Judge came to a correct conclusion when he so decided. The only question is whether these part-payments have been properly recorded in the Court because under the terms of Order XXI, rule 2, sub-rule (3), Code of Civil Procedure, "a payment or adjustment of a decree, which has not been certified or recorded, shall not be recognized by any Court executing the decree." There is no definition of what certifying or recording is: but it is quite clear that the practice in this country is that the decree-holder certifies the part-payments in the application for execution and thereupon the Court having recorded the whole of the petition directs execution to issue for the balance. There is no doubt that that is the usual mode of proceeding and that it is not usual that a separate petition is filed merely certifying the part satisfaction of the decree. There is no period of limitation fixed within which the decree-holder must certify and, therefore, the decree-holder can certify the part-payments at any time and if the part-payment be within time to prevent the decree from being barred, then execution can issue for the balance. In this case the last part-payment was on the 21st February 1913 and the execution was applied for on the 17th December of the same year. That was obviously within time. The present Rule, therefore, fails and must be discharged with costs—one gold *mohur*.

Rule discharged.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1834 OF 1910.

March 31, 1913.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

Maharaja BIRENDRA KISHORE MANIKYA BAHADUR—PLAINTIFF—APPELLANT

versus

BHOIRAB CHANDRA CHAKRABARTI AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Rent-free title—Possession for long series of years without payment of rent—Absence of proof of rent having been ever realised—Inference.

Possession of lands for a long series of years without payment of rent in the absence of proof that rent has ever been realized in respect of the lands, leads to the inference that they are held under a rent-free title.

Appeal against the decree of the District Judge of Tipperah, dated the 28th February 1910, affirming that of the Munsif, third Court, at Comilla, dated the 22nd February 1909.

Mr. *S. P. Sinha*, Babus *Dwarka Nath Chuckerbutty* and *Birendra Chandra Das*, for the Appellant.

Babu *Aukhoy Kumar Banerjee*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff in a suit for declaration of his *zemindari* title to certain lands, for assessment of fair and equitable rent thereon and for recovery of three years' back rent. The defendants resisted the claim on the ground that they held under a *nishkar* or rent-free title. The Courts below have concurrently held on the evidence that the defendants have been in possession for a long series of years without payment of rent and that the plaintiff has not proved that rent has ever been realised in respect of the lands in suit. The

Courts below have inferred from this circumstance that the defendants hold under a rent-free title. This view is clearly right and is supported by the cases to which reference was made in the course of argument: *Tareeneepersad Ghose v. Kaleechurn Ghose* (1), *Dhunput Singh v. Russomoyee Chowdhrain* (2), *Radhagobind Dass v. Prokash Chunder Dass* (3). The appeal consequently fails and the decree of the Court below is affirmed with costs.

Appeal dismissed.

(1) (1862) Marshall 215; 2 Hay 90.
(2) 10 W. R. 461.
(3) 14 W. R. 108.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 1192 OF 1903.
June 29, 1905.
Present:—Mr. Justice Ghosh and Mr. Justice Pratt.

MOHAMED FAIZ CHOWDHURY AND ANOTHER—DEFENDANTS—APPELLANTS
versus
KASHI NATH GHOSH—PLAINTIFF—RESPONDENT.

Revenue sale—Residuary taluq—*Suit for possession by purchaser—Burden of proof.*

Where separate accounts were opened with different share-holders of a certain *taluq* in respect of specified portions thereof, and ultimately a residuary *taluq* was left in the hands of a person who defaulted in the payment of the Government revenue, with the result that the estate was sold up and purchased by the plaintiff, who sued for possession

Held, that the plaintiff must succeed on the strength of his own title, and it lay on him to prove that the lands in suit formed part of the residuary *taluq*.

Appeal against the decree of the Subordinate Judge of Sylhet, dated the 12th March 1903, modifying that of the Munsif of Moulvibazar, dated the 26th February 1900.

Babu *Umakali Mukerjee* and Moulvi *Mahomed Habibullah*, for the Appellants.

Babu *Brojo Lal Chuckerbutty*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit instituted by the purchaser at a sale for arrears of Government revenue. The Court of first instance dismissed the suit, but the lower Appellate Court has given the plaintiff a decree such as he claimed. The facts are shortly these: There is a *taluq* Gour Hari Singh No. 1, in the register of the Revenue Authorities. From time to time, separate accounts were opened with the different share-holders of this *taluq* in respect of specified portions thereof, and ultimately a residuary *taluq*, which still bears No. 1, was left in the hands of the person who defaulted in the payment of the Government Revenue, the result being that the residuary estate was sold up and purchased by the plaintiff. The defendant denied the title of the plaintiff, and urged that the lands claimed by him did not appertain to *taluq* Gour Hari Singh, but to a different *taluq*. The Munsif, amongst others, raised the following issue: "Do the lands in suit appertain to *taluq* No. 1, Gour Hari Singh?" That issue was understood by that Officer as involving two questions, *first*, whether the lands claimed appertain to the main estate *taluq* Gour Hari Singh, as it stood at the time of the Permanent Settlement and, *secondly*, whether the said lands appertain to the residuary estate *taluq* Gour Hari Singh No. 1, as it was purchased by the plaintiff at the revenue sale. The Munsif held that the plaintiff had failed to prove that the lands appertain to the residuary estate, and he remarked that no evidence was adduced by the plaintiff to show that the said lands do not appertain to the separate shares but to the residuary estate which the plaintiff purchased. The Subordinate Judge in appeal thought that it was not necessary for the plaintiff, and indeed the plaintiff could not be in a position, to prove that the lands in question appertain to the residuary share of the *taluq* that plaintiff purchased and finding upon the *amin's* investigation that they appertain to *taluq* Gour Hari Singh, gave the plaintiff a decree. We think, however, that it was not sufficient for the plaintiff to prove in the circumstances mentioned that the lands in suit appertain to *taluq* Gour Hari Singh as it stood at the time of the Permanent Settlement, for there being separate accounts opened with various other individuals in respect of specified portions of the *taluq* and there being certain other specified portions of land left as the residuary *taluq*, and the plaintiff having purchased that residuary *taluq* it was his duty to prove that the lands in suit appertain to that *taluq*, that is to say, the

residuary *taluq*, and it was not enough for him to prove that the land formed part of the entire *taluq* Gour Hari Singh. It will be observed that this was a suit in ejectment and the plaintiff must succeed upon the strength of his own title. Let us suppose for a moment that the lands in suit appertain to the shares in respect of which separate accounts were opened before the revenue sale took place. If the plaintiff succeeds, he would be recovering a decree for the lands which do not belong to him but to some other shares, though within the same *taluq* Gour Hari Singh No. 1. In this view of the matter, it seems to us that the judgment of the Subordinate Judge, as it stands at present, is defective and cannot, therefore, be supported. Referring, however, to the issue that was framed by the Munsif, it is quite possible that the plaintiff understood that issue as being confined to the question whether the lands in suit appertained to the whole *taluq* Gour Hari Singh No. 1, and that it had no reference to the further question whether they appertain to the residuary share of the *taluq*, though it must be stated that the Munsif who tried the case understood it in a different sense. But as we have already stated, it is just possible that the plaintiff understood the issue as an issue confined to the situation of the land as within the whole *taluq* Gour Hari Singh No. 1, and the absence of any proof on his part upon the other question may well be accounted for in that way. In these circumstances, we are of opinion that the case should be sent back to the Court of first instance with a view to allow to the plaintiff an opportunity of proving, if he can, that the lands in suit appertain to the residuary share as Taluq Gour Hari Singh No. 1. The parties will be at liberty to adduce fresh evidence upon this matter. Costs will abide the result.

Case sent back.

MADRAS HIGH COURT.

CIVIL APPEAL No. 79 OF 1912.

October 1, 1913.

Present:—Sir Arnold White, Kt., Chief Justice, and Mr. Justice Oldfield.

KUPPAMMAL—DEFENDANT No. 3—APPELLANT

versus

GATTIPALLI GOPAUL CHETTI AND OTHERS—PLAINTIFFS AND DEFENDANT No. 1—RESPONDENTS.

Collector's certificate, whether confers title on possessor—Evidence, value of certificate.

A certificate issued by the Collector in respect of immoveable properties situated within the town of Madras is only evidence of revenue registry and affords no title or security as to ownership.

Appeal from the decree and judgment of the Hon'ble Mr. Justice Wallis, dated the 11th day of September 1912, in the Ordinary Original Civil Jurisdiction of the High Court, in Civil Suit 144 of 1910.

FACTS.—The houses in suit originally belonged to the father of Kuppammal, the 3rd defendant in the case, and on his death were inherited by her. She had a son *R*, who died leaving behind him his widow, Kamalammal. During his life-time, *R* obtained a certificate from the Collector of Madras in respect of one of the suit properties and was in enjoyment of rents and profits of the suit properties. He had also once created an equitable mortgage of the suit properties by deposit of the Collector's certificate and pledging also some jewels. Kuppammal had always lived in Pondicherry. On *R*'s death his widow, Kamalammal, sold the suit properties to the plaintiffs for paying off the liabilities of *R*. The purchasers then filed the present suit in ejectment, claiming possession of the houses by virtue of the sale-deed in their favour. The defence was that Kamalammal had no title to convey, as the properties belonged to Kuppammal and that the plaintiffs got nothing by the purchase. The plaintiffs replied to this case by saying that though the title had been really in Kuppammal she had acquiesced in *R* putting himself forward as the ostensible owner of the suit properties and was in consequence estopped from denying the same, and hence their title under the sale was unassailable as they were *bona fide* purchasers for value after ascertaining that the widow had power to convey. Mr. Justice Wallis, who heard the case, held that the

KUPPAMMAL v. GATTIPALLI GOPAUL CHETTI.

Collector's certificate conferred no title at all, but acting upon other evidence in the case held that Kamalammal, the widow, was the ostensible owner of the property with the consent of Kuppammal and that the plaintiffs had acted in good faith and had purchased the properties after taking reasonable care to ascertain that the widow had power to convey the same. He decreed the suit in plaintiffs' favour. The 3rd defendant then appealed.

Mr. *C. V. Ananthakrishna Iyer*, for the Appellant:—The Collector's certificate is no evidence of title. It is only evidence of revenue registry. The evidence did not warrant the conclusion of the learned Judge that the widow was an ostensible owner.

Messrs. *Short Bewes & Co.*, for the Respondents:—In the town of Madras the Collector's certificate is the only evidence of title in respect of immoveable properties. The evidence fully warrants the finding of the learned Judge as to ostensible ownership.

JUDGMENT.

WHITE, C. J.—This is an appeal from a judgment of Wallis, J., giving the plaintiffs a decree in a suit in ejectment.

One Kamalammal, the widow of one Rangasami Chetti, on 2nd December 1909 purported to convey to the plaintiffs two houses, one house in Thambu Chetti Street and another house in Linghi Chetti Street (Exhibit C). It is not disputed that Rangasami Chetti's mother, one Kuppammal, was the owner of the houses and that his widow had no title to convey. The learned Judge held that Kuppammal (I will refer to her as the mother), who was made a party to the suit, was estopped from denying the plaintiffs' title, since Kamalammal (I will refer to her as widow) was the ostensible owner of the property with the mother's consent, and that the plaintiffs, after taking reasonable care to ascertain that the widow had power to make the conveyance, had acted in good faith.

I have had considerable doubt as to whether the evidence was sufficient to warrant a finding that the widow was the ostensible owner with the consent of the true owner, the mother, within the meaning of section 41 of the Transfer of Property Act.

In February 1905, Rangasami Chetti obtained the Collector's certificate for the Thambu Chetty Street house. The Judge (and I think quite rightly) does not attach any importance to this incident.

In 1905 Rangasami Chetti borrowed money from the plaintiffs on the security of certain jewels and of the Collector's certificate (described in the deed as the title-deed) for the Thambu Chetty Street house. The transactions leading up to the conveyance are recited in the deed (Exhibit C). It was not shown that the jewels were the mother's and she was not asked about them.

Prior to the execution of Exhibit C, there were negotiations carried on on behalf of the plaintiffs by one Murugappa, their partner, with the object of clearing Rangasami Chetti's liabilities to the plaintiffs. The Judge found that Murugappa knew a great deal more about the transaction than the plaintiffs did. Murugappa was also a relative of Rangasami Chetti's family. According to Murugappa's evidence he went to Pondicherry, where the widow lived, and made an arrangement to which the widow was a party, that money should be raised for the payment of Rangasami Chetti's liabilities by the sale of the two houses to his sister. He stated that a sale-deed was executed, but not stamped or registered. The learned Judge held that secondary evidence of this unstamped document was inadmissible. For the purpose of corroborating Murugappa's evidence, the press copy of the letter alleged to have been written by Murugappa to the widow was put in evidence. Rangasami Chetti died just after this letter was written. The evidence, as to the sending of this letter, was not satisfactory but I am not prepared to differ from the learned Judge's finding that it was in fact sent. Murugappa spoke to a further interview with the widow at Pondicherry, when according to him she promised to send him the title-deeds of the Linghi Chetti Street house.

He also said that, when he asked the widow why she did not come to Madras to act in pursuance of the agreement (apparently the agreement to sell the house to the

sister), the widow said, "will you obtain the wife's signature?"

The widow was called and denied all knowledge of any arrangement for the sale to the sister. She also denied that Murugappa had seen her in Pondicherry and told her about her son having mortgaged this property. She admitted his coming to Pondicherry, but said it was to offer condolence on the death of her son.

The learned Judge accepted the evidence of Murugappa as substantially true. I am not prepared to say he was wrong. If Murugappa's evidence was true, I think the evidence adduced on behalf of the plaintiffs was sufficient to support the learned Judge's finding as to ostensible ownership by Rangasami Chetti, and after his death by his widow with the consent of the mother.

In my opinion, however, the evidence adduced on behalf of the plaintiffs was not sufficient to establish that they took reasonable care to ascertain that the widow had power to make the transfer and that they acted in good faith. They took a conveyance, from a widow and the only document of title was the Collector's certificate for one of the houses which she purported to convey. The certificate of the Thambu Chetti Street house gives the number of the petition (Exhibit B) on which the certificate was granted. It is then stated that the registered proprietor was Rangasami Chetti's grandfather and that Rangasami traced title as the grandson through a daughter (the mother) who was dead. As a matter of fact she was alive. The plaintiffs knew this and if they had examined the petition, they would have been made aware there was an outstanding life-estate.

As regards the Linghi Chetty Street house, the plaintiffs did not receive even the Collector's certificate. The conveyance, Exhibit C, in fact recites that the title-deeds of the Linghi Chetti Street house were not in the widow's possession; and that she did not know where they were. The conveyance also recites an agreement by the widow to execute to the plaintiffs a bond of indemnity in respect thereof, but the bond does not seem to have been executed.

The learned Judge relies on the plaintiffs' knowledge that the mother was arranging for the sale of these houses by Rangasami Chetti to his sister and the fact that the widow subsequently urged the plaintiffs to get the widow to sell direct to them. With all respect, I do not think this is enough to relieve the plaintiffs from the obligation of making further inquiry than they had in fact made. It seems to me that the arranging was done mostly by Murugappa Chetty, who, it is not unlikely, being a relative of Rangasami Chetti's family, knew all about the real state of affairs, though, it may well be, the plaintiffs did not. Murugappa, however, was, I think, the plaintiffs' agent throughout, and the plaintiffs cannot plead their own ignorance if Murugappa knew all about it. Further. I do not think it can be said there was any inquiry upon the plaintiffs' part and on the part of the mother to get the widow to convey to the plaintiffs. All that Murugappa said as to this was that when he asked the mother to go to Madras to act in pursuance of the agreement with the sister, the mother said, "will you obtain the widow's signature?"

Assuming that Murugappa did not know the real state of affairs, I do not think it can be said that the plaintiffs took reasonable care to ascertain that the widow had a title to convey.

I would allow the appeal and dismiss the suit with costs throughout.

OLDFIELD, J.—The plaintiffs sue in ejectment claiming possession of two houses under Exhibit C, a conveyance from Kamalammal, widow of Rangasami. The learned Judge has held, and it is not disputed here, that the title to the property was never with either of these two persons, but was with the third defendant, Rangasami's mother. He, however, decided in the plaintiffs' favour with reference to section 41, Transfer of Property Act, on the ground that the 3rd defendant held out Rangasami before his death and his widow afterwards to the plaintiffs' agent, the plaintiffs' 2nd witness, as the ostensible owner of the property. The questions are, *first*, whether the learned Judge's findings of fact entail his legal conclusion, *next*, whether these findings are justified by the evidence.

The first incident referred to by the learned Judge was treated by him as unimportant and, therefore, can be dealt with shortly.

It is the obtaining by Rangasami on the 10th February 1905, more than 18 months before the first dealing with the property, of Exhibit D, the Collector's certificate, for one of the two houses in suit in his name. There is no evidence that the 3rd defendant was aware of, or had any connection with, his doing so. Even if she had, she lived in Pondicherry and might well have allowed his registry to enable her son to collect the rents more conveniently. In fact Exhibits I, II, III and IV show that he claimed transfer on the false ground of inheritance, suppressing the fact of the 3rd defendant's existence. Generally, as to enjoyment, there is the evidence of the plaintiffs' 4th witness, a tenant, and the 3rd defendant.

They agree that on one occasion at least, the 3rd defendant obtained a payment on account of rent on producing Rangasami's authority, Exhibit H; and the 3rd defendant says that Rangasami was collecting and spending the rents. But there is no reason for doubting her evidence that she has a substantial income from other sources. There is nothing to show that Rangasami ever claimed ownership to her knowledge in this connection. The most this entailed is that he asserted it to the tenants for the purpose of collecting rents; and, if she allowed him to do so, that gives very little support to the case of holding out as full owner, which the plaintiffs have to establish.

Next, in 1905 Rangasami, who according to the 3rd defendant, was extravagant, borrowed from the plaintiffs on the security of some jewels. Some of the jewels were sold, and the proceeds credited towards the debt. In 1906 a pro-note was executed, the amount due being still secured by pledge of the unsold jewels and also by an enquitable mortgage of the suit property. So far there is no suggestion that the 3rd defendant had any anything to do with the transactions, except (1) that the jewels were hers and (2) that she allowed Rangasami to have one house in his name and use the title-deed. But the 3rd defendant was not questioned as to the ownership of the jewels, and there is nothing regarding it, except the 2nd plaintiff's reference to a statement made to him by Rangasami. Moreover, when the jewels were eventually returned on the discharge of the debt by the sale under Exhibit C, they were not returned to the 3rd defendant, but to the vendor, the widow. As regards the title-deed, Exhibit D, it was for one house only; and, though (according to the 2nd plaintiff) Rangasami sent for it from Pondicherry, there is no evidence to show in whose custody it was there.

Regarding the next stage, the preliminaries to Exhibit C, there is a conflict of evidence The plaintiffs' 2nd witness is related to the 3rd defendant's family and he is a partner of the plaintiffs. He says that he went to Pondicherry and induced Rangasami to execute an agreement to sell the two houses and two jewels to his sister, Nagalakshmi, in order to pay the plaintiffs' debt and that the 3rd defendant was present throughout. Afterwards the witness wrote to Rangasami, Nagalakshmi and one Manikkam Pillai, since deceased. Later, in reply to a letter from the 3rd defendant, he wrote to her the original of Exhibit F, a press copy. It is on the 3rd defendant's complicity in this arrangement that the plea of holding out by her is mainly based.

First as to the legal aspect of this evidence, if it is accepted, section 41, Transfer of Property Act, is applicable when the transferor is the ostensible owner and the transfer is made with the consent of the real owner. Such consent may, no doubt, be either to the particular transfer or generally to any transfer which the ostensible owner may make. But there is nothing in the present case to show that the 3rd defendant's consent was of the latter class or extended to more than the transfer then under consideration. That transfer and the representations involved in it were not to the plaintiffs or any possible purchaser, but only to Nagalakshmi; and the representations (if any) to her could not affect the plaintiffs' 2nd witness, their agent, since their concern was only to get the money due to them, not with the manner in which it was obtained. This part of their case cannot be put higher with reference to Exhibit F. So far they have nothing on their side.

But in fact this part of their case is inadequately proved, and the learned Judge has found in its favour, perhaps because he throughout overlooked the fact that only the

plaintiffs' 2nd witness tells the whole story and he is not independent. It is, therefore, unsafe to act on his statements, which the 3rd defendant contradicts *in toto*, without corroboration. It is further ground for suspicion that the 2nd plaintiff, his principal, knew nothing of the 3rd defendant, of her part in the negotiations, or of correspondence with her. Then again, each item of documentary corroboration relied on is either inadmissible or inconclusive. There was, according to the plaintiffs' 2nd witness, a letter from the 3rd defendant to him. But she denied it, and it is said that the writer, Thangavelu, cannot be identified. If it were clear, as the learned Judge held, that Exhibit F, the reply to the 3rd defendant, had been written and despatched, as the plaintiffs' 2nd witness alleges, that would be material. But there is only the evidence of the plaintiffs' 4th witness, the plaintiffs' 2nd witness's *gumashta*, to corroborate his own on the point and according to them the original of Exhibit F was not despatched to the 3rd defendant, Kuppammal, but to one Kuppuswami Chetty, her relative, by mistake; and Kuppuswami is not called to produce it or speak to its receipt. If, therefore, it was written on the date indicated by its position in the press letter book, there is still nothing to fix the 3rd defendant with knowledge of it, or to exclude the possibility of its having been created to support a fraudulent claim. Exhibit G, a letter from Manikkam Pillay above referred to, mentions the arrangement with Nagalakshmi, but not the 3rd defendant and it in no degree supports her connection with the transaction. Though a cover is produced with this letter, there is no security beyond the plaintiffs' 2nd witness's evidence for its having been written on the date it bears, since Manikkam was, according to the plaintiffs' 2nd witness, alive till after this suit was filed. Lastly the plaintiffs no doubt summoned Nagalakshmi to produce the agreement between her and Rangasami, and could not give secondary evidence of it, because the plaintiffs' 2nd witness described it as unstamped. But neither Exhibit F nor Exhibit G mention any written agreement; and the existence of one, therefore, rests on no better foundation than the plaintiffs' inability to adduce evidence as to its contents and the statement of the plaintiffs' 2nd witness —which it is required to corroborate. The result is that the documentary corroboration of the plaintiffs' 2nd witness's evidence is deficient. The oral evidence to corroborate him is given by the plaintiffs' 3rd witness alone. He is a relative of the 3rd defendant. But the character of Exhibit B, to which he obtained Rangasami's signature as a formal acknowledgment of his indebtedness, indicates that he was acting in the plaintiffs' interest. He described a conversation with the 3rd defendant. But, as he eventully admitted that he heard her say nothing as to the ownership of the property, he added nothing to the plaintiffs' case. In conclusion the plaintiffs have not explained their omission to call Kamalammal, their vendor, who is referred to by the plaintiffs' 2nd witness as having consulted with the others. In these circumstances the evidence of the plaintiffs' 2nd witness is not adequately corroborated and accordingly this part of the case cannot be held proved.

Rangasami died on the 18th September 1909, the alleged date of despatch of Exhibit F. His widow, as the plaintiffs' 2nd witness says, quarrelled with the 3rd defendant and left Pondicherry. After she did so, he went to remonstrate with the 3rd defendant for her failure to come to Madras, to act in pursuance of her agreement with Nagalakshmi. This is unintelligible, since it is inconsistent with the plaintiffs' case that she had actively concealed her own ownership and had held out Rangasami as owner. According to the plaintiffs' 2nd witness, she first said she would have come but for Rangasami's illness and afterwards that Kamalammal could sign the document to be executed. She also, according to the plaintiffs' 2nd witness, promised to send him the title-deed for the house not covered by Exhibit B, putting him off for the time being. This attracts suspicion, because there is nothing as to further attempts to get the title-deed from her; and Exhibit C says that its whereabouts are not known. The learned Judge has relied on the reference to Kamalammal as a continuation of the previous holding out of Rangasami. But the evidence as to this conversation is, as pointed out, improbable and, as it is given by the plaintiffs' 2nd witness alone and is contradicted by the 3rd defendant, it cannot be accepted. The sale-deed, Exhibit C,

was executed by Kamalammal on the 2nd December 1909. As she had quarrelled with the 3rd defendant and was to regain two jewels by executing it, no presumption arises in favour of her disinterestedness. The conclusion on the whole case must be that the facts alleged by the plaintiffs have not been proved, and that, if they had been, only the last portion of them, the reference of Kamalammal's signature, could have entailed the legal consequence claimed.

It is then unnecessary to deal with the question whether the good faith and reasonable care postulated by the proviso to section 41 of the Transfer of Property Act have been established. It would be material, first, that the plaintiffs never saw any title-deed under which Rangasami could be supposed competent to deal with one of the houses. Next, Exhibit D, which covers the other, is only the Collector's certificate of revenue registry and could afford little or no security as to ownership. The learned Judge observes that a registration search would have disclosed nothing, and that is probably the case. But the direction in which a purchaser's inquiries might and should have been made was towards the circumstances in which and the allegations on which Exhibit D was obtained. If such inquiries had been made, Exhibits I—IV would have been forthcoming, as they have been to the 3rd defendant, the number of the connected registration case being specified in Exhibit D itself. The plaintiffs would have seen that Exhibit D was obtained by suppression of a material fact, the 3rd defendant's existence. In any case, therefore, it would be impossible to hold that the requirements of the proviso were complied with.

The result is that the appeal must be allowed and the suit is dismissed with costs in both Courts.

Appeal allowed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1612 OF 1910.

September 1, 1913.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

HARA CHANDRA MAJUMDAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

Maharaja RADHA KISHORE MANIKYA BAHADUR—PLAINTIFF—RESPONDENT.

Possession, suit for—Assessment of rent—Addition to holding—Maintainability of suit—Bengal Tenancy Act (VIII of 1885), s. 52.

A suit for possession on the allegation of dispossession by the defendant, or in the alternative for assessment of rent, where the land in suit is not part of the original holding but is subsequently acquired and treated as an addition to the original holding, is not maintainable, as not being framed under section 52 of the Bengal Tenancy Act.

Appeal against the decree of the first Subordinate Judge of Noakhali, dated the 1st February 1910, affirming that of the Munsif, first Court, at Feni, dated the 18th June 1909.

Babu *Sasadhar Roy*, for the Appellants.

Babus *Dwarka Nath Chuckerbutty* and *Birendra Chandra Das*, for the Respondent.

JUDGMENT.—In this suit the plaintiff sought to recover possession of a tank on the allegation that the defendant dispossessed him in the year 1898. There was an alternative prayer for assessment of rent.

The defendant alleged that plaintiff had never been in possession, that the tank had been excavated by his ancestor on land which formed part of his holding, and that his ancestor had by paying the capitalised value of the rent to the landlord acquired a right to hold the land rent free.

The Munsif found that the plaintiff's allegation of dispossession was false, and that defendant and his ancestor had been in possession for upwards of 50 years. He, therefore, refused the prayer for possession. He was, however, of opinion that the defendant was liable to pay rent for the tank, for he found that it previously formed part of the *mal* land of the estate and disbelieved the defendant's story of payment of a premium on the capitalised rent and acquisition of a right to hold it rent-free thereby.

He also found that the tank had been dug with the permission of the plaintiff's predecessor and that defendant's possession was

not adverse to the plaintiff prior to 1899. He further found that the tank was not on land forming part of the defendant's original holding.

He accordingly assessed the land to rent.

On appeal only two points appear to have been argued before the Subordinate Judge, *viz.*, (1) that the onus was on the plaintiff to prove that the land was *mal*, (2) that the claim was barred. The learned Subordinate Judge disposed of these contentions by remarking as to the *first*, that it was admitted that the land was *mal* and virtually admitted that rent was paid for it, as payment of the rent of the holding was not denied; and as to the *second*, that the defendant held the land as appertaining to his *jote*, so his possession could never be adverse, and that he had in fact never asserted a rent-free title.

He found, as a fact, that the defendant's ancestor had acquired the land either by encroachment or by the landlord's implied permission, as the latter had given permission to excavate a tank. His findings taken together amount to this that the land was not part of the original holding, but was subsequently acquired and treated as an addition to the original holding.

On this appeal the learned Pleader for the appellant has advanced two arguments only: (1) that the suit must fail as plaintiff has not proved his possession within 12 years of the suit, (2) that the suit is premature, for as the plaintiff's ancestor had given permission for the tank to be dug and rent had never been paid or demanded, and the tank still exists, the purpose of the grant has not been exhausted.

The first point needs no further comment than this, that the claim for possession has been dismissed and the appeal is against a decree for assessment of rent.

As to the second point, it need only be remarked that it was never the defendant's case that there had been a grant and no issue was framed to deal with any such question. The defendant's case was that he had redeemed the rent by paying the capitalized value of it, a case which has been disbelieved.

The real difficulty in the plaintiff's way is in the frame of the suit. His case now is that the land was not part of the original holding but was added to that holding by encroachment. The finding of the lower Appellate Court is that it was added to and treated as part of the holding. In that view of the facts the suit should have been framed as one under section 52 of the Bengal Tenancy Act.

To this the plaintiff's Pleader replies that the facts found are such as it would have been necessary to find if the suit had been framed as one under section 52. The obvious answer to this argument is that the allegations in the plaint are not the allegations that would be made in a suit under section 52, and if the suit had been properly framed as one under that section, the defendant might have taken a different line of defence and put the plaintiff to proof of the extent of the encroachment.

In the circumstances the appeal must be allowed and the suit dismissed with costs in all Courts.

Appeal allowed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 15 OF 1912-13 OF FYZABAD DISTRICT.

April 1, 1914.

Present:—Sir Duncan Colvin Baillie, S. M and Mr. Tweedy, J. M.

Musammat BALRAJEE AND ANOTHER—APPELLANTS

versus

SARJU PRASAD—RESPONDENT.

Ex-proprietary rights, declaration of—*Dakhl-dihani of proprietary rights does not amount to ex-proprietor's dispossession from his rights—Collection of rent from sub-tenants of ex-proprietor, whether amounts to dispossession—Possession by ex-proprietor, effect of—Mutation of names.*

A *dakhl-dihani* of proprietary rights cannot amount to dispossession of the ex-proprietor from his ex-proprietary rights in his *sir*, nor does the subsequent proprietor's collection of rent from the ex-proprietor's sub-tenants in possession of the *sir*, not by some overt act but in the background, amount to such dispossession.

An ex-proprietor retaining possession of his *sir* since the date of sale of his proprietary rights can claim ex-proprietary rights in respect of the *sir* at the time of mutation proceedings, even though they take place after more than a year from the date of the transfer.

Appeal against the order of the Commissioner, Fyzabad, dated 9th July 1913.

Babu *Bishwanath Singh*, for the Appellants.

Babu *Gopal Sahai*, for the Respondent.

SHEORAJ KOER *v.* FAKHRUDDIN.

JUDGMENT.

BAILLIE, S. M.—(*March 30th*, 1914).—The land now in question was formerly in proprietary possession of the husband of the appellants. It was admittedly his *sir* and when his proprietary rights were on the 29th May 1911 transferred by *dakhil-dihani* to the respondent, ex-proprietary rights in his favour admittedly accrued. His widows now apply under section 36, Land Revenue Act, for a declaration of their ex-proprietary rights. Their claim was allowed by the Court of first instance and a rent of Rs. 12-1-6 fixed. This decision was, however, reversed by the Deputy Commissioner. He found that as the suit was brought on the 12th June 1912 and that as respondent had in the meantime collected rent from the sub-tenants who cultivated the land, the appellant had been for over a year out of possession and was not entitled to recover possession or to have a declaratory decree passed in their favour. This decision was upheld by the Commissioner. There is an obvious mistake in this finding. The *dakhl-dihani* of proprietary rights could not possibly amount to dispossession of the appellants' husband from his ex-proprietary rights; nor was it claimed by respondent himself that it did amount to dispossession. What he did claim was that the collection of rent from the sub-tenants amounted to dispossession. Now the *rabi* rent of 1911 was due to the former proprietor and not to the respondent. The first rent that respondent was entitled to collect was the rent of the *kharif* and this could not have been collected till November, so that a year had certainly not passed after dispossession according to the respondent's own claim.

There does not, however, appear to me to have been anything of the nature of a distinct dispossession which would give a cause of action for suit under section 108 for recovery of possession. Dispossession cannot be effected by collecting rent in the background from sub-tenants who also held other land from the respondent. It must be by means of some overt act which brings prominently to notice of the persons dispossessed the fact that adverse rights are being exercised. I find no evidence whatsoever of any such overt act. Appellants have a right of collection of the arrears due from their sub-tenants for three years, and so far as the record shows there is nothing which brought prominently to their notice the fact that their right of collection was being interfered with. I do not think that it can be held that in this case appellants have been dispossessed. As their initial ex-proprietary rights are admitted I would allow this appeal, cancel the order of the Commissioner and Deputy Commissioner and restore that of the Court of first instance. Costs on respondent. Pleader's fee, Rs. 15.

TWEEDY, J. M.—I concur.

Appeal allowed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 9 OF 1913-14 OF PARTABGARH DISTRICT.

April 18, 1914.

Present:—Sir Duncan Colvin Baillie, S. M.

Bahuriya SHEORAJ KUAR—DEFENDANT—APPELLANT

versus

FAKHRUDDIN—PLAINTIFF—RESPONDENT.

Lease for certain purpose—Lessee's act in pursuance of purpose of lease—Landlord bound by lessee's act.

Where a lessee holds land from the landlord for a certain purpose and does any act in pursuance of that purpose the landlord is bound by that act, although that particular act may not be mentioned in the lease as one which the lessee is entitled to do.

Appeal from the decree of the Commissioner, Fyzabad, dated 11th August 1913, upholding that of the Assistant Collector, Partabgarh, dated 25th March 1913.

FACTS.—The defendant landlord gave certain land on lease to one Mr. Chapman for the purpose of constructing a canal or drain thereon. Mr. Chapman constructed the canal, acquiring for that purpose some under-proprietary land of the plaintiff and giving him in exchange some other land comprised in his lease. Some time after this, the defendant issued in respect of the land so given in exchange a notice of ejectment against the plaintiff, who contested it on the ground that he was not liable to ejectment as the land was his under-proprietary tenure. But the defendant pleaded that the land had not been so given in exchange and that even if it had been so given, he was not bound by this particular act of Mr.

Chapman, as the latter was merely a lessee and not entitled to give the land in question with any rights to the plaintiff. It was found by the lower Courts as a question of fact, that the land was given in exchange for the plaintiff's under-propietary land acquired by Mr. Chapman in the course of construction of the canal. Thus the only question for decision was whether the defendant was bound by Mr. Chapman's act.

Pandit *Balraj Sahay*, for the Appellant.

JUDGMENT.—It is urged that Mr. Chapman, who was merely a lessee, was not entitled to give the land in question with any rights to the respondent. Mr. Chapman occupied respondant's under-proprietary land for the purpose of an improvement on the property and I have no hesitation in holding that the *talukdar* is bound by his act in giving other land in exchange. The question as to whether there was an exchange is one of fact. There is no ground for interference by this Court.

The appeal is dismissed with costs on appellant.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 1192, 1644 AND 1624 OF 1912.

May 29, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

MATUNGINI DEBI—DEFENDANT—APPELLANT

versus

BROJESWAR BANERJEE—PLAINTIFF—RESPONDENT.

Landlord and tenant—Contribution, right of, founded on justice, equity and good conscience—Principle—Contribution for excess over one's share—Liability limited only to one's share—Over-payment good defence—Suit for contribution—Decree, how to be framed.

The right of contribution has its foundation in, and is controlled, by the principles of justice, equity and good conscience. It does not arise from contract, although it has sometimes been based on the theory of an implied contract for contribution supposed to exist between parties jointly liable *ex contractu*. The principle is that one who has discharged a common liability can recover from his co-obligors only for the excess that he has paid over his share, and each co-obligor is liable to contribute only in proportion to his share of the common debt or obligation. No contribution can be claimed against a person who paid more than his share of the debt. It is not necessary that the entire debt should have been satisfied by the plaintiff, but he must establish that he has paid more than his share of the joint liability. In a suit for contribution, the liabilities of the different parties, plaintiffs and defendants, must be separately ascertained. a joint decree cannot be made in favour of the plaintiffs against the defendants.

X, *Y*, and *Z* are co-sharer landlords, each of whom collects his share of the rent separately *X* obtains a decree for rent against *A*, *B*, and *C*. Similar decrees are obtained by *Y* and *Z* against the same set of tenants. *A* satisfies the decree of *X*, *B* that of *Y*, and *C* that of *Z*. In a suit for contribution brought by *A* against *B* and *C* in respect of payment made by him to satisfy the decree of *X*, it is open to *B* and *C* to plead non-liability on the ground that they have discharged a liability which would otherwise have fallen upon *A* under the decrees of *Y* and *Z*.

Appeals from the decrees of the District Judge of Jessore, dated the 29th March 1912, confirming those of the Subordinate Judge of Jessore, dated the 31st May 1911.

Dr. *Sarat Chunder Byak* and Babu *Bhudeb Chandra Rai*, for the Appellant.

Babu *Hara Prosad Chatterjee*, for the Respondent.

JUDGMENT.—This is an appeal by one of the defendants in a suit for contribution. The circumstances under which the present plaintiff seeks relief are somewhat complicated; but the facts essential for the appreciation of the question of law raised before us may be shortly stated. There were three sets of plaintiffs, who for the sake of brevity may be called *X*, *Y* and *Z*, and who instituted a suit for rent against a number of defendants. One of these defendants was the present plaintiff. Another defendent was the husband of the present appellant, whose estate is now represented by her as the executrix under his Will. A decree was drawn up in this suit for rent, under which the tenant defendants became liable to the plaintiffs for a large sum of money. The decree, however, specified the extent of the relief to which the plaintiffs *X*, *Y* and *Z* were entitled as amongst themselves. It may be observed incidentally that the decree was drawn up in this form, because the landlords were accustomed to collect rent in their respective shares separately. But as was pointed out by the Judicial Committee in the case of *Raja Pramada Nath Roy* v. *Raja Ramani Kanta Roy* (1), that did not stand in the way of a suit by all the landlords for a

(1) 35 I. A. 73; 35 C. 331; 7 C. L. J. 139; 12 C. W. N. 249 (P. C.); 10 Bom. L. R. 66; 8 M. L. T. 151; 18 M. L. J. 43.

joint decree against all the defendants. After this decree had been drawn up in favour of *X*, *Y* and *Z*, *X* proceeded to execute the decree against one of the defendants, *Y* against another and *Z* against a third. The result was that the present plaintiff satisfied the claim made in execution by one of the decree-holders, and the husband of the present appellant similarly satisfied the claim made by another decree-holder. The plaintiff now asserts that he has paid more than his share of the aggregate liability under the decree and is accordingly entitled to seek contribution from all the defendants to the original suit. The present appellant contends that her husband had also paid more than his share of the total liability under the decree, and that consequently no right of contribution can be claimed against her as his representative. This defence has not found favour with the Court below. The District Judge seems to have thought that there were separate decrees in favour of the different sets of landlords whom we have named *X*, *Y*, *Z*, and that it was not open to the present appellant, whose husband had satisfied the claim of one of these decree-holders *Y*, to assert in answer to the claim for contribution by the plaintiff, who had satisfied the claim made by the other decree-holder *X*, that he had made a payment in excess of his own liability and was consequently not liable to contribution. In our opinion this view cannot be supported.

In the first place, there was only one decree in the suit for rent. No doubt, that decree specified the extent of relief to which the different sets of plaintiffs were entitled. But the liability of the defendants was joint and several. Consequently, if any one of the defendants to the original suit satisfied more than his share of the liability, no claim for contribution could be made against him by any other co-sharer. It may be conceded that if he had made a payment in excess of his own share and wanted relief against his co-debtors, he was bound to bring a suit for contribution against them. But so long as he did not actively seek relief against his co-debtors, he was entitled to plead in answer to a claim for contribution by a co-debtor that he had discharged his liability and could not be called upon to contribute to the original debt. The contrary view cannot possibly be supported on principle.

In the second place, assume, as the respondent contends, that there were in essence three decrees in one sheet of paper in favour of three different sets of landlords, *X*, *Y* and *Z*, the question still remains whether satisfaction, by one of the joint debtors, of the claim of one of the decree-holders could not be pleaded in answer to a claim for contribution by a co-debtor who had satisfied another decree in favour of another landlord. The position may be thus re-stated for the sake of clearness. *X*, *Y*, and *Z* are co-sharer landlords, each of whom collects his share of the rent separately. *X* obtains a decree for rent against *A*, *B* and *C*. Similar decrees are obtained by *Y* and *Z* against the same set of tenants; *A* satisfies the decree of *X*, *B* that of *Y*, and *C* that of *Z*. If a suit for contribution is brought by *A* against *B* and *C*, in respect of payment made by him to satisfy the decree of *X*, is it open to *B* and *C* to plead non-liability on the ground that they have discharged a liability which would otherwise have fallen upon *A* under the decrees obtained by *Y* and *Z*? Clearly, the answer should be in the affirmative. If a defence like this were not available, the result would be that every joint debtor who makes a payment in satisfaction of the joint debt must have recourse to a suit for contribution; if he omits to seek relief by way of contribution, he does so at his peril. This view was not accepted by this Court as well-founded on principle in the cases of *Gogun Chand Dut* v. *Huri Mohun Dut* (2) and *Gajadhar Mahto* v. *Raghubar Gope* (3). When, as here, or as in the hypothetical case just mentioned, the judgment-debts satisfied are closely connected and arise out of the same or similar transactions, there is no good reason why in a suit by one of the joint-debtors for contribution, the defence should not be allowed to the co-debtors that they had discharged a similar liability which would otherwise have fallen upon the claimant. In our opinion, the contention of the respondent is based upon a misapprehension of the nature and purpose of a suit for contribution. The right of contribution has its foundation in, and is controlled by the principles of justice, equity and good conscience. It does not arise from contract,

(2) 12 C. L. R. 539.
(3) 12 C. W. N. 60.

although it has sometimes been based on the theory of an implied contract for contribution supposed to exist between parties jointly liable *ex contractu*. Every joint debtor who has been compelled to pay more than his share of the common debt, has the right of contribution from each of his co-debtors. The principle is that one who has discharged a common liability can recover from his co-obligors only for the excess that he has paid over his share, and each co-obligor is liable to contribute only in proportion to his share of the common debt or obligation; hence, it follows as a corollary that no contribution can be claimed against a person who has paid more than his share of the debt. It is not necessary that the entire debt should have been satisfied by the plaintiff, but he must establish that he has paid more than his share of the joint liability. As soon as the plaintiff establishes this, he becomes entitled to contribution from every one of the joint debtors who has not paid up to the full extent of his share of the liability. In a suit so framed, the liabilities of the different parties, plaintiffs, and defendants, must be separately ascertained; a joint decree cannot be made in favour of the plaintiffs against the defendants, because that would be contrary to the principle that each co-obligor is liable to contribute only in proportion to his liability; a joint decree against the defendants in a contribution suit would render necessary a succession of contribution suits. Tested in the light of these principles, the claim of the respondent against the appellant proves entirely unsustainable, for it has not been disputed that the husband of the appellant paid more than his share of the liability, and that is a complete answer to the claim of the plaintiff.

The result is that this appeal is allowed, the decree of the District Judge set aside in so far as the present appellant is concerned, and the suit dismissed with costs against her in all the Courts.

This judgment, it is conceded, will govern the other two appeals (Nos. 1644 and 1624 of 1912) in which similar decrees will be drawn up.

Appeals allowed.

CALCUTTA HIGH COURT.

FIRST CIVIL APPEALS NOS. 169 AND 195 OF 1912.

September 2, 1912.

Present:—Mr. Justice Chitty and Mr. Justice Teunon.

IN FIRST APPEAL NO. 169 OF 1912.

Mohunt MADHUSUDAN DAS—APPLICANT—APPELLANT

versus

Maharaja JAGADINDRA NATH ROY—RESPONDENT.

IN FIRST APPEAL NO. 195 OF 1912.

Maharaja JAGADINDRA NATH ROY—PETITIONER—APPELLANT

versus

Mohunt MADHUSUDAN DAS AND OTHERS—APPLICANTS—RESPONDENTS.

Mohunt—*Document appointing successor to gaddi, whether Will—Property held in capacity of* mohunt—*Letters of Administration—Probate—Question of title.*

Letters of Administration cannot be granted in respect of properties held by a person in his capacity of *mohunt*.

Where a *mohunt* executed a document purporting to appoint a successor to the *gaddi* and making over to him as *mohunt* all the properties of the *asthal* and the right of performing the *debshebu*

Held, that the document was not a Will and therefore its probate could not be granted.

Obiter.—On a *bona fide* application for Probate or Letters of Administration the Court will not go into questions of title, with reference to the property of which the deceased purported to dispose or in respect of which he died intestate.

Appeals against the decree of the District Judge of Murshidabad, dated the 16th May 1912.

IN F. A. No. 169 OF 1912.

Babus *Umakali Mukerjee*, *Golap Chunder Sarkar* and *Rishindra Nath Sarkar*, for the Appellant.

Babus *Dwarka Nath Chuckerbutty*, *Jatindra Nath Lahiri* and *Krishna Kamal Maitra*, for the Respondent.

IN F. A. No. 195 OF 1912.

Babus *Dwarka Nath Chuckerbutty* and *Jatindra Nath Lahiri*, for the Appellant.

Babus *Golap Chunder Sarkar*, *Krishna Kamal Maitra* and *Rishindra Nath Sarkar*, for the Respondents.

JUDGMENT.—These appeals arise out of an application made by Madhusudan Das for Probate of a document said to be the Will of Raghunath Das Brajabasi. Radhamohan Das was the Mohunt of the Lohaganj Akhrá. On the 6th June 1903

in consideration of Rs. 12,000 he transferred the whole of the Asthal properties (including the right of performing the *debsheba*) by way of usufructuary mortgage to the Maharaja of Nattore for a period of 40 years, the Maharaja making an allowance to support the *debsheba*. There was also an *ekrarnama* of even date, to which we need not more particulary refer. Raghunath Das, claiming to be the successor of Radhamohan, filed a suit *in forma pauperis* (No. 77 of 1905) against the Maharaja to set aside the mortgage, except as to any payments properly made on account of the Asthal. The plaintiff obtained a decree and the Maharaja appealed to this Court. That appeal (No. 371 of 1906) came on for hearing and on 2nd June 1910 this Court delivered judgment and ordered a remand for the ascertainment of certain amounts. The findings of the lower Court have now been returned and the appeal is ready for final disposal.

On the 9th July 1911, however, Raghunath Das died. He is alleged to have executed a Will the day before his death, and that is the document now propounded by Madusudan Das, the executor therein named. He applied for Probate or in the alternative for Letters of Administration. The District Judge has refused his application on the ground that the document is not a Will of which Probate can be granted. Madhusudan Das has appealed and his appeal is No. 169. To that there are cross-objections by Naga Behari Das, who claims to have succeeded Raghunath Das as Mohunt, that the District Judge was wrong in not holding that he had a *locus standi* in the Probate proceeding and in not awarding him costs. The Maharaja, who was definitely found by the District Judge to have no *locus standi*, has filed a cross-appeal, No. 195.

The real question between the parties is, who is entitled to be substituted in place of Raghunath Das as respondent in Appeal No. 371 of 1906; but that cannot be determined in these appeals. The only question before us is whether the document propounded is a Will of which Probate can be granted. If it is, the case would have to be remanded to the District Judge for inquiry into the genuineness of the document, which is disputed. We are, however, of opinion that the decision of the District Judge is correct. The learned Pleader for the appellant Madhusudan Das relied on the case of *Behary Lall Sandyal* v. *Juggo Mohun Gossain* (1) and a number of decisions following upon it, which establish the proposition that on a *bona fide* application for Probate or Letters of Administration the Court will not go into questions of title, with reference to the property of which the deceased purported to dispose or in respect of which he died intestate. That is a proposition which cannot be gainsaid, but that is not the question before us. What we have to determine is whether this document is really a Will. A careful perusal will show that it is not. Raghunath Das by this document purported to appoint the minor Madan Mohan Das as his successor on the *gaddi*, and to make over to him as Mohunt all the properties of the Asthal and the right of performing the *debsheba*. Raghunath Das did not by that document purport to deal with any property of his own. It is clear from his petition to sue in *forma pauperis* that he had none. The petition also for Probate or Letters of Administration makes mention only of the *debuttar* properties. The case appears to be indistinguishable from *Chaitunya Gobinda Pujari Adhikari* v. *Dayal Gobinda Adhikari* (2) and we are content to follow that ruling.

As for Letters of Administration there is distinct authority that they cannot be granted in respect of properties held by a person in his capacity of Mohunt. See *Mohunt Jib Lal Gir* v. *Mohunt Jaga Mohan Gir* (3) in which the case of *Ranjit Singh* v. *Jagannath Prosad Gupta* (4) was distinguished, and *Parsania* v. *Hari Charan Das* (5). We agree with those rulings, and the case distinguished is equally distinguishable from the present.

The Maharaja does not press his appeal, nor Naga Behari Das his cross-objections.

Both appeal and cross-objections are dismissed. We leave the respective parties to bear their own costs.

Appeals and cross-objections dismissed.

(1) 4 C. L. R. 422; 1 Shome L. R. 185.
(2) 32 C. 1062; 9 C. W. N. 1021.
(3) 16 Ind. Cas. 453; 16 C. W. N. 798.
(4) 12 C. 375.
(5) 16 Ind. Cas. 588; 17 C. L. J. 65.

HAMABAI FRAMJEE *v.* SECRETARY OF STATE.

PRIVY COUNCIL.

APPEALS FROM THE BOMBAY HIGH COURT.

November 18, 1914.

Present:—Lord Dunedin, Lord Shaw and Mr. Ameer Ali.

HAMABAI FRAMJEE PETIT—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—RESPONDENT

AND

MOOSA HAJEE HASSAM AND OTHERS—APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—RESPONDENT.

Contract—Lease and sanad by Government—Resumption for public purposes—"Public purpose," meaning of—Erection of dwelling houses for Government officials, whether public purpose

A lease and a *sanad* granted by the Government contained a power of resumption at any time for "public purposes" upon certain terms as to notice and compensation. The Government gave notice to resume the lands in order to erect dwelling houses which they could offer to Government officials at adequate rents for their private residence, as suitable houses could not be easily obtained, though it was shown that it was not impossible to obtain quarters of some kind:

Held, that the term "public purpose" includes a purpose in which the general interest of the community, as opposed to the particular interests of individuals, is directly and vitally concerned and that as the scheme of the Government is one which will redound to public benefit by helping the Government to maintain the efficiency of its servants, it is a "public purpose" within the meaning of the contracts contained in the lease and the *sanad*.

Appeals from two judgments and decrees of the High Court of Bombay, dated the 5th of September 1911, reported in 12 Ind. Cas. 871, affirming the judgments and decrees of the High Court in the exercise of its Ordinary Civil Jurisdiction, dated the 11th of April 1910.

FACTS.—A lease and *sanad* were respectively granted to the appellants of certain premises and lands in the town of Bombay by the East India Company, with the stipulation that the Company, their successors or assigns had the power of resuming them for a public purpose. By 21 and 22 Victoria, Chapter 106, section 1 (1858), the rule of the East India Company was terminated and all property and benefit of all contracts to which the Company was entitled vested in the Crown. In 1908 rents of houses in respectable quarters of Bombay became very high, and the officials whose salaries were not very large felt the difficulty of keeping up appearances to command respect from the Indians who were impressed by a show of diginity. The Government of Bombay thereupon desired to build a certain number of houses to be let out to the officials at a reasonable rent, and gave notice to the appellants for the mutation of the parcels of land in their possession. The appellants challenged the *bona fides* of the Government, as they stated that constructing any buildings for the Bishop of Bombay and his domestic Chaplain and the Senior Chaplain of the Scottish Church for their personal use and accomodation was not a public purpose, nor was the building of bungalows for the officials an object which concerned the public utility. The Government instituted a suit for the possession of aforesaid lands. The High Court (original side) decided that building for the aforesaid purpose was a public purpose as "the average Oriental could not understand and would soon cease to respect an exalted official whose outward circumstances were those of the humblest citizen." On appeal to the High Court (appellate side) the findings of the lower Court were affirmed and the aforesaid purpose held to be a public purpose.

The appellants then appealed to His Majesty in Council.

As both appeals involved the same question for determination, *i. e.*, what constitued a public purpose, they were heard together.

Messrs. *DeGruyther*, *K. C.*, *Kemworthy Brown* and *McCardie*, for the Appellants, contended that a public purpose consisted in the conversion of private use and occupation into public use and occupation. Therefore, there must be occupation and user by the public.

[LORD DUNEDIN.—By the Land Acquisition Act of 1896 (Australia), section 16, the Government can acquire land for any purpose.]

[LORD DUNEDIN.—The other idea is that the scheme must be for public and need not exclusively be for public purpose.]

The definition that public purposes covered every step which the Government took as Government in the interest of the public committed to their care, was too wide. The whole point was whether housing the officials was a public purpose or not. The lease was in perpetuity. This kind of resumption would mean converting it into a tenancy-at-

will, for the Government might take possession of it for any purpose. The true test was, what was the use to which the land was put afterwards? The incorporation of the provisions of the Indian Land Acquisition Act, 1894, into the lease was erroneous.

[LORD DUNEDIN.—The language is so wide that if the Government wanted it for a scheme, it could take it.]

It was not to be obtained under the Land Acquisition Act, by which mere declaration would have been sufficient. The Government were in effect proposing to carry on a business for profit. The list of 33 officials for whom the Government proposed to provide houses ought to have been admitted in evidence. The building of houses for the Bishop and the Chaplain of the Scottish Church could not be a public purpose.

Sir *E. Richards, K. C.*, and *Mr. Lowndes*, who appeared for the respondent, were not called on.

JUDGMENT.

LORD DUNEDIN.—The same general point is raised in these two appeals.

The first appellant was lessee under the Government as successors of the East India Company under a lease of date 18th April 1854, which lease contained a power of resumption in favour of the lessor if "the Company, their successors or assigns, shall, for any public purpose, be at any time desirous to resume possession of the premises granted" . . . upon certain terms as to notice and compensation.

The second appellants are holders of land under Government in virtue of a *sanad* originally granted to one George King on 6th April 1839, by the said East India Company, which declares the ground given in occupation is to be "at any time resumable by Government for public purposes" upon certain terms as to notice and compensation.

The Government gave notice in both cases to resume for a public purpose. On being challenged as to what that public purpose was, they explained that they wished for the ground in order to erect dwelling houses, which they could offer to Government officials at adequate rents for their private residence. Suitable houses for Government servants are not easily obtainable in Bombay; but it is not said that obtaining quarters of some kind is an impossibility. The whole question, therefore, is: Is such a scheme a "public purpose," within the meaning of the contracts contained in the lease and the *sanad*?

The learned Judge of first instance in the High Court of Judicature at Bombay and the Appeal Court of the same Court have both held that it is. The learned Judges in the Court below have, in deference to citations made before them, elaborately considered many of the decisions which construed the words "public purposes," as used in the Statute of Elizabeth with reference to exemptions from rating. In the end, however, they came to the conclusion that those decisions afforded no help as to the proper construction to be put on the words of these contracts; and in that conclusion their Lordships unhesitatingly agree.

The argument of the appellants is really rested upon the view that there cannot be a "public purpose" in taking land, if that land when taken is not in some way or other made available to the public at large. Their Lordships do not agree with this view. They think the true view is well expressed by Batchelor, J., in the first case, when he says:—

"General definitions are, I think, rather to be avoided where the avoidance is possible, and I make no attempt to define precisely the extent of the phrase 'public purposes' in the lease; it is enough to say that, in my opinion, the phrase, whatever else it may mean, must include a purpose, that is, an object or aim, in which the general interest of the community, as opposed to the particular interests of the individuals, is directly and vitally concerned."

That being so, all that remains is to determine whether the purpose here is a purpose in which the general interest of the community is concerned. *Prima facie* the Government are good judges of that. They are not absolute judges. They cannot say: "*Sic volo sic jubeo*," but at least a Court would not easily hold them to be wrong. But here, so far from holding them to be wrong, the whole of the learned Judges who are thoroughly conversant with the conditions of Indian life, say that they are satisfied that the scheme is one which will

redound to public benefit by helping the Government to maintain the efficiency of its servants. From such a conclusion their Lordships would be slow to differ, and upon its own statement it commends itself to their judgment.

Their Lordships are, therefore, of opinion that on the general point the view of the Courts below was right.

A special point was taken in the second case as to sufficiency of notice. It is enough to say that the view of the Courts below was clearly right in this matter.

Their Lordships will humbly advise His Majesty to dismiss the appeals, but there will be no costs to either party before this Board.

Appeals dismissed.

Solicitors for Appellants: Messrs. *T. L. Wilson & Co., Latteys and Hart.*

Solicitors for Respondent: *The Solicitor, India Office.*

CALCUTTA HIGH COURT.

FIRST CIVIL APPEAL No. 395 OF 1912.

April 6, 1914.

Present:—Mr. Justice Coxe and Mr. Justice D. Chatterjee.

MAHADEO MONDAL—APPELLANT

versus

BIDHI CHAND MONDAL AND OTHERS—RESPONDENTS.

Guardians and Wards Act (VIII of 1890), ss. 39, 42—Removal of guardian—Grounds of removal—Appointment of successor—Appeal.

Section 42 of the Guardians and Wards Act can only come into operation when a guardian is properly removed. Therefore, where the point in issue is whether he has been so removed, the order of removal is appealable.

Where there is nothing on the record to show the grounds of the removal, the case should be remanded in order that the District Judge may deal with the matter properly under section 39 of the Act

Appeal against the order of the District Judge of Purneah, dated the 16th of April 1912.

Babu *Bimala Charan Deb*, for the Appellant.

Babu *Sarat Chandra Mukherjee*, for the Respondent.

JUDGMENT.—This is an appeal against an order of the District Judge of Purneah removing one Mahadeo Mondal from the guardianship of a minor Bidhi Chand, and appointing the *Nazir* of the Court to be guardian in his place.

An objection is taken that this order must have been passed under section 42 of the Guardians and Wards Act in so far as it appointed the *Nazir* to be the guardian and that, therefore, no appeal lies. This may be so; but section 42 could only come into operation if Mahadeo was properly removed and this is the question contested in this appeal. It appears to me perfectly clear that he was not properly removed. A Court can, of its own motion, remove a guardian under section 39 of the Act for the reasons given in that section.

It has been suggested on behalf of the respondents that Mahadeo in this case failed to discharge certain duties of the trust and acted in contumacious disregard of the orders of the Court. That may or may not be so. But the learned Judge did not pass his order on these grounds and we have no materials before us for any opinion whether there was a case for Mahadeo's removal or not.

It is also suggested that the Court might have acted in consideration of the preference of the minor under section 17 of the Act. But there is nothing before us to show that the Court ever consulted the minor personally at all.

It seems to us perfectly clear that the case must go back to the District Judge in order that he may deal with the matter properly under section 39. Mahadeo should be clearly informed under what clause or clauses of section 39 he is being proceeded against and should be allowed to give any explanation he may desire to put forward.

Meanwhile the *Nazir* of the Court will continue guardian of the property of the minor.

We make no order as to costs.

Appeal allowed; Case remanded.

FATEH SINGH *v.* SANT SINGH.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 1456 OF 1912.

December 14, 1914.

Present:—Sir Alfred Kensington, KT, Chief Judge, and Mr. Justice Shadi Lal.

FATEH SINGH—PLAINTIFF—APPELLANT

versus

SANT SINGH—DEFENDANT—RESPONDENT.

Punjab Pre-emption Act (II of 1905), s. 11—'Member of agricultural tribe'—Government Notification—'Holding land'—Tenant-at-will—Right should also be subsisting at date of suit.

Under section 11 of the Punjab Pre-emption Act, 1905, the expression 'member of an agricultural tribe' means, according to the Government notification on the subject, a person (*i*) belonging to any one of the tribes notified as agricultural tribes for the district in which he claims that status, and (*ii*) either holding land or residing in that district.

It is very doubtful whether a person who occupies land as a tenant-at-will can be said to 'hold land' within the meaning of the notification.

To maintain a suit for pre-emption, the plaintiff must show, not only that he had a right of pre-emption at the time of the sale, but also that his right subsisted at the date of the institution of the suit.

First appeal from the decree of the District Judge, Lyallpur, dated the 26th January 1912, dismissing the claim.

Mr. *Nand Lal*, for the Appellant.

Pandit *Rambhaj Datta*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the appellant, Fateh Singh, for pre-emption of a plot of land situate in *Chak* No. 271, Rakh Branch, Tahsil and District Lyallpur. The sale was effected by Sawan Singh *Jat*, father of the plaintiff-appellant, in favour of Sant Singh *Jat*, by a deed, executed on the 17th of February 1909 and registered on the 1st of March 1909, and the suit was instituted on the 28th of February 1910. The District Judge has dismissed the suit on the preliminary point that the plaintiff was not a member of an agricultural tribe in the Lyallpur District at the time of the sale and did not, therefore, comply with the requirements of section 11 of the Punjab Pre-emption Act, II of 1905. We have considered the arguments advanced by Mr. Nand Lal on behalf of the appellant and are of opinion that the suit must fail, not only on the ground stated by the learned District Judge, but also on the further ground that the plaintiff was not a member of an agricultural tribe at the date of the *institution of the suit*, and that the possession of that status on the above date was essential to the success of his suit.

The law as enacted in section 11 of the Act makes it a condition precedent to the success of a pre-emption suit in respect to agricultural land sold by a member of an agricultural tribe, that the plaintiff must be a member of an agricultural tribe. We have, therefore, to determine whether Fateh Singh satisfies this requirement of the law. The expression "member of an agricultural tribe" is not defined by the Act, but a notification of the Local Government dealing with the subject prescribes that a person claiming that status in a particular district must fulfil two conditions:—

(1) he must either hold land or ordinarily reside in that district;

(2) he must belong to any one of the tribes notified as agricultural tribes for that district. Now the present plaintiff, being a *Jat*, undoubtedly satisfies the second condition, but he has, in our opinion, failed to establish that he either resided or held land in the Lyallpur District at the time of the sale. The original home of the plaintiff was admittedly in the Sialkot District and though he resided in the Lyallpur District for a few years, it is clear from the *patwari's* evidence that he had ceased to do so before the sale took place. Nor is it shown that he held land in the district at the time of the sale. It has been urged on behalf of the appellant that he was a tenant-at-will of the land in dispute, but we doubt very much whether a person who occupies land as such can be said to 'hold land' within the meaning of the notification. It seems to us that the definition given therein contemplates that a person must have some permanent connection with the district in which he wants to acquire land as pre-emptor and that that connection can be established either by proving ordinary residence in it or by showing that he held land therein. The interest of a tenant-at-will, which is liable to be determined at the instance of the landlord, is of too transient a nature to secure the object which the framers of the definition had in view.

It is, however, unnecessary to pursue the subject any further, because we are clear that the plaintiff was not even a tenant-at-will at the time of the sale. The *girdawari* papers produced by the *patwari* show that

the plaintiff did not cultivate any land in this district in *kharif* 1908 or at any time thereafter. We, therefore, hold that the plaintiff, who was neither residing in the district nor holding land therein at the time of the sale, was not a member of an agricultural tribe and that his suit was rightly dismissed by the lower Court.

But there is a further obstacle in the way of the plaintiff. It is a well-established principle of law that to maintain a suit for pre-emption, the plaintiff must show not only that he had a right of pre emption at the time of the sale but that his right subsisted at the date of the institution of the suit, Vide, *inter alia*, *Khan* v. *Mahanda* (1) and *Janki Prasad* v. *Ishar Das* (2). In the present case there is not a particle of evidence to show that on the 28th of February 1910 the plaintiff either resided or held land in the district. In fact, his own witnesses deposed to the effect that he had severed all connection with the district several months before the suit was filed. This ground alone is fatal to his claim.

For the aforesaid reasons we affirm the decree of the District Judge and dismiss the appeal with costs.

Appeal dismissed.

(1) 32 P. R. 1902; 30 P. L. R. 1902.
(2) 21 A. 374; A. W. N. (1899) 128.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 868 OF 1913.
May 21, 1914.
Present:—Mr. Justice Coxe and Mr. Justice Beachcroft.
RAM KRISHNA SADHUKHAN—
PLAINTIFF—APPELLANT
versus
MONINDRA MOHAN RAY—DEFENDANT—RESPONDENT.

Evidence Act (*I of* 1872), *ss.* 11, 32—*Statements as to date of birth by person who is dead—Admissibility of such statement.*

A statement by a person who dead made in a petition for guardianship to the effect that a certain person was born on a certain date, not being a statement relating to the existence of any relationship by blood, marriage or adoption, is not admissible under section 32 of the Evidence Act. Nor does section 11 cover a statement of this kind.

Appeal against the decree of the District Judge of 24-Perganas, dated the 2nd December 1912, affirming that of the Subordinate Judge, first Court, at Alipur, dated the 26th February 1912.

Babu *Sarat Chandra Roy Chowdhury*, for the Appellant.

Babus *Tarakishore Chowdhury* and *Kshetra Gopal Banerjee*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for money on two hand-notes. The defence was minority. The Courts below have dismissed the suit and the plaintiff appeals.

It is first contended on behalf of the appellant that the Courts below erred in admitting the statement of one Nistarini Debya in evidence. Nistarini apparently is dead. She applied to be appointed guardian of the defendant and in her petition she stated that he was born on the 12th January 1890. The learned District Judge, following the decision in *Dhanmull* v. *Ram Chunder Ghose* (1), held that this statement was admissible in evidence. It is, however, difficult to reconcile that case with that of *Satis Chunder Mukhopadhya* v. *Mohendro Lal Pathak* (2), and certainly in the present case we cannot hold that the statement now before us can be regarded as one relating to the existence of any relationship by blood, marriage or adoption and, therefore, admissible under section 32 of the Evidence Act.

It has been contended that the statement is admissible under section 11 of the same Act. But that section, in our opinion, was never intended to cover statements of this kind. The learned District Judge based his decision on this statement alone. He says in his judgment: "The first question is whether defendant Manindra was a minor when he executed either or both of the hand-notes." He then deals with the oral evidence and says with regard to it: "It is impossible to come to a definite decision on this evidence." Clearly, therefore, on the

(1) 24 C. 265; 1 C. W. N. 270.
(2) 17 C. 849.

evidence other than the statement of Nistarini, he was not prepared to hold that the defendant was a minor.

That being so, the appeal must be allowed, the decree of the lower Appellate Court set aside and the case sent back to the District Judge in order that he may dispose of the second issue in the case.

Costs will abide the result.

Appeal allowed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1613 OF 1910.

April 3, 1913.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

ALLAB-UD DIN AND OTHERS—DEFENDANTS APPELLANTS

versus

Maharaja BIRENDRA KISHORE MANIKYA BAHADUR—PLAINTIFF—RESPONDENT.

Ijara—*Non-payment of rent—Possession without payment after expiry of lease—Limitation—Assessment of rent.*

Where a certain *Mouza* was given in *ijara* to the predecessor-in-title of the appellants who excavated a tank there with the permission of the superior landlord and did not pay any rent therefor even after the expiry of the lease, on a suit for *khas* possession or in the alternative for assessment of rent:

Held, (1) that the *ijara* constituted a good answer to the plea of limitation;

(2) that the appellants should be treated as *raiyats* holding at fixed rates.

Appeal against the decree of the Subordinate Judge, third Court of Tipperah, dated the 4th February 1910, affirming that of the Officiating Munsif, sixth Court, at Comilla, dated the 26th July 1902.

Babu *Sasadhar Roy*, for the Appellant.

Babu *Gobind Chandra Dey Roy* (with him Babu *Dwarka Nath Chuckerbutty* and *Birendra Chandra Das*), for the Respondent.

JUDGMENT.—In our opinion the *ijara* constitutes a good answer to the plea of limitation. But it is manifest that we have here conditions which bring into play the doctrines to which expression has been given in a number of cases purporting to follow *Ramsden* v. *Dyson* (1). We are by no means satisfied that this has been thoroughly appreciated by the lower Appellate Court, and were it not that the parties before us have taken up a reasonable attitude, it might have been incumbent on us to have sent down the case for further investigation in the lower Appellate Court. This is now unnecessary, because the appellant accepts and the respondent does not object to our suggestion that the appellant should be, in respect of the land in suit, treated not merely as a settled *raiyat* but a *raiyat* holding at fixed rates, the rate being 8 annas per *kani* as settled by the lower Courts.

In the circumstances we make no order as to costs.

(1) (1866) 1 H. L. 129, 12 Jur. (N. S.) 506, 14 W. R. 926.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 21 OF 1914.

September 7, 1914.

Present:—Sir George Shaw, J. C.

NGA HLA GYAW AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

MI YA PO AND OTHERS—DEFENDANTS—RESPONDENTS.

Arbitration—Revocation of submission not allowed without good cause—Notice of meeting to party who has already withdrawn not necessary—Arbitrators not bound to discuss in presence of parties—Civil Procedure Code (Act V of 1908), Sch. II, para. 20—Regular suit to enforce award—Court Fees Act (VII of 1870), s. 7 (X) (d)—Limitation—Appeal.

Neither party to a submission to arbitration can revoke it unless for good cause shown.

Omission to give notice of the meeting of arbitrators to a party, who has prior to such meeting notified to the arbitrators his withdrawal from the submission, does not invalidate the award.

The arbitrators are not bound to discuss in presence of the parties what award they are going to make.

The procedure laid down in the Civil Procedure Code, Schedule II, paragraph 20, is not obligatory. Instead of applying that an award may be filed, a party may institute a regular suit to enforce the award. For such a suit, the Court-fee would be *ad valorem* on the value of the property in dispute [section 7 (X) (*d*), Court Fees Act], and the period of limitation is three years at least, in some land cases it may be twelve years, and there is free right of appeal and second appeal.

Mr. *C. G. S. Pillay*, for the Appellants.

Messrs. *L. K. Milter* and *D. Dutt*, for the Respondents.

NGA HLA GYAW v. MI YA PO.

JUDGMENT.—Plaintiffs-appellants sued to enforce an award of arbitration, in other words, for specific performance of an award. The plaint was quite plain. It did not mention Schedule II, clause 20, Civil Procedure Code, or ask that the award might be filed in Court, but prayed that the award might be enforced and a decree pronounced in accordance with it. The procedure laid down in the Civil Procedure Code is not obligatory. Instead of applying that an award may be filed, a party may institute a regular suit to enforce the award.

The distinction is important. The Court-fee on an application to file an award is eight annas: the Court-fee in a suit to enforce an award is *ad valorem* on the value of the property in dispute [section 7 (X) (*d*), Court Fees Act].

In the case of an application to file an award the period of limitation is six months and there are stringent restrictions on appeal [*See* Schedule II, clause 21(2), and section 104 (2), Civil Procedure Code]. In the case of a regular suit to enforce an award the period of limitation is three years at least, in some land cases it may be twelve years, and there is free right of appeal and second appeal.

The Courts below were in error in not observing this distinction and in speaking of the case as an application to file an award. There is the less excuse for them that the matter was explained long ago in *Nga Pu* v. *U De Wainda* (1), *Kyan Pon* v. *Yan Nyein* (2) and *Mi Hla Win* v. *Shwe Yan* (3).

In the present case the parties on the 15th February 1912 by a written submission referred the partition of their inheritance to arbitrators, Tha Do and Po Se. On the 22nd April, the arbitrators pronounced an award in favour of plaintiffs-appellants. Before the hearing of the case, the defendants-respondents gave the arbitrators notice that they withdrew from the reference, and they did not attend the hearing or the delivery of the award. The arbitrators on receiving the notice proceeded *ex parte* without replying to the defendants-respondents' notice.

The defence to the plaintiffs-appellants' suit was that the award was invalid because it dealt with a piece of land which was not included in the reference, because defendants-respondents had no notice of the date on which the arbitrators intended to proceed with the case (*ex parte*) and because defendants-respondents had withdrawn from the reference.

The Sub-Divisional Court found against the defendants-respondents on all points, and ordered the award to "be filed" (*sic*) and a decree to issue in accordance therewith. The District Court, on appeal, set aside that order and decree, and "dismissed the suit" (*sic*) with costs.

The grounds on which the District Court came to this decision were that the arbitrators had omitted to reply to the defendants-respondents' notice or to make them aware of the date of the *ex parte* hearing, and that the arbitrators did not discuss in the presence of the parties what award they were going to make. This last ground was not raised by the defendants-respondents and was entirely unsustainable. The arbitrators were in no way bound to discuss in presence of the parties what award they were going to make. They deposed that they discussed the matter together, and that one of them, Tha Do, drew up the award and signed it and sent it for signature to the other arbitrator, Po Se, who then signed it. This was a perfectly legitimate method of preparing the award.

On other points also the lower Appellate Court's decision cannot be supported. As the learned Additional Judge observed: "When parties have agreed to submit a dispute to arbitration, no party can revoke the submission unless for good cause shown, and a mere arbitrary revocation is not permitted." This was laid down by the Privy Council in *Peston jee Nusserwanjee* v. *Manockjee and Co.* (4). The subject is fully explained in Banerji's Law of Arbitration in India, 1908, at page 118.

It has also been clearly laid down that the omission to give notice of the meeting of the arbitrators to a party who has, prior to such meeting, notified to the abritrators his withdrawal from the submission, does not invalidate the award. The case of *Subraya Prabhu* v. *Manjunath Bhakta* (5), where this was declared to be the law, was very like the present case.

(1) U. B. R. (1892-96) II, 11.
(2) U. B. R. (1897)-1901) II, 10.
(3) U. B. R. (1897-1901) II, 293.
(4) 12 M I A. 112, 10 W. R (P.C.) 51, 1 Ind. Jur. (N. S.) 69, 2 Suth. P. C J. 164, 2 Sar P. C. J. 390, 20 Eng. Rep. 283.
(5) 29 M. 44.

The defendants-respondents had no right to withdraw; they have never attempted to show that they had. It was their business to attend before the arbitrators, and when they failed to do so, it was not incumbent on the arbitrators to give them any further notice.

This was the position on general principles and apart from any special stipulation in the reference. The reference in the present case, however, expressly provided that if either party failed to appear before the arbitrators, the arbitrators might proceed *ex parte*.

The decree of the lower Appellate Court is set aside and the plaintiffs-appellants are granted a decree in terms of the award as prayed.

Defendants-respondents will pay the plaintiffs-appellants' costs.

Decree set aside.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 742 OF 1913.

July 29, 1914.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

DAJI ABAJI SAWANT AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SAKHARAM KRISHNA KULKARNI—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 27—Admission of additional evidence on appeal—Appellate Court, duty of—Practice.

In admitting additional evidence, it is necessary for an Appellate Court to comply with the provisions of Order XLI, rule 27; and if it thinks, either with the consent of the parties or on the application of any one of them, that there is sufficient ground to admit certain papers, the reasons for admitting them in evidence should be stated, and the papers should be formally admitted in evidence.

Second appeal against the decision of the Additional First Class Subordinate Judge, at Ratnagiri, in Appeal No. 443 of 1912, reversing that of the Subordinate Judge of Malwan, in Civil Suit No. 238 of 1913.

Mr. *D. W. Pilgaokar*, for the Appellants.

Mr. *Nilkanth Atmaram*, for the Respondent.

JUDGMENT.—The main point argued in this appeal relates to the question of the admissibility of certain evidence which the lower Appellate Court considered for the first time in appeal. That evidence consists of certain papers relating to a revenue-inquiry. During the course of the argument we were led to think that these papers were looked at and considered by the Court without the knowledge and consent of the present appellants. It turns out, however, that these papers were sent for expressly on the application of the plaintiffs, and the Pleaders on both sides were heard after these papers were received and before the judgment was pronounced. No objection has been taken to this procedure in the memorandum of appeal to this Court. Under these circumstances it is quite clear that so far as the present appellants are concerned, they have no just grievance at all as regards the procedure adopted by the lower Appellate Court with reference to these papers.

At the same time we think that it was necessary for the lower Court to have complied with the provisions of rule 27 of Order XLI before taking these papers into consideration; and if it thought, either with the consent of the parties or on the application of any one of the parties, that there was sufficient ground to admit these papers, the reasons for admitting them in evidence should have been stated, and they should have been formally admitted in evidence. The lower Appellate Court no doubt acted improperly in considering the papers without formally admitting them in evidence. But having regard to the facts which we have already mentioned, it is quite clear that the appellants cannot be allowed to object to the procedure which they invited the Court to adopt.

On a consideration of the whole evidence in the case, including these papers, the lower Appellate Court has come to definite conclusions on questions of fact, *viz.*, that the plaintiffs have not proved their title, and that the defendant has been in possession of the lands for over twelve years prior to the date of the suit. These findings must be accepted. On these findings it is quite clear that the decree passed by the lower Appellate Court is proper.

We, therefore, confirm the decree of the lower Appellate Court with costs.

Decree confirmed.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 25 OF 1914.
July 7, 1914.
Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.
THAMMAN SINGH—DEFENDANT—APPELLANT
versus
DAL SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Adoption—Adoptee not a lineal descendant of his natural father—Occupancy holding, succession to—Right of brother adopted in another family—Agra Tenancy Act (II of 1901), s. 22.

Once a boy has been adopted into another family, he ceases to be a "lineal descendant" of his natural father, and, therefore, cannot succeed to the occupancy holding of his brother by the natural father.

Second appeal from a decree of the District Judge of Shahjahanpur.

Mr. *Mohan Lal Sandal* (with him Mr. *Ibn Ahmad*), for the Appellant.

Mr. *E. A. Howard*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by one Kewal Singh to recover possession of certain immoveable property comprising an occupancy holding. The occupancy holding belonged at one time to Puhap Singh. Puhap Singh had a son Hansi and a son Kewal, the plaintiff. On the death of Puhap Singh, Hansi became the occupancy-tenant. Kewal had been adopted into another family. On the death of Hansi the defendant, Thamman Singh, entered into possession. Kewal Singh then brought the present suit alleging that he was entitled under section 22 (*c*) of the Tenancy Act to the occupancy holding. He also alleged that Thamman Singh was illegitimate.

The Court of first instance dismissed the suit. The lower Appellate Court reversed the decision of the Court of first instance and decreed the plaintiffs' suit. Hence the present appeal.

In our opinion the decree of the Court of first instance is correct and must be restored. Unless Kewal Singh can be said to be the brother by the same father as Hansi's, he has no right to the occupancy holding, even on the assumption that Thamman Singh is illegitimate. In our opinion once a boy has been adopted into another family, he ceases to be a "lineal descendant" of his natural father. This was expressly held by a Bench of this Court in the case of *Lala* v. *Nahar Singh* (1). In principle exactly the same view was taken in the case of *Nandan Tewari* v. *Rajkishore Rai* (2). We agree with both these authorities.

The respondents rely upon the case of *Ali Baksh* v. *Barkatullah* (3) and quote the following passage from the judgment: "In our opinion the personal law of the parties has nothing to do with the rule of succession which is laid down by section 22 of the Tenancy Act." In our opinion this remark of the Judges must be read in connection with the particular facts of the case before them.

The result is that the appeal is allowed, the decree of the Court below set aside and the decree of the Court of first instance restored with costs in all Courts.

Appeal decreed.

(1) 16 Ind. Cas. 181; 34 A. 658; 10 A. L. J. 299.
(2) S. D. Board of Revenue No. 5 of 1904.
(3) 14 Ind. Cas. 181; 34 A. 419; 9 A. L. J. 488.

BOMBAY HIGH COURT.
FIRST CIVIL APPEAL No. 218 OF 1913.
July 22, 1914.
Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Batchelor.
KESHAVLAL HIRALAL—APPELLANTS
versus
GIRDHARILAL UTTAMRAM PAREKH—RESPONDENT.

Companies Act (VI of 1882), s. 158—Liquidation proceedings—Charge—Lease providing for payment of arrears of rent from buildings erected on land—Priority over unsecured creditors—Charge.

Where a lease provided that if the lessees (a Company) caused delay in payment of rent, the landlords would be entitled to recover the arrears with interest "from the buildings which may have been erected on the land:"

Held, (1) that in equity a charge was created on the buildings when they came into existence; and

(2) that although the charge did not amount to a transfer or a mortgage, it gave a right of priority to the landlords over the unsecured creditors of the company in a winding-up.

First appeal from the decision of the District Judge of Ahmedabad, in Miscellaneous Application No. 141 of 1911.

Mr. *G. S. Rao*, for the Appellants.

Mr. *S. S. Patkar*, for the Respondent.

ASAD ALI v. ANAND SARUP.

JUDGMENT.—The only point that we have to dispose of in this appeal is whether the claim of the appellants for rent, accrued due under the lease under which the Company enjoyed the property upon which the mill-buildings were erected before the date of the winding-up, could be satisfied out of the proceeds of the mill-buildings in priority to the claims of unsecured creditors. The lease of which the Company have taken the benefit provided that: "If the lessees cause delay in paying the rent the landlords should give one month's notice, and inspite of that if the lessees or their representatives do not pay the arrears of rent within one month, the landlords may recover the arrears of rent with interest at the rate of eight annas per cent. per month from the building or buildings which may have been erected on the land and from the person and property of the tenants." No question has been raised as to the want of notice under that clause, but what we have to consider is whether the clause gives a charge to the landlords for unpaid rent upon the buildings when the buildings come into existence. We think that in equity a charge was created upon the buildings when they came into existence, as is shown by the judgment in *Holroyd* v. *Marshall* (1). But the charge does not amount to a transfer or a mortgage, and the further question arises whether in equity such a charge will give a right of priority to the landlords in a winding up. That it will do so seems to be taken as settled law in the judgment of Mr. Justice Lindley in *Andrew* v. *Swansea Cambrian Benefit Building Society* (2), where he says that a general charge upon the assets of the Company, although not amounting to a mortgage, will give the holder of the charge priority over the unsecured creditors. We must, therefore, allow the appeal, directing the liquidator to pay out of the proceeds of the buildings upon the land the sum of Rs. 1,937-8-0 with interest at 6 per cent. in priority to the unsecured creditors. The appellants are entitled to their costs out of the assets of the Company in both Courts.

Appeal allowed.

(1) (1861) 10 H. L. C. 191; 33 L. J. Ch. 193, 9 Jur. (N. S.) 213; 7 L. T. 172; 11 W. R. 171; 138 R. R. 106; 11 Eng. Rep. 999.

(2) (1889) 50 L. J. Q. B. 428; 44 L. T. 106; 29 W. R. 382; 45 J. P. 507.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 18 OF 1914.

November 6, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

ASAD ALI—DEFENDANT—APPELLANT

versus

ANAND SARUP AND OTHERS—PLAINTIFFS—RESPONDENTS.

Mortgage—Suit for redemption—What should mortgagor prove—Adverse possession, what amounts to—Issue, whether properly remitted.

In a suit for redemption of a mortgage if the mortgagor proves that there is a subsisting mortgage affecting the property claimed by the other party as his and that the equity of redemption is vested in him (the mortgagor) he is entitled to a decree, but if he fails to prove a subsisting mortgage covering the property, he cannot succeed.

It is not necessary for the person who claims the property as his to prove that he or the person through whom he claims were in possession for 12 years.

A mortgagor must prove that he has been in legal possession of the property mortgaged within 12 years of the institution of the suit.

A man can be in legal possession either through his tenant, care-taker or mortgagee.

Per *Richards, J.*—(*Banerji, J.*, dissenting).—

Where the lower Appellate Court has found in a redemption case that the mortgage is not proved, a Judge of the High Court is not entitled to remit an issue to inquire whether the mortgagor has been in possession either personally or through others within 12 years.

Per *Banerji, J.*—If the ownership of the property was vested in the mortgagor and not in the party claiming adversely, the mortgagors are entitled to recover possession unless they have lost their title by reason of the adverse possession of some one for a period exceeding 12 years.

Possession to be adverse must be by a person who does not acknowledge the other's rights but denies them. There must be an ex rese or implied repudiation of the rights of the true owner and an open assertion by the person in possession of a claim of rights to hold the property on his own behalf. Unless possession is coupled with an express or implied claim of right inconsistent with the title of the lawful owner, it cannot be regarded as adverse to the true owner.

Bejoy Chunder Banerji v. *Kally Prosonno Mookerji*, 4 C. 327, 2 Shome L. R. 106, *Bhavrao* v. *Rakhmin*, 23 B. 137, referred to.

Letters Patent Appeal against the decision of Mr. Justice Tudball, in Second Appeal No. 1231 of 1912, dated 12th December 1913.

The Hon'ble Mr. *Abdul Raoof*, for the Appellant.

Mr. *Gulzari Lal*, for the Respondents.

JUDGMENT.

RICHARDS, C. J.—This appeal arises out of a suit in which the plaintiffs claimed

possession of premises described as "Sarai Bala" and a *parao* attached thereto. The plaintiffs' case was that the *parao* was transferred by way of usufructuary mortgage on 2nd April 1853 to secure Rs. 100 and that the whole *sarai* was similarly mortgaged on 26th June 1853. Persons who were alleged to be the representatives of the original mortgagees were made defendants. They are relatives of the plaintiffs and did not contest the suit. The plaintiffs also made Saiyed Asad Ali a defendant, stating that they did so because he alleged himself to be the purchaser of half the *parao* at an auction-sale but that the judgment-debtors had no interest which could be sold. It is admitted that Saiyed Asad Ali was an auction-purchaser at a sale of the interest (if any) of the defendants, third party. These last-mentioned defendants had, of course, no interest in contesting, and did not contest, the present suit. The contest in the suit was only about that part of the premises claimed by the defendant, Saiyed Asad Ali.

Saiyed Asad Ali put in a written statement which beyond doubt put the plaintiffs on proof of everything that it was necessary to prove to entitle them to a decree for possession of the property claimed by them. Among other matters pleaded in the written statement was an allegation that the *parao* claimed by Saiyed Asad Ali was not in Sarai Bala.

On the general merits of the plaintiffs' case it may be remarked that it is strange that the plaintiffs have waited since the year 1853 (over 50 years) to redeem the mortgages for the small sums of Rs. 100 and Rs. 25. The mortgaged property was worth very much more. On the other hand the answering defendant purchased half the *parao* for the sum of Rs. 11. If the title was clear it would be worth a great deal more. However this may be, the plaintiffs are entitled to a decree if they prove their case. If the plaintiffs fail to prove their case, the answering defendant is entitled to have the suit dismissed as against him notwithstanding that he purchased the property in dispute for a small sum.

The Court of first instance granted the plaintiffs a decree. Mr. Sabonadiere reversed the decree of the Court of first instance. A learned Judge of this Court remitted an issue which was tried by Mr. Pitamber Joshi In remitting the issue the learned Judge directed that no further evidence should be taken. Upon the finding of Mr. Joshi the learned Judge of this Court restored the decree of the Court of first instance. The case has come again before this Court in Letters Patent Appeal.

There can be no doubt that if the plaintiffs proved that there was a subsisting mortgage affecting the property claimed by the answering defendant and that the equity of redemption was vested in them, they would be entitled to a decree. On the other hand the answering defendant was entitled to call upon the plaintiffs to prove that they had been in possession of the property in dispute within 12 years of the institution of the suit. In my opinion it was not necessary for the answering defendant to prove that he or persons through whom he claimed were in possession for over 12 years. The plaintiffs need not prove actual physical possession. A man can be in "legal" possession (*e.g.*, through his tenant, care-taker, or usufructuary mortgagee). In the present case the plaintiffs did not allege, much less prove, that there was any one in possession otherwise than as mortgagee. It was necessary for the plaintiffs to prove not only that there were mortgages affecting some premises; it was necessary to prove that the mortgages or any one of them affected the actual premises claimed by the answering defendant. Mr. Sabonadiere found that the mortgages were not proved, and reading his judgment as a whole I think it is absolutely clear that he intended to find and did find that the plaintiffs failed to prove that the mortgages (even if they were subsisting mortgages) included the premises in dispute. If this was the finding of the learned District Judge, it was binding on this Court in second appeal and would, in my opinion, have entitled the answering defendant to have the appeal dismissed.

The issue which the learned Judge of this Court sent down for a finding was as follows:—"Have the plaintiffs or their predecessors-in-title been in possession either personally or through others within 12 years?" The finding was as follows:—"On the whole I find that the persons whom the plaintiffs call their mortgagees were in possession after September 1910."

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Now it was never suggested that any one was in possession of the *disputed premises* otherwise than as mortgagee (and Mr. Sabonadiere found that that the defendants were not mortgagees). There is no finding that any one was ever put into possession by permission otherwise than as mortgagee. Such evidence as was given related to the alleged mortgages and not to permission of any other kind, and the finding of Mr. Subonadiere that these mortgages were not proved to include the premises in dispute was conclusive in second appeal. The learned Judge of this Court says in his judgment of the 12th December 1913: "There can be no doubt whatever that as between the parties, the contest raged round the question as to whether the defendant or his so-called predecessors-in-title had been in actual possession and whether.....whom the plaintiffs had admitted to be their mortgagees had been in possession." I do not think this is quite accurate. There had been a very sharp contest as to whether the premises in dispute were or were not in Sarai Bala. The evidence was very conflicting and documents had been tampered with or fabricated. I do not think that the learned Judge of this Court ought to have referred the particular issue he did, nor do I think the finding of Mr. Pitamber Joshi justified the setting aside of the decree of the Court of first appeal. If there was any inconsistency in the finding of Mr. Sabonadiere so as to make his finding on the subject of the mortgages bad, a new issue on the point might have been referred. Judging from the evidence referred to by Mr. Sabonadiere it is difficult to see how the plaintiffs proved that the mortgages covered the property in dispute If, however, the plaintiffs' case in the appeal was that the defendants first party were in possession on their behalf (other than as mortgagees), it was a new case and could not be disposed of on evidence which related only to the mortgages. I think that Mr. Sabonadiere's finding was a finding that the plaintiffs failed to prove a subsisting mortgage covering the premises now in dispute. If we accept this finding, the plaintiffs have failed to prove possession of this part of the property by themselves or any other persons on their behalf within 12 years of the institution of the suit. I would, therefore, allow the appeal.

BANERJI, J.—This appeal relates to a half share of a plot of land which is a camping ground or *parao* and forms part of the property claimed in the suit by the plaintiffs-respondents. The appellant purchased the half share at auction in 1908 as the property of the defendants of the third party, and it has been found that he has been in possession since that year. It has also been found that the land did not belong to the predecessors-in-title of the appellant and that they never were in possession, so that the appellant is not the owner of the land in question. This, of course, will not entitle the plaintiffs to a decree unless they can prove their own title to the property and a title which still subsists. All the lower Courts which tried this suit have found that the land in question originally belonged to the plaintiffs-respondents. The finding, on the point, of Mr. Sabonadiere, who dismissed the suit, is in the following terms:—"I find that although the case for the respondents is not too strong, yet it does amount to proof that they are owners of this *parao* or were, and that that case has not been rebutted." As it has been found that the ownership of the property was vested in the plaintiffs and not in the appellant, the plaintiffs are entitled to recover possession unless they have lost their title by reason of the adverse possession of some one for a period exceeding 12 years. It has not been suggested that they have lost their ownership in any other way.

It has been found by the Court below that before the appellant took possession of the land in dispute, it was for several years in the physical possession of Mukta Prasad, the predecessor-in-title of the first set of defendants, and of those defendants. The plaintiffs alleged that their ancestors had mortgaged the land to Mukta Prasad in 1853 and that he and his successors were in possession as usufructuary mortgagees. The plaintiffs brought the present suit for redemption of the mortgage. The Court of first instance found in favour of the plaintiffs and granted them a decree. The defendants of the first party, who are the representatives of the original mortgagee, submitted to the decree. The appellant alone appealed. On his appeal Mr. Sabonadiere held that the alleged mortgage had not been

proved and he dismissed the suit against the appellant on this ground. In view of the evidence referred to by the Court of first instance and Mr. Pitamber Joshi, I think Mr. Sabonadiere's finding was erroneous but as it was a finding of fact, this Court was bound to accept it in second appeal. The finding was not, however, sufficient, in my opinion, for dismissal of the suit. It was necessary to find whether the possession of Mukta Prasad and his successors was adverse to the plaintiffs, because unless it was adverse the plaintiffs' proprietary title did not become extinct. As Mr. Sabonadiere had not come to any finding on this point our learned brother Tudball was, in my opinion, fully justified in referring an issue to the Court below. The finding of Mr. Pitamber Joshi, though not very clearly expressed, is in substance a finding to the effect that the possession of Mukta Prasad and his representatives was on behalf of the plaintiffs and was equivalent to their possession. He found that Mukta Prasad, so far from setting up a right of his own, had alleged himself to be mortgagee and claimed to enforce the mortgage. Upon this finding the learned Judge of this Court was, in my opinion, right in decreeing the claim against the appellant. The failure of the plaintiffs to prove, as against the appellants, the mortgage alleged by them would not necessarily make the possession of Mukta Prasad and his successors adverse. Possession to be adverse must, as observed by Dr. Markby in his Elements of Law, Chapter X, 2nd Edition, be possession "by a person who does not acknowledge the others' rights but denies them." There must be an express or implied repudiation of the rights of the true owner and an open assertion by the person in possession of a claim of right to hold the property on his own behalf. Unless possession is coupled with an express or implied claim of right "inconsistent with the title of the lawful owner," it cannot be regarded as adverse to the true owner. On this point I need only refer to the remarks of Markby, J., in *Bejoy Chunder Banerji* v. *Kally Prosonno Mookerjee* (1), and of Farran, C. J., in *Bhavrao* v. *Rakhmin* (2). See also Banning on Limitations, 2nd Edition, page 101. In the present case Mukta Prasad or his successors, who have been found to have been the only persons in actual physical possession, never denied the plaintiffs' right and never asserted a proprietary right in themselves. On the contrary Mukta Prasad claimed to be the mortgagee of the property. His representatives who are the defendants of the first party in the present suit, did not deny the mortgages set up by the plaintiffs and submitted to the decree for redemption made by the Court of first instance. Their possession cannot, therefore, be regarded as adverse to the plaintiffs. By reason of their possession the plaintiffs' title has not become extinct and they are entitled to recover possession from the appellant who has no title. I would dismiss this appeal with costs.

BY THE COURT.—The order of the Court is that the appeal be allowed, the decree of this Court be set aside and the decree of the lower Appellate Court restored.

The parties will abide their own costs in this Court.

Appeal allowed.

(1) 4 C. 327; 2 Shome L. R. 106.
(2) 23 B. 137.

BOMBAY HIGH COURT.
SECOND CIVIL APPEAL No. 953 OF 1913.
July 21, 1914.
Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Beaman.
MAHMADALI KAMRUDDIN AND OTHERS —DEFENDANTS NOS. 1 TO 26—APPELLANTS
versus
ABDULALI KARIMBHAI—PLAINTIFF —RESPONDENT.

Mortgage—Sale of portion of mortgaged property—Subsequent sale of remainder to mortgagee—Suit to recover balance of mortgage-money—Right to redeem entire mortgage.

Where out of a house-site and a field mortgaged to the plaintiff the house-site was sold to the defendants who thereby acquired a right to redeem the whole property and the plaintiff subsequently purchased the field and set off the purchase-money *pro tanto* against the mortgage-debt, and sued to recover the balance by sale of the house-site:

Held, that as the sale to the plaintiff was subsequent to the acquisition of the house-site by the defendants and was without their privity or consent, they had not been deprived of their right of redemption which had been in existence since they purchased the house-site.

Second appeal from the decision of the Assistant Judge, Ahmedabad, in Appeal No. 76 of 1912, confirming the decree passed by the

Subordinate Judge at Godhra, in Suit No. 225 of 1910.

Mr. *K. N. Koyajee*, for the Appellants.

Mr. *Ratanlal Ranchhoddas*, for Respondent No. 1.

JUDGMENT.—In this case the property of a mortgagor was mortgaged to the plaintiff. It consisted of a house-site and a field. Subsequently the house, subject to the mortgage, was sold to defendants Nos. 1 to 26. The defendants then had a right to redeem the whole property. After this purchase the plaintiff by arrangement with the mortgagor purported to acquire the field for Rs. 1,200 and set off the price *pro tanto* against the mortgage-debt. He now sues the purchasers of the house to enforce the balance of the mortgage-debt by sale of the house. The defendants as such purchasers claim to be entitled to redeem the original mortgage and to take over the field upon such redemption. It is clear that they would be entitled to do so if the field had not been sold out and out to the plaintiff. But that sale was subsequent to the acquisition of the house-site by the defendants, and it was without their privity or consent. We, therefore, think that they have not been deprived of their right of redemption which was in existence since they purchased the house-site, and their offer to pay to the plaintiff the amount of Rs. 1,200, which had been set off against the mortgage-debt at the time of the alleged transfer of the equity of redemption of the field, should have been allowed. We, therefore, set aside the decree of the lower Appellate Court and decree that the defendants be at liberty to redeem the mortgage by payment of Rs. 1,628-12-0 (British) together with interest at 4 per cent. upon Rs. 428, part thereof, from the date of suit until redemption within six months, and upon redemption we decree that the plaintiff do transfer the field to them free from incumbrances, but that if the mortgage-debt be not paid within six months, the field be taken as representing Rs. 1,200, and that the house-site be sold and the proceeds applied to satisfy the balance of the mortgage-debt. If the property is redeemed, the mortgagee will be entitled to the costs of the institution of this suit to be added to the mortgage-debt. But he must pay to the defendants the costs of the hearing in the first Court and the costs of the two appeals. If the defendants do not redeem within six months, they must pay all the costs of the plaintiff.

Decree varied.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 3707 OF 1910.

May 26, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

KATKI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

LAKPATI PUJARI—PLAINTIFF—RESPONDENT.

Hindu Law—Adoption—Twice-born classes—Datta homa—Adopted child of same gotra.

Among the twice-born classes *dattahoma* is not essential when the adoptive father and the adopted child belong to the same *gotra*.

Appeal against the decree of the Subordinate Judge of Sambalpur, dated the 29th June 1910, affirming that of the Munsif of Burgurh, dated the 7th March 1910.

Babus *Satis Chandra Ghose* and *Smritis Chandra Ghose*, for the Appellants.

Babus *Sarat Chandra Ray Choudhury*, *Charu Chandra Bhattacharya* and *Gobind Chandra Chakrabarti*, for the Respondent.

JUDGMENT.—This is an appeal by the third and fourth defendants in a suit for declaration of title to land and for recovery of possession thereof. The property in dispute belonged to Pitabas, one of four brothers who were members of a Hindu family governed by the *Mitakshara* Law. The plaintiff is one of the sons of a brother of Pitabas, and his case is that he was taken in adoption by his uncle in the year 1900. The defendants, now appellants, are two of the daughters of Pitabas, who would be entitled to succeed to the estate of their father in the absence of an adopted son. They consequently challenge the *factum* as also the validity of the alleged adoption. The Courts below have concurrently found in favour of the plaintiff and decreed the suit. They have held on the evidence that the adoption did in fact take place, that since then the plaintiff has been treated as the son of

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Pitabas, that his thread and marriage ceremony has been performed as such, and that he has performed the annual *shradh* ceremony of his adoptive father and enjoyed the turn of worship of the family deity as his successor-in-interest. The Courts below have also held that there is no evidence that the *datta homa* ceremony was performed on the occasion of the adoption of the plaintiff, but they have taken the view that as the plaintiff was the nephew of his adoptive father, the performance of such ceremony was not essential. In this view, the adoption has been held valid and the claim of the plaintiff to the estate of his adoptive father sustained. The defendants have appealed to this Court and have reiterated the objection that the adoption was invalid, as the parties are Brahmins in whose case the *datta homa* ceremony is essential; in support of this view, reliance has been placed upon the case of *Luchmun Lall* v. *Mohun Lall* (1), where Dwarkanath Mitter, J., stated that the performance of the *putrashtijag* (apparently written inadvertently for *datta homa*) is essential to the validity of an adoption in the *dattaka* form among the three superior castes. On behalf of the respondent, it has been argued that this is not an accurate statement of the rule on the subject, that in any event it is too broadly formulated, and that no *datta homa* is necessary when the son of a brother is taken in adoption. In support of this contention, reference has been made to the cases of *Atmaram* v. *Madho Rao* (2) *Govindayyar* v. *Dorasami* (3) and *Valubai* v. *Govind* (4). In our opinion, the contention of the plaintiff must prevail that the validity of his adoption has not been affected by the non-performance of the *datta homa*.

The claim of the plaintiff is supported by a text attributed to Yama: "The *homa* or the like ceremony is not necessary in the case of adoption of the daughter's or the brother's son; by the verbal gift and acceptance alone, that is accomplished; this is declared by the Lord Yama." This text is quoted by the authors of the Dattaka Kaumudi and Dattaka Darpana as one of Devala mentioned in the Saraswati Vilasa of Dwaipayna (Dattak Siromani by Prof. Bharat Chandra Siromani published under the direction of Prasanna Kumar Tagore, pages 45, 92, 244, 246) and the comment is added by the author of the Dattaka Darpana that the expression "brother's son" includes persons who are *sapindas* and *sagotras*, and that consequently it is only when an adoption is made of a Samanodaka or Sakulya Sagotra, the rule for performance of the *datta homa* ceremony operates. The text, which was quoted as early as 1821 by the Pandits consulted in connection with the case of *Husbant Rao* v. *Govindrao* (5), has also been accepted as genuine in the cases of *Valubai* v. *Govind* (4)! and *Atmaram* v. *Madho Rao* (2), and its authority was treated as unquestionable by V. N. Mandlik (Yajnavalykya, page 483). The rule enunciated in the text of Yama was also recognised by a Full Bench of the Madras High Court in *Govindayyar* v. *Dorasami* (3), on the authority of an opinion expressed by Ellis that *datta homa*, though proper in all cases, was not indispensable if the person adopting and the boy adopted were of the same *gotra*. It has been argued, however, that the text of Yama is not based on any intelligible reason which could justify a departure from the general rule that the *datta homa* is an essential ceremony for the validity of an adoption amongst members of the three regenerate classes. We are not prepared to accept this contention as well-founded. There has been considerable divergence of opinion amongst text-writers, ancient and modern, which is reflected also in judicial decisions upon the question whether the *datta homa* is essential for the validity of an adoption, and even if it be conceded that there is a strong body of opinion in favour of the view that it is obligatory in the case of adoption amongst Brahmins, we would not be disposed to ignore or even to minimise the effect of an exception for which direct authority may be found in a text of unquestionable genuineness and authority.

To take the texts first, it is plain that Manu undoubtedly contemplated nothing

(1) 16 W. R. 179.
(2) 6 A. 276; A. W. N. (1884) 82.
(3) 11 M. 5.
(4) 24 B. 218; 1 Bom. L. R. 786.
(5) (1821) 2 Borrodaile 83.

more than gift and acceptance for the validity of an adoption in the *dattaka* form, as in defining the *dattaka* son he says that the gift is to be made 'together with water,' that is, as Sir William Jones renders it, the gift is confirmed by pouring water. "That (boy) equal (by caste) whom his mother or his father affectionately gives, (confirming the gift) with (a libation of) water, in times of distress (to a man) as his son, must be considered as an adopted son (*Datrima*)" [Manu, IX, 168; S. B. E. Volume XXV, page 361]. It is noteworthy that none amongst the commentators of Manu, not even Medhatithi, the oldest among them, touches upon this question (Mandalik's Manu, page 1202). Vasistha describes the ceremonies in a more developed form, though not in the passage (XVII, 29; S. B. E. Volume XIV, page 87) where he classifies the different kinds of sons. He directs that "he who desires to adopt a son shall assemble his kinsmen, announce his intention to the king, make burnt offerings in the middle of the house, reciting the Vyahritis, and take (as a son) a not remote kinsman, just the nearest among his relatives." (Vasistha, XV, 6; S. B. E. Volume XIV, page 75; Mitakshara, I. 11, 13; Dattaka Mimansa, II, 51; Dattaka Chandrika, II, 11.)

The ritual is further elaborated by Baudhayana (VII, 5; S. B. E. Volume XIV, pages 334-336; Dattaka Mimansa V, 42; Dattaka Chankrika II, 16; Journal, A. S. B. Vol. XXXV, page 162), though not in the passage where he classifies the various kinds of sons (II, 2, 3, 20; S. B. E. Volume XIV, page 227). An equally elaborate description is given by Saunaka [Dattaka Mimansa (V, 2, 42); Dattaka Chandrika (II, 1, 3, 5, 7, 9); Vyavahara Mayukha (IV, 5, paragraphs 8, 36-42); Mandalik, pages 50-53, 63-65; Buhler, Journal A. S. B., Volume XXXV, page 149]. These statements, nothing like which can be found either in Yajnavalkya (II, 130; Mandlik, page 219) or in Vishnu (XV, 18-19; S. B. E. Vol. VII, page 63), still leave the question open whether the performance of the *homa* is essential for the validity of the adoption, because they enumerate it along with other matters, such as the assembly of the kindred and notice to the king, which have never been deemed indispensable to validate the adoption. The *Mitakshara* and its commentaries, Subodhini and Balambhatti, though referring specifically to the text of Vasistha, do not raise the question at all [*Mitakshara*, Ed. Setlur, page 695]. A similar observation applies to Apararka, who in his commentary on Yajnavalkya (II, 130) contents himself by quoting the verse of Manu (IX, 168). When, however, we come to the Dattaka Mimansa, we find definite rules laid down on the subject; paragraph 50 of section V lays down that the filial relation of the five sons previously mentioned proceeds from adoption only with observance of the form of either Vasistha or Saunaka and not otherwise. This is emphasised in section V, paragraph 56, where the general conclusion is stated that the filial relation of adopted sons is occasioned only by the proper ceremonies, and that the filial relation even fails, should either gift, acceptance, a burnt sacrament and so forth, be wanting. [Reference may also be made to section V, paragraph 47, where an ingenious attempt is made to read this interpretation into the simple text of Manu (IX, 168), and to section V, paragraph 55, where a quotation from Medhatithi, which cannot be traced in his commentary on Manu, is similarly treated.] To the same effect is the statement in the Dattaka Chandrika, section II, paragraph 17, where it is recited, after the description in paragraph 16 of the mode of adoption prescribed by Baudhayana for followers of the Taittri Veda, that in case no form as propounded should be observed, the adopted son will be declared entitled to assets sufficient for his marriage. This is reiterated in section VI, paragraph 3, where reliance is placed on a text of Manu which has not been traced: "He who adopts a son without observing the rules ordained, should make him the participator of the rites of marriage, not a sharer of the wealth." In this connection, it is worthy of note that the opinion has been expressed by Sastri Golap Chandra Sarkar (Tagore Lectures on Adoption, page 124; Hindu Law, 4th Edition, page 126), that the Dattaka Chandrika was composed about the year 1800 for the purposes of a particular litigation, by one Raghumani Vidyabhusana who passed it off as the work of Kuvera. Serious notice need not accordingly be taken of a text which has not been

found in the Institutes of Manu. There remains, however, the opinion of the author of the Dattaka Mimansa, which is, no doubt, entitled to weight. As against his opinion, we have the contrary view maintained by commentators of repute. Shankarabhatta, in his work styled the Dharma Dvaita Nirnaya, in the chapter styled the "Solution of doubts in regard to adoption," which has been translated by Mandalik (page 55, lines 39-42), says that by the operation of the rule Yatha Saktinyaya (the rule which enjoins the observance of a precept as far as possible), the *homa* (sacrifice) or the like, which is a part of the ritual enjoined for adoption, may be disregarded, for the rule properly applies with regard to the details of an enjoined ritual. Laugakshibhaskara, as Mandalik points out (Yajnavalkya, page 509), goes into this question very elaborately and comes to the conclusion that the *homa* (sacrifice or any other ceremonies beyond giving and taking are not essential for any of the four classes. The Dattaka Darpana, as we have already stated, declares the performance of the *homa* and other ceremonies unnecessary where the person to be adopted is a near relation, on the strength of a liberal interpretation of the expression "brother's son" in the text of Yama. The Dattaka Nirnaya (Dattaka Shiromoni, page 238) declares an adoption performed without *homa* to be valid, at least in the case of Sudras. The Dattaka Kaumudi (Dattaka Siromoni, page 245) quotes the commentary of Maheswara and the Dayakala of Bhabadeva as authorities in favour of the validity of an adoption where the *datta homa* ceremony has not been performed. Jagannath, in his great Digest of Hindu Law, translated by Colebrooke, after an elaborate examination of the texts, comes to the conclusion that an adoption without the performance of the *datta homa* is valid (Volume III, page 323; Book V, Chap. IV, section VIII, paragraph 273). Jagannath observes that the gift and acceptance only are essential, and that the *homa* or oblation to the fire with holy words from the Veda is an unessential part of the ceremony; even though it be defective, the adoption is nevertheless valid, for no one admits that the principal object is unattained i an unessential part be defective. Jagannath directs a very weighty criticism against the position that the *datta homa* is necessary: if you say that the performance of the *homa* is essential, then you cannot but admit that it must be accurately, properly and completely performed; for if there be any defect in its performance, it cannot serve the purpose; but if you say that even a defective *homa* is sufficient, you necessarily admit that it is not essential. There can be no question as to the weight to be attached to an opinion expressed by Jagannath Tarkapanchanan, who, as stated by Dwarkanath Mitter, J., in *Kory Kolitany* v. *Monseram Kolita* (6), was one of the most learned Pandits that Bengal had ever produced and whose authority on questions of Hindu Law ranks only next to that of Jimutavahana, Raghunandana and Srikrishna. The divergence of opinion to which we have referred has led to a similar want of unanimity amongst leading text-writers of the last century. Thus, Shama Churn Sirkar strenuously maintained to the end the view that the *datta homa* is essential, not only in the case of the three regenerate classes, but also in the case of Sudras, and wrote a learned criticism on the contrary opinion established by a Full Bench of this Court [*Behari Lal* v. *Indramani* (7)], subsequently approved by their Lordships of the Judicial Committee, *Indromoni* v. *Behari Lal* (8); [Vyavastha Darpana, 3rd Edition, Part I, page 355, Part II, page 574; Vyavastha Chandrika, Part II, page 125] Dr. Jogendranath Bhattacharyya acquiesced in the view that the *datta homa* is not necessary in the case of Sudras, but maintained that it is essential in the case of the three regenerate classes [Hindu Law, 3rd Edition, Volume I, page 450]. On the other hand, Sastri Golap Chandra Sarkar follows the view of Jagannath that the absence of the *datta homa* does not in any case affect the validity of an adoption (Tagore Lectures on Adoption, page 377).

When we turn to examine the course of judicial decisions on the subject, we meet with a similar absence of uniformity. But one point is now finally settled, *viz*, no religious ceremony is essential in the

(6) 13 B. L. R. 1 at p. 44; 19 W. R. 367.

(7) 13 B. L. R. 401; 21 W. R. 285.

(8) 7 I. A. 24; 6 C. 770; 6 C. L. R. 183; 4 Sar. P. C. J. 120; 3 Suth. P. C. J. 716; 4 Ind. Jur. 192; 3 Shome L. R. 180.

case of adoption by Sudras. This had been formulated by the Supreme Court of Calcutta as early as 1800 when Sir John Anstruther, C. J., with the concurrence of Royds and Russell, JJ., held, in the case of *Gopee Mohan Deb* v. *Sree Rajcrishna Deb* (9), that the adoption was validly made if gift and acceptance of the child by an overt act was shown to have taken place. The elaborate judgment of the Chief Justice is mentioned by Sir Thomas Strange in his Elements of Hindu Law, 1825, Volume I, Page 84, but has never been traced. There was, after this, a uniform succession of decisions to that effect: *Joymony Dossee* v. *Siboosoondry Dossee* (10), *Dayamayee* v. *Rasbihari* (11), *Ramkishore* v. *Bhubanmayee* (12), *Perkash Chandra* v. *Dhanmani* (13), *Sreenarain* v. *Kishen Soondery* (14). The flow of this current was, however, interrupted by the contrary view taken in *Bhairubnath* v. *Mohesh Chandra* (15) and *Sayamalal* v. *Saudamini Dasi* (16), which were doubted and disapproved in *Nittianund* v. *Krishna Dyal* (17) and were ultimately overruled by the Full Bench in *Behari Lal* v. *Indramani* (7), the decision wherein was confirmed on appeal to the Judicial Committee, *Indromoni* v. *Behari Lal* (8). This brought the rule on this point into harmony with what had been laid down in *Sootrugun* v. *Sabitra* (15) [on appeal from *Sabitreea* v. *Sutur Gun* (19)], *Veerapermall* v. *Narain* (20), *Alwar* v. *Ramaswamy* (21) and *Thangathanni* v. *Ramu Mudali* (22). The principle that religious ceremonies are not necessary in the case of an adoption by a Sudra has been applied to support the inference that a Sudra leper can adopt, *Sukmari* v. *Ananta* (23); see also *Shoshinath* v. *Krishnasundari Dasi* (24). As regards the three regenerate classes, however, the point is by no means settled. The dictum of Lord Wynford in *Sootrugun* v. *Sabitra* (18) undoubtedly admits of a wide interpretation, and in Madras it was actually decided in *Singamma* v. *Yinjamuri Venkatacharlu* (25), on the strength of the opinion of Jagannath and the decision of Sir Thomas Strange in *Veerapermall* v. *Narain* (20), that even in the case of Brahmans, the gift and acceptance of a boy qualified to be adopted is sufficient to constitute a valid adoption according to Hindu Law. A similar view was adopted in the case of a Kshatriya in *Chandramala* v. *Muktamala* (26), and of a Nambudri Brahman in *Shankaran* v. *Kesavan* (27). But the tide has apparently turned back in Madras, and the view taken in *Singamma* v. *Yinjamuri Venkatacharlu* (25) has been doubted in *Venkata* v. *Subhadra* (28) and *Subbarayar* v. *Subbammal* (29), though it has been held in the second of these cases that the *datta homa*, which had not been performed by the adoptive father, could, after his death, be performed by his widow. The later view in Madras, as indicated in *Gobindayyar* v. *Dorasami* (3) and *Ranganayakammá* v. *Alwar Setti* (30), is sought to be supported by reliance on the dictum of the Judicial Committee in *Shoshinath* v. *Krishnasundari Dasi* (24) to the effect that "amongst the twice-born classes, there can be no valid adoption by deed, and certain religious ceremonies, the *datta homa* in particular, are in their case requisite." A similar view is embodied in the extract from Savara Swami translated by Ellis (Strange's Hindu Law, 1825, Volume II, page 192) and had also been put forward by the Pandits who were consulted in the cases of *Alank Manjari* v. *Fakir Chand* (31) and *Bullubakant* v. *Kishenprea* (32). The statement by Dwarkanath Mitter, J., in *Luchmun* v. *Mohun* (1), to which reference has already been made, points in the same direction, and *Thakoor Oomrao Singh* v. *Thakooranee Mehtab Koonwer* (33) leads to the same conclu-

(9) (1800) Mort. Montriou Hindu Law Cases 381; 1 Ind. Dec. (o. s.) 232.
(10) (1837) Fulton 75; 1 Ind. Dec. (o. s.) 689.
(11) (1852) Beng. S. D. A. 1001.
(12) (1859) Beng. S. D. A. 229.
(13) (1858) Beng. S. D. A. 96.
(14) 11 W. R. 196.
(15) 4 B. L. R. (A. C.) 162; 13 W. R. 168.
(16) 5 B.L.R. 362; 2 Ind. Jur. (N.S.) 24; Bourke 189.
(17) 7 B. L. R. 1; 15 W. R. 300.
(18) (1834) 2 Knapp. 287 at p. 290; 5 W. R. (P. C.) 109; 12 E. R. 489.
(19) (1812) 2 Mac. Sel. Rep. 21.
(20) (1801) 1 Strange (N. C.) 78 at p. 91; 5 Ind Dec. (o. s.) 41.
(21) (1858) 2 Mad. S. D. 67.
(22) 5 M. 358.
(23) 28 C. 168.
(24) 7 I. A. 250 at p. 256; 7 C. L. R. 313; 6 C. 381; 8 Shome L. R. 231; 4 Sar. P. C. J. 191; 3 Suth. P. C. J. 812; 4 Jur.
(25) 4 M. H. C. R. 165.
(26) 6 M. 20; 6 Ind. Jur. 627.
(27) 15 M. 6.
(28) 7 M. 548; 8 Ind. Jur. 557.
(29) 21 M. 497.
(30) 13 M. 214.
(31) (1834) 5 Mac. Sel. Rep. 356 (418 N. E.); 7 Ind. Dec. (o. s.) 650.
(32) (1838) 6 Mac. Sel. Rep. 219 (270 N. E.); 7 Ind. Dec. (o. s.) 869.
(33) 3 Agra. H. C. R. 103.

sion, though it recognizes that the ceremony may be performed at any place. There are also expressions in *Ravji* v. *Lakshmibai* (34) which may possibly be called in aid by those who seek to support the more stringent rule. In this diversity of judicial opinion, it must be conceded that the principle that *datta homa* ceremony is essential for the validity of an adoption among Brahmans still counts a strong body of supporters, and that the rationalistic view has not yet finally triumphed over formalism. Yet among all this divergence of opinion, the doctrine clearly emerges that the *datta homa* is not necessary when the adoptive father and the adopted child belong to the same *gotra*: *Govindayyar* v. *Dorasami* (3), *Ranganayakamma* v. *Alwar* (30), *Thanathanui* v. *Rama Mudali* (22), *Vedavalli* v. *Mangamma* (35), *Valubai* v. *Govind* (4), *Atmaram* v. *Madho Rao* (2) *Nittianund* v. *Krishna Dyal* (17). It has, indeed, been argued that this distinction is not based on logical grounds, and that the view cannot be maintained that *datta homa* becomes unnecessary where the adoptive father and the adopted child belong to the same *gotra*, because a change of *gotra* is not necessary in such a case. It is not necessary for our present purpose to examine, whether what is thus regarded as an exception is based on logical grounds, or, as is not improbable, really indicates a modern relaxation of the primitive inflexible rule, in the growth of which, as in so many archaic systems, formalism exercised a dominating influence. Whether the rule itself will ultimately stand discredited and disappear, it is needless to speculate in this instance; it is sufficient to hold that the present case falls within the text of Yama and is covered by a long series of decisions which affirm the doctrine that even amongst twice-born classes, the *datta homa* is not essential when the adopted boy is of the same *gotra* as his adoptor.

In this view, the validity of the adoption of the plaintiff must be upheld, the decree of the Subordinate Judge affirmed and this appeal dismissed with costs.

Appeal dismissed.

(34) 11 B 381 at p. 393.
(35) 27 M. 538; 14 M. L J. 340.

BOMBAY HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 31 OF 1913.

August 12, 1914.

Present:—Mr. Justice Beaman and Mr. Justice Hayward.

TULSIDAS LALUBHAI—PETITIONER—APPELLANT

versus

THE BHARATKHAND COTTON MILLS CO., LD.—DEFENDANTS—RESPONDENTS.

Companies Act (VI of 1882), s. 169—Petition by creditor to wind-up—Dispute about genuineness of claim—Object of petitioner to bring pressure in order to obtain cheap and expeditious payment—Order refusing to wind-up—Appeal, whether maintainable.

The principle upon which a Company is to be wound-up on the petition of a creditor is simply its inability to pay after proper demand made and the lapse of three weeks. Any such neglect must be judged by reference to the facts of each particular case, and when the defence is that the debt is disputed, all that the Court has first to see is whether that dispute is, on the face of it, genuine or merely a cloak of the Company's real inability to pay just debts.

Where a creditor's demand is in respect of a claim which the Company honestly believes to be a fraudulent claim and unsustainable at law, and in filing a winding-up petition his object is to bring the pressure of insolvency proceedings to bear upon the Company in order to make it pay cheaply and expeditiously a heavy debt which it desires to dispute in the Civil Courts, the petition for insolvency of the Company must be dismissed under section 169 of the Indian Companies Act (VI of 1882).

An appeal will lie from an order refusing to wind-up a Company.

Appeal from the decision of the District Judge of Ahmedabad, in Miscellaneous Application 282 of 1912.

Mr. *G. S. Rao*, (with him Mr. *M. K. Mehta*), for the Appellant.

Mr. *B. J. Desai*, (with him Mr. *D. A. Khare*), for the Respondent.

JUDGMENT.—The petitioner-appellant is assignee of certain debts alleged to be due by defendant-Company to its late Secretary and Manager, Mr. Kevaldas, and his *benamidars*, his wife and daughter. The petitioner-appellant gave the Company notice on the 7th of October 1912 and demanded payment. On the 24th October 1912 the Company replied in a rather vaguely worded letter, the general content of which, however, clearly indicates the line of defence subsequently adopted by the Company. On the 15th of November the petitioner, instead of accepting the Company's challenge and bringing a suit

to vindicate the justice of his demand, put in a winding-up petition. This came on before the District Judge, and the Company replied in effect that the alleged demand was in respect of a claim which the Company honestly believed to be a fraudulent claim and unsustainable at law. The matter appeared to the learned District Judge to be one of great complexity, and we think that in declining to go into it upon this petition he acted upon sound and correct principles. We are not afforded any assistance by such cases as *In re King's Cross Industrial Dwellings Company* (1) and *In re Great Britain Mutual Life Assurance Society* (2). The dicta of Jessel, M. R., in the latter case certainly appear to be rather widely and loosely expressed, but in no case could such general dicta be carried further than the facts of the case would warrant. If any general rule is to be laid down at all, it is easily obtained from the Statute Law. The principle upon which a Company is to be wound-up, for all the purposes with which we are now concerned, is simply its inablity to pay its just debts, and that inability is said to be indicated by its neglect to pay after proper demand made and the lapse of three weeks. It is quite clear, however, that any such neglect must be judged by reference to the facts of each particular case, and that, where the defence is that the debt is disputed, all that the Court has first to see is whether that dispute is, on the face of it, genuine or merely a cloak of the Company's real inability to pay just debts. In this case it is perfectly clear that the defence, whatever its ultimate result may be, has substance in it, for it is hardly even the petitioner-appellant's case that the Company is unable to pay the debt it owes him. It has been stated here that he expects to obtain all his dues in full in the liquidation. Thus, therefore, it appears that the petitioner's object is to bring the pressure of insolvency proceedings to bear upon the Company in order to make it pay cheaply and expeditiously a heavy debt which it desires to dispute in the Civil Courts, and this, we are both very strongly of opinion, is one of the worst abuses to which the winding-up sections of our Statute Law upon Companies could be perverted. We are clearly of opinion that the learned Judge below was right, and that his order ought to be confirmed and this appeal dismissed with costs.

Appeal dismissed.

(1) (1870) L. R. 11 Eq. 149; 23 L. T. 585; 19 W. R. 225.

(2) (1880) 16 Ch. D. 246, 43 L. T. 684; 29 W.R. 202; 51 L. J. Ch. 10.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 1226 OF 1912.

June 25, 1914.

Present:—Mr. Justice Holmwood and Mr. Justice Chapman.

NIRODE MOHAN DEY—PLAINTIFF—APPELLANT

versus

JAGARALI AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 49 (a)—Lease-hold property, whether heritable—Lease for a term of years—Death of tenant before expiry of term—Right of son to hold lease—Suit for ejectment—Notice to quit.

A lease-hold property under the Bengal Tenancy Act or under any other Act if it is for a term of years is necessarily heritable, inasmuch as the contract enables the lessee to remain in possession for the full term.

Where a tenant holding under a written lease for a fixed term of years died before the expiry of his term and his son held the lease and went on cultivating the lands even after the lease:

Held, that the son was liable to be ejected without a notice to quit.

Appeal against the decision of the Subordinate Judge, Tipperah, dated the 29th February 1912, affirming that of the Munsif, third Court, Chandpur, dated the 23rd May 1911.

Babu *Kritanta Kumar Basu*, for the Appellant.

Babus *Biraj Mohan Majumdar* and *Jotindra Mohan Ghose*, for the Respondents.

JUDGMENT.—This second appeal arises out of a suit brought by an occupancy *raiyat* in ejectment against an under-*raiyat*. It appears that the father of the defendant took a lease from the plaintiff as under-*raiyat* of his holding for nine years. The rent stipulated for was Rs. 45 and odd. But apparently under the provisions of section 48 of the Bengal Tenancy Act this rent was irrecoverable, and upon the tenant's admission that the real rent was Rs. 8-4-0 the plaintiff continued to accept that rent. The other conditions of the lease do not appear in any way to have been varied, and it cannot be said that the lease was cancelled or a new tenancy created. If it was it must have been

created before the death of the original tenant. That tenant died five years after the inception of the lease and his son succeeded him and went on cultivating till the expiry of the lease. When the plaintiff wanted to eject him under section 49 (*a*) of the Bengal Tenancy Act, he pleaded that he could not be ejected without notice, and in this suit both the lower Courts have held that that is so.

It is perfectly true that it has been held by this Court in more than one case that the ordinary holding of an under-*raiyat* from year to year is not in itself heritable. There is nothing in the Bengal Tenancy Act which makes it heritable. But that is a very different thing from saying that a lease-hold property is in any case not heritable and that the Bengal Tenancy Act can make it not heritable. A lease-hold property under the Bengal Tenancy Act or under any other Act if it is for a term of years is necessarily heritable, inasmuch as the contract enables the lessee to remain in possession for the full term, and in the case of a *kabuliat* such as this is, where the lessee promises to hold land for nine years, his death can make no difference to the contract under section 37 of the Contract Act. It cannot be said, therefore, that in no circumstances can an under-*raiyati* be heritable, and there is no law that we are acquainted with that has ever said so. We think that on the death of the lessee his son had a right to hold the lease and did hold it, and that the finding of the lower Court, that after Budha Gazi's death the plaintiff and defendants entered into a contract with one another that the latter shall continue as under-*raiyat*, or in other words, the plaintiff recognised, as he says, the heirs of Budha Gazi as his tenants, is a mere matter of argument and certainly cannot be a finding of fact upon evidence; for this simple reason the defendants did not appear and the case was dismissed *ex parte*, and this is clear from the Munsif's judgment where he puts forward the same consideration as an argument raised by the Pleaders in the case.

We think that as a question of law the present defendants did not enter into a fresh contract with the plaintiff, and the plaintiff's recognition of them which was unnecessary, cannot operate in law as any admission that there was a renewal of the contract or fresh contract. There is nothing to show that the original contract did not continue. That being so, we think that the plaintiff who is a *raiyat* who wishes to cultivate his own land, is entitled to succeed in this suit and to eject the defendants-under-*raiyats* on the expiration of the term of the written lease and that as the written lease expired some years ago, the plaintiff is further entitled to obtain damges for use and occupation which he claims for two years with costs.

The judgment and decree of the lower Court are set aside and the plaintiff's claim is decreed in full with costs in all Courts.

Appeal allowed.

BOMBAY HIGH COURT.

CIVIL REVISION APPLICATION No. 251 OF 1914.

June 25, 1914.

Present:—Mr. Justice Beaman and Mr. Justice Hayward.

VYANKATESH MAHADEV—DEFENDANT—APPLICANT

versus

RAMCHANDRA KRISHNA—PLAINTIFF—RESPONDENT.

Civil Procedure Code (*Act V of* 1908), *O. XXIII, r.* 3, *Sch. II, cl.* 18—*Agreement to refer to arbitration after institution of suit—Application for stay of suit—Adjustment within the meaning of O. XXIII, r.* 3.

Clause 18, Schedule II, of the Civil Procedure Code, 1908, is restricted to cases in which the suit complained of has been instituted after the agreement to refer to arbitration.

Where after the institution of a suit, the plaintiff and the defendant entered into an agreement to refer the matter in dispute to arbitration, and the defendant moved the Court to stay proceedings:

Held, that the agreement did not fall under any of the clauses of the second Schedule of the Civil Procedure Code and that, therefore, the application must fail

Per *Beaman, J.*—A mere agreement to refer to arbitration, even though it be in other respects valid, cannot be such an adjustment in whole or in part of the suit as the Court can give effect to under Order XXIII, rule 3.

Where the Court is seized of a cause, its jurisdiction cannot be ousted by the private and secret act of parties, and if they, after having involved the authority of the Court and placed themselves under its superintendence, desire to alter the tribunal and substitute a private arbitrator for the Court, they must proceed according to the law laid down in the first sixteen clauses of the second Schedule.

VYANKATESH MAHADEV v. RAMCHANDRA KRISHNA.

Civil application under Extraordinary Jurisdiction, against an order passed by the District Judge of Poona, in Miscellaneous Appeal No. 3 of 1913, confirming that of the Subordinate Judge at Poona, in Civil Suit No. 657 of 1910.

Mr. *Coyajee*, with him Mr. *B. V. Vidwans*, for the Applicant.

Messrs. *D. A. Khare*, with him *J. B. Gharpure*, for the Respondent.

JUDGMENT.

BEAMAN, J.—A suit had been instituted, and it is alleged that the plaintiff and one of the defendants after the institution of the suit entered into an agreement to submit the matters in difference between them to arbitration. Thereupon the defendant moved the Court to stay the further progress of the suit. The first Court refused, and on appeal the learned District Judge was of opinion that the defendant's application could not be sustained and that the suit must proceed.

We are asked to interfere in the exercise of our revisional jurisdiction and to set aside that order of the learned District Judge. It appears to me that the agreement alleged to have been made between the plaintiff and one of the defendants does not fall under any of the clauses of the second Schedule of the Civil Procedure Code. The first sixteen of those clauses exhaust the whole process of arbitration after the suit has been instituted and the parties desired to submit their differences to arbitration under the control of the Court. The Court under those sixteen clauses controls completely the whole course of the reference, indeed the reference is its own, and its jurisdiction is never at any time ousted until a good award has been made. In the event of an award having been made, but being set aside for any reason, the Court immediately resumes its jurisdiction and completes the trial of the action. The next class of cases provided for in the second Schedule are those in which persons who have not instituted any legal proceedings desire to submit any difference between them to arbitration. Having agreed to do so either party may then bring the agreement into Court, and, if resisted by the other party, his application to have the agreement filed and further action taken upon it will be treated as a suit. Thereafter, again, the Court immediately assumes and retains control of the subsequent arbitration proceedings. The third and the last case provided for in the second Schedule is where the parties who have not come into Court have not only agreed to refer matters in difference between them to arbitration, but have obtained an award. Here again the party desiring to enforce the award may bring it into Court and upon proper proceedings obtain a decree in conformity with it. There remains only one single clause 18, which is of an exceptional character and virtually re-enacts a portion of section 21 of the Specific Relief Act, which is declared to have no applicability to any arbitration proceeding provided for in the second Schedule. That clause, which is also to be found almost *in totidem verbis* in section 19 of the Arbitration Act, provides for a special class of cases in which, after parties have agreed to submit matters in difference between them to arbitration, one of them in violation of such agreement institutes a suit in respect of any or all of those matters. Then the other party may set up in bar of the suit the agreement to submit to arbitration. If this analysis be correct, and I think there is no doubt but that it is, it is clear that what the defendant here relies upon is an agreement nowhere provided for in the second Schedule of the Civil Procedure Code, nor does it fall within the language or the spirit of section 18, for that section, as I say, is designedly restricted to cases in which the suit complained of has been instituted after the agreement to refer to arbitration. It might be objected that no solid ground in reason can be found for refusing to extend the principle of that section to cases where, after a suit had been instituted, parties had privately agreed to submit the matters in difference between them to arbitration, and in spite of such agreement and in violation of it one of them insists on going on with the suit. The answer to that appears to me to be short and simple, and to cover other objections which might arise upon the other points I have very generally indicated, for, in my opinion, where the Court is seized of a cause its jurisdiction cannot be

ousted by the private and secret act of parties, and if they, after having invoked the authority of the Court and placed themselves under its superintendence, desire to alter the tribunal and substitute a private arbitrator for the Court, they must proceed according to the law laid down in the first sixteen clauses of the second Schedule. Therefore, it appears to me that there is no force whatever in the applicant's contention that a private agreement of this kind is on the same footing as the private agreement contemplated in clause 17 reproducing old section 523, nor, as I have just explained, will it give him any right to invoke the assistance of clause 18. How then could it serve him? Only as a lawful agreement by which the suit had been adjusted wholly or in part. Doubtless any parties litigating in Court have perfect liberty to compose their differences amongst themselves by entering into any lawful agreement, compromise or satisfaction. And when this is done, they have only to apply to the Court to act under Order XXIII, rule 3. But it is equally clear that a mere agreement to refer to arbitration, even though it be in other respects valid, could not be such an adjustment in whole or in part of the suit as the Court could give effect to under Order XXIII, rule 3.

In my opinion, therefore, the learned Judge below was right and no case whatever has been made out for the exercise of our revisional jurisdiction. I would, therefore, dismiss this application with all costs.

HAYWARD, J.—The plaintiff brought a suit against the defendant No. 1 with regard to a certain matter which was subsequently referred by them to private arbitration without leave of the Court. The defendant No. 1 thereupon applied for stay of the suit in consequence of the reference to private arbitration outside the Court.

The original Court refused to stay the suit, holding that the reference had been made under a mistake of fact, and that in any case it did not amount to an adjustment of the matter in suit within the meaning of Order XXIII, rule 3, of the Civil Procedure Code.

The first Appeal Court did not decide the question as to mistake of fact, but held that there was no adjustment inasmuch as there had been no award within the meaning of Order XXIII, rule 3, and that further the suit could not be held to be barred by the contract to refer, as that contract was entered into subsequent to suit, and was not prior to suit as contemplated by section 21 of the Specific Relief Act. Moreover, it pointed out that that provision had been repealed by rule 22 of the second Schedule of the Civil Procedure Code.

On this application for revision it has been contended, though the contention has not been very seriously pressed, that the submission to arbitration did, as a matter of fact, amount to a lawful adjustment, but there does not seem to me to be any substance in that contention, as there was no resulting award as explained in the case of *Rukhanbai* v. *Adamji Shaik Rajbhai* (1) and *Venkatachellam Reddi* v. *Rangiah Reddi* (2). It is to be observed that there was a resulting award in *Harakhbai* v. *Jamnabai* (3), in which case it was held by the present learned Acting Chief Justice that there was a good adjustment within the meaning of Order XXIII, rule 3, to which effect could be given under the saving provisions of section 89 of the Civil Procedure Code.

But it has been contended, and strenuously contended, that a stay ought to have been granted of the suit. It has been argued that notwithstanding the pendency of the suit it was open to the parties to enter into an agreement to arbitrate privately, without leave of the Court, and to proceed to have that private reference to arbitration or the resulting award converted into an independent decree of the Court. It appears to me, however, that the matter is concluded by the wording of rule 3 and rule 15 occurring among the first sixteen rules referring to arbitration during pendency of a suit with the consent of the Court. Rule 3 lays down the conditions upon which jurisdiction in the suit shall be withdrawn from the Court and that condition is that there has been an

(1) 1 Ind. Cas. 622; 10 Bom. L. R. 366 at p. 372; 33 B 69.
(2) 12 Ind. Cas. 372, 36 M 353; 10 M. L. T. 248; 21 M L J 990; (911) 2 M. W. N. 249.
(3) 19 Ind. Cas. 786; 16 Bom. L. R. 340, 37 B. 639.

order of reference under that rule by the Court. As no other condition is stated, it must be presumed that that is the only condition under which the suit could be removed from the jurisdiction of the Court. Then again, rule 15 expressly provides the conditions under which jurisdiction in the suit can be resumed by the Court. It states that that can occur when the award either becomes void or has been set aside by order of the Court. Again, as these are the only circumstances under which jurisdiction can again be resumed by the Court, it must be presumed that there are no other circumstances under which such jurisdiction could be resumed by the Court. A ruling to the contrary has been quoted to us in the case of *Harivalabdas Kalliandas* v. *Utamchand Manekchand* (4) and it has been pointed out that that ruling was apparently approved of by one of the Judges in the case of *Pragdas* v. *Gardhardas* (5), but it seems to me that caution must be observed in giving weight to that distant authority in view of the observations of the Privy Council in the case of *Gulam Khan* v. *Muhammad Hassan* (6). The Privy Council there appear to have taken the view that the rules corresponding to the present rules of the Code were exclusive and the only rules permitting arbitration during the pendency of a suit before a Court, and that the succeeding rules corresponding to rules 17 to 21 of the second Schedule of the Code applied solely to arbitration in matters which had not come as suits before the Court. The Privy Council's decision has been so interpreted both by the Calcutta and Madras High Courts in the cases of *Tincowry Dey* v. *Fakir Chand Dey* (7) and *Venkatachellam Reddi* v. *Rangiah Reddi* (2).

It has also to be observed that stay of a suit instituted after the reference to arbitration would alone appear to be contemplated by the wording of rule 18 of the second Schedule, which is almost identical with the concluding thirty-seven words of section 21 of the Specific Relief Act, and that interpretation is borne out by the cases of *Peruri Suryanarayan & Co.* v. *Gullapudi* (8) and *Ramjidas Poddar* v. *Howse* (9) dealing with the corresponding section 19 of the Indian Arbitration Act. So that this application would have been bound to fail whether it had been possible to have recourse to rule 18 of the second Schedule of the Civil Procedure Code or the concluding words of section 21 of the Specific Relief Act or section 19 of the Indian Arbitration Act. It appears to me, therefore, that this application must be dismissed, and the order of the first Appeal Court confirmed, and it is, therefore, unnecessary to discuss the further question raised whether the decision of the learned Judge would or would not have amounted to irregularity in the exercise of the jurisdiction within the meaning of section 115 of the Civil Procedure Code. Rule discharged with costs.

Rule discharged.

(4) 4 B. 1.
(5) 8 Bom. L. R. 481; 26 B. 76.
(6) 29 C 167; 29 I A. 51; 12 M. L. J. 77; 4 Bom. L. R. 161; 6 C W. N 226; 25 P. R. 1902.
(7) 30 C. 218; 7 C. W. N. 190.
(8) 4 Ind. Cas. 133; 11 Bom. L. R. 1060; 34 B. 372.
(9) 35 C. 199.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1254 OF 1911.

June 5, 1913.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Mullick.

ROWSHAN SIRCAR—DEFENDANT —APPELLANT

versus

SHYAMA CHARAN CHAKRABARTY—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), s. 29—Partition among superior landlords—Distribution of rent—Enhancement.

If the total rent remains unaltered, its distribution, by agreement of parties, over different parcels of land does not constitute enhancement within the meaning of the Bengal Tenancy Act.

Appeal against the decree of the Subordinate Judge of Mymensingh, dated the 15th February 1911, affirming that of the Munsif of Mymensingh, dated 9th June 1910.

Babu *Binal Chandra Das Gupta*, for the Appellant.

Babu *Joges Chandra Roy*, for the Respondent.

JUDGMENT.—In this appeal by the defendant in a suit for rent, the controversy relates to the rate at which the rent is pay-

able. The plaintiff claims rent at the rate of Rs. 16-4 a year. The defendant asserts that he is not liable to pay rent at a higher rate than Rs. 7 a year. The Courts below have found that the defendant held under the plaintiff and his co-sharers two separate tenancies, that in 1866 the holdings were amalgamated and that the consolidated rent was fixed at Rs. 80; consequently in 1885, when the Bengal Tenancy Act came into force, the defendant held under the plaintiff and his co-sharers one holding for which Rs. 80 was annually payable. In 1892 there was a partition amongst the superior landlords; the consequence was that the land now in dispute fell into the share of the plaintiff, and by agreement of parties Rs. 16-4 was fixed as the fair rent payable in respect thereof. The defendant argues that as before 1866 Rs. 7 was payable as annual rent in respect of this land, there has been an enhancement in contravention of section 29 of the Bengal Tenancy Act. This contention is obviously unfounded. There has been no enhancement at all, for it is not suggested that in 1892, when the partition and distribution of rent took place, the rent was enhanced from Rs. 80 to a higher sum. If the total rent remained unaltered, its distribution, by agreement of parties, over different parcels of land does not constitute enhancement within the meaning of the Bengal Tenancy Act. What the defendant now seeks to do is to deprive plaintiff of the fruit of the agreement of 1892 under which he made himself liable to pay rent at the rate of Rs. 16-4 a year for the disputed land. His contention is clearly unjust and should not prevail.

The result is that the decree of the Court below is affirmed and this appeal dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 6 OF 1913.

March 11, 1914.

Present:—Mr. Justice Wallis and Mr. Justice Ayling.

CHINTAM REDDI SANYASI—DEFENDANT—APPELLANT

versus

Sri RAJASAGI APPALA NARASIMHA RAJA GARU—PLAINTIFF—RESPONDENT.

Madras Estates Land Act (I of 1908), s. 185—Private land—Determination—Onus—Evidence.

Section 185 of the Madras Estates Land Act enacts rules to determine whether any particular land is private land. The presumption is that it is not and in determining the question the Court is to have regard to the local custom and to the question whether the land was before the 1st day of July 1898 specifically let as private land, and to any other evidence that may be produced. Letting as private land after 1st July 1898 is not to be taken into account.

Appeal under section 15 of the Letters Patent against the decree of the Hon'ble Mr. Justice Sadasiva Aiyar, dated the 13th of November 1912, in Second Appeal No. 564 of 1912, perferred against that of the Court of the Temporary Subordinate Judge of Vizagapatam, in Appeal Suit No. 535 of 1910, preferred against that of the Court of the District Munsif of Yellamanchili, in Original Suit No. 358 of 1909.

Mr. *B. N. Sarma*, for the Appellant.

Mr *S. Srinivasa Iyengar*, for the Respondent.

JUDGMENT.—Private land is defined in section 3, clause 10, of the Madras Estates Land Act (I of 1908) as the domain or home-farm land of a landholder by whatever designation known, such at *kambattam*, *khas*, *sir* or *pannai*, and section 185 enacts rules to determine whether any particular land is private land. The presumption is that it is not, and in determining the question the Court is to have regard to local custom and to the question whether the land was before the 1st day of July 1898 specifically let as private land, and to any other evidence that may be produced. Letting as private land after 1st July 1898 is not to be regarded because it was thought that after the introduction of the Tenancy Bill landholders might have attempted to extend unduly the area of private land. It is clear, however, from the section that the fact that the land has been let as private land in the years immediately preceding 1898 is some evidence that it was private land, to be considered with the evidence of local custom and all the other evidence in the case. In face of these provisions we cannot accept Mr. Sarma's contention that the Act does not recognise as private land any cultivable land which was not private land at the date of the Permanent Settlement; what

the Court has to find is, with regard to the clauses of evidence mentioned in the section, whether the land was private land at the passing of the Act.

The land in question has been found by two Courts, on evidence upon which in our opinion they might legitimately come to that conclusion, to be private land; and the learned Judge has declined to interfere. We are not prepared to differ from him and we dismiss this appeal with costs.

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 103 OF 1913.

July 29, 1914.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

SHIDAPPA BAPU BIRADKAR AND OTHERS —DEFENDANTS—APPELLANTS

versus

NINGANGAUDA SIDDANGAUDA— PLAINTIFF—RESPONDENT.

Hindu Law—Adoption—Right of widowed daughter-in-law—Consent of mother-in-law in whom estate vested.

Under Hindu Law a widowed daughter-in-law, that is to say, the widow of a pre-deceased son, can make a valid adoption with the contemporaneous consent of her mother-in-law in whom the estate of the last full owner is vested as an heir.

Second appeal from the decision of the District Judge of Bijapur, in Appeal No. 64 of 1911, confirming that of the Second Class Subordinate Judge at Muddebihal, in Civil Suit No. 35 of 1908.

Mr. *Nilkanth Atmaram*, for the Appellants.

Mr. *Setlur* (with him Mr. *P. D. Bhide*), for Respondent No. 1.

JUDGMENT.

SHAH, J.—The facts out of which this second appeal arises are few and undisputed. One Ramanganda had a son Ninganganda, who died during his life-time leaving a widow Shidava. Thereafter Ramanganda died leaving a widow Avabai, who inherited the property of her husband. In 1878 Shidava adopted Shidappa with the consent of Avabai, in whom the estate was vested at the time as the heir of the last full owner. Shidava died in 1904. Avabai apparently had pre-deceased Shidava. The present plaintiff, who is the adopted son of Shidappa, claims to be the owner of the property in suit, while the defendants claim the property as the reversioners of Ramanganda. It is common ground that the plaintiff is entitled to succeed if the adoption of Shidappa by Shidava is valid. The lower Courts have held the adoption to be valid, mainly relying upon the case of *Payapa* v. *Appanná* (1).

In the appeal before us, the same question has been raised, and it is argued on behalf of the defendants that the adoption by Shidava is invalid as the adoption is not to the last full owner, and that the consent of Avabai cannot validate it. In other words, it is contended that the case of *Payapa* v. *Appanna* (1), which is admittedly on all fours with the present case, is not correctly decided. It is conceded—and I think rightly conceded—that there is no decision of this Court or of the Privy Council which is in conflict with *Payapa's* case (1). But Mr. Nilkanth has relied upon certain dicta in *Shri Dharnidhar* v. *Chinto* (2), *Ramachandra* v. *Mulji Nanabhai* (3), *Ramkrishna* v. *Shamrao* (4) and *Datto Govind* v. *Pandurang Vinayak* (5), as showing that the decision in *Payapa's* case (1) cannot now be accepted as a binding authority. He has also drawn our attention to the criticism on these cases in paragraphs 194 and 195 of Mayne's Hindu Law (8th Edition, pages 255-258).

In dealing with these cases it is necessary to bear in mind the particular facts of each case, and the point for decision with reference to which the observations must be deemed to have been made. It is also necessary to remember that a case is only an authority for what it actually decides, and that it cannot be quoted for a proposition which may seem to follow logically from it. Viewed in this light, it is clear that *Payapa's* case (1) is an authority for the proposition that a widowed daughter-in-law (I mean the widow of a pre-deceased son) can make a valid adoption with the contemporaneous consent of her mother-in-law in

(1) 23 B. 327.
(2) 20 B. 250 at p. 258.
(3) 22 B. 558.
(4) 4 Bom. L. R. 315; 26 B. 526.
(5) 32 B. 499; 10 Bom. L. R. 692.

whom the estate of the last full owner is vested as an heir. We are not concerned in this case with the exact scope of the general propositions enunciated in the case as third and fourth exceptions to the rule by Ranade, J. The observations in the two earlier cases were *obiter dicta* and considered by the Court which decided *Payapa's* case (1). The Full Bench ruling in *Ramkrishna* v. *Shamrao* (4) does not touch the point actually decided in *Payapa's* case (1). The Full Bench considered the question of the power of the grandmother to make a valid adoption, and held that her power to adopt was at an end when her son died leaving a grandson as his heir.

The considerations which would apply to the limited proposition with which we are concerned in this appeal, and with which the learned Judges in *Payapa's case* (1) were concerned, would be quite different, and, so far as I can see, there is nothing in the Full Bench case which is in conflict with the main ground of *Payapa's* decision (1). The same may be said of the case of *Datto Govind* v. *Pandurang Vinayak* (5) in which, as I read the observations of Chaubal, J., it was merely suggested that the general propositions stated as the third and fourth exceptions to the ordinary rule were not universally true and could not apply to certain widows adopting under certain conditions. In any case I see nothing in these two cases which is in conflict with the decision in *Payapa's* case (1). On a careful consideration of the arguments urged by Mr. Nilkanth, I am unable to see any reason to dissent from the decision in *Payapa's* case (1).

I consider it essential that a rule affecting the devolution of property after it is laid down definitely and clearly should not be lightly disturbed unless there are clear and cogent reasons to do so. *Payapa's* case (1) was decided in 1898. Mr. Justice Ranade then observed as follows (page 332):—"Nothing is more common in this country than to find that parents, when they grow old and have the misfortune of losing an only son in their old age, leaving a young widow behind, think it their duty to console that widow for the loss she has suffered by permitting her to adopt a son in preference to adopting a son themselves." To adopt any other view now would have the effect of unsettling many titles settled on the footing of *Payappa's* case (1). I would, therefore, follow the decision in *Payapa's* case (1).

Apart altogether from *Payapa's* case (1), I see nothing in such an adoption as we have in this case which is opposed to the Hindu sentiment or Hindu usage or any specific and inflexible rule of Hindu Law In this case Avabai was unquestionably competent to adopt to Ramangauda at the time when she consented to Shidappa's adoption by Shidava and to defeat the rights of the reversioners. Instead of following that method of doing so, she allowed her daughter-in-law to do so by giving her consent to the adoption at the time. It matters nothing to the reversioners whether their rights are defeated by the adopted son of the last full owner or of a pre-deceased son of the last full owner. The rule as to the adoption being to the last full owner for the purposes of inheritance is subject to certain exceptions. For instance, a mother is allowed to adopt, though her adoption is not to the last full owner, so as to enable the adopted son to inherit the property of her son. An exception in favour of the widow of a pre-deceased son when she adopts with the contemporaneous consent of her mother-in-law seems to be just and in accordance with Hindu Law. The result, therefore, is that the decree of the lower Appellate Court is confirmed with costs.

HEATON, J. —I concur. I do not wish to express any opinion at all on the general principles which were discussed and which it is far from easy to determine, but I am quite satisfied that in this case we should decide as was done in *Payapa's* case (1).

Decree confirmed.

JEHANGIR DADABHOY *v.* KAIKHUSHRU KAVASHA.

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

November 26, 1914.

Present:—Lord Dunedin, Lord Shaw, Sir John Edge and Mr. Ameer Ali.

JEHANGIR DADABHOY AND ANOTHER—APPELLANTS

versus

KAIKHUSHRU KAVASHA AND OTHERS—RESPONDENTS.

Will, Parsi, construction of—Succession Act (X *of* 1865), *s.* 111, *applicability of.*

A Parsi made a Will of his property in favour of his two sons, stating: "The . two sons are proprietors, half and half alike, and in equal (shares) of my whole 'estate' . At present my elder son.. has no male issue of his body ..therefore, if my elder son gets a male issue, half of the estate is to be made over to him, on his attaining full age. . If my son elder) does not get a son, my son (younger) is to give away his son as . *palak*." After his death the elder son died leaving no male issue and then his heirs under the Parsi Intestate Succession Act sued for his share:

Held, that on the general principles applicable to the construction of such a Will as well as on the principle of section 111 of the Indian Succession Act, the estate got divided on the testator's death into two portions and each portion became the absolute property of one of the two sons.

Appeal from a judgment and decree of the High Court, Bombay, dated December 9th, 1910, and printed at 9 Ind. Cas. 951, affirming those of the Subordinate Judge of Thana, dated April 2nd, 1910.

FACTS are fully stated in the judgment of the High Court reported in 9 Ind. Cas. 951.

Mr. *DeGruyther*, *K. C.*, (with him Mr. *Horace Miller*), for the Appellants, contended that there were three points to be considered, *viz.*, (1) whether there was a gift under the Will, (2) whether the gift was valid and (3) whether the suit was barred either in whole or in part.

[LORD DUNEDIN—There were two points only decided in the lower Court, (1) there was no gift and (2), if any, it was barred under the Indian Succession Act].

It was the Will of a Parsi and was written, One must place oneself in the position of the testator in order to construe the Will rightly. There was no custom of adoption among the Parsis and, therefore, any mention of adoption in a Will must imply the intention of the testator to vest the adoptee with proprietary rights.

[LORD DUNEDIN.—Has adoption among Parsis any legal effect?]

At first the custom of primogeniture prevailed among them; the division among sons followed, which in turn was replaced by the Parsi Successisn Act of 1866. There was a well-recognised institution of *palak* among Parsis. A Parsi could adopt during his life-time to the exclusion of his widow and daughter.

[MR. AMEER ALI.—Therelis no limit of age.]

Section 111 of the Indian Succession Act did not apply. The action was barred by limitation as the true nature of the action was to recover properties from Jehangirji. The High Court wrongly held that there was no limitation in this case, as section 10 of the Limitation Act applied. He was really a trustee for a specific purpose and had to hand over the properties on Pallonji's son coming of age, *i. e.* 21 years.

[LORD SHAW.—Assume vested interest. As a trustee he ought to have divested himself of the trust in time].

In any case costs ought to come out of the estate as all troubles were caused by the wording of the Will.

Reference was made to, Act XXI of 1861, *Chunilal Parvatishankar* v. *Bai Samrath* (1), *Venkata Narasimha Appa Row* v. *Parthasarathy Appa Row* (2), *Dowlat Koer* v. *Ramphul Das* (3), *Advocate-General of Bengal* v. *Surnomoyee Dossee* (4), *Norendra Nath Sircar* v. *Kamalbasini Dasi* (5), *Tarachun Chatterji* v. *Suresh Chunder Mookerjee* (6), Jarman on Wills, Volume I, page 452, Volume II, page 2209, paragraph 4 of 1908 Edition, *Edwards* v. *Edwards* (7).

Sir *R. Finlay*, *K. C.*, *M. P.* and Mr. *Lowndes*, for the Respondents, contended that on construction of the Will there was no gift to Byramji. It was impossible to say that the words therein included a devise to him.

[LORD DUNEDIN.—How could an adopted son take as a natural son? The latter takes as

(1) 23 Ind. Cas. 645; 38 B. 390; 26 M. L. J. 647; 18 C. W. N. 844; 19 C. L. J. 563; 16 Bom. L. R. 366 (P. C.); 12 A. L. J. 742; 16 M. L. T. 59; 1 L. W. 762.

(2) 23 Ind Cas. 166; 37 M. 199 at p 221; (1914) M.W.N. 299; 12 A. L. J. 8 5; 18 C.W.N. 554; 26 M. L. J. 411; 15 M. L. T. 285; 6 Bom L. R. 328 (P. C.).

(3) 25 I. A. 21 at p. 28; 25 C. 459; 2 C. W. N. 177.

(4) 9 M L A 387 at p. 411; 1 W. R. (P. C.) 14; 2 Moo. P. C. (N. S.) 22; 9 Jur. (N. S.) 877; 8 L. T 843; 2 N. R. 530; 12 W. R. (Eng.) 2 ; 1 Suth. P. C. J. 515; 2 Sar. P. C. J. 37; 19 Eng. Rep. 786; 15 Eng. Rep. 811; 141 R. R. 1.

(5) 23 I. A. 18 at p. 27; 23 C. 563.

(6) 16 I. A 166; 17C. 122.

(7) (1852) 15 Beav. 357; 21 L. J. Ch. 324; 16 Jur. 259; 92 R. R. 464; 51 Eng. Rep. 576.

soon as he attains the age of 21, but an unnatural son cannot, owing to the possibility of unnatural son.]

Section 111 of the Indian Succession Act applied to all kinds of property and all contingent bequests, substitutions and executory devises.

[LORD DUNEDIN.—I give my property to *A* on the condition that if such and such things should happen, it would lapse. Is it possible in India to give in these terms?]

Yes, it was according to *Sreemutty Soorjeemonee Dossee* v. *Denobundoo Mullick* (8).

[LORD DUNEDIN.—If there is a gift subject to defeasances, the effect would be that the defeasances would be thrown off and the gift would operate.]

Reference was made to *Narendra Nath Sarcar* v. *Kamalbasini Dasi* (5).

Mr. *DeGruyther*, in reply.

JUDGMENT.

LORD SHAW.—This is an appeal from a decree of the High Court of Judicature at Bombay, dated the 9th December 1910. The High Court affirmed a decree of the Subordinate Judge of Thana, dated the 2nd April 1910.

The case has reference to the construction of a Will executed by one Dadabhoy Byramji on 8th August 1866. By this Will the testator narrated that of his three sons then living, he has given one in adoption to a paternal uncle. His other two sons were named Pallonji and Jehangirji. The material portions of the Will disposing of the "estate" are these:—

"The said two sons are proprietors: half and half alike, and in equal (shares), of my whole 'estate,' outstandings, debts, title, and interest . . . . Both the heirs are to take care of the said 'estate' and look after it, and both the heirs living together, are duly to enjoy the balance which may remain after payment of the Sarkar's assessment . . . . In this my testamentary writing, I the testator have appointed my two sons as (my) heirs."

The Will then states that Pallonji, the elder, a man then of about 39 years of age, was in a confused state of mind, and that the other son Jehangirji was accordingly entrusted with the management of the "estate."

"by his true and pure integrity, and both the heirs are to equally enjoy half and half alike the whole 'estate' with unanimity with my elder son Pallonji in such a way as not to injure his (Pallonji's) right."

Up to this point in the Will there can be no doubt whatsoever that the property of the estate was effectually and equally divided between these two sons. There then follow, however, the clauses which are said to create difficulty. They are these:—

"At present my elder son Pallonji has no male issue of his body. (He) has only a daughter. Therefore, if my elder son Pallonji gets a male issue, half of the 'estate' is to be made over to him, on his attaining (his) full age."

And it may be proper that the 11th clause of the Will should be quoted in full. It reads thus:—

"I, the testator, have in the second clause of this Will appointed my two sons Pallonji and Jehangirji as my heirs. The wife of Pallonji, the elder of them, has now gone to her father's house. On her return, if she, by instigating her husband, or by any (other way) cause to be mortgaged, sold, given in gift, charity, etc., or disposed of, whatsoever in any way to any one, any immoveable and moveable 'estate', etc., appertaining to the half share during the life-time of my son Pallonji or, after his death, which God forbid, my son Pallonji or his wife, or daughter, or any (other) person (shall), as stated in the third clause of this Will, have no authority, power and right so to do. If my son Pallonji does not get a son, my son Jehangirji is to give away his son as Pallonji's *palak* (or his adopted son). All the clauses of this Will are applicable to the said adopted (son). If a son be born of the body of Pallonji, he (shall) on his attaining (his) full age be the owner of half share in the whole of the immoveable and moveable 'estate' belonging to me. My heir (and) vakil (or executor) Jehangirji, or his heirs shall raise no objection to give him the share. If they raise any objection, the responsibility arising therefrom is on their heads. All the clauses written in this Will are applicable to the said son of (his body)."

(8) 9 M. I. A. 123 at p. 135; 19 E. R. 688; 1 Sar. P. C. J. 837.

JEHANGIR DADABHOY *v.* KAIKHUSHRU KAVASHA.

The material facts of the case are that the testator having executed this Will on 8th August 1866 died within a fortnight thereafter, *viz*, on 21st August 1866. He was survived by his two sons. Pallonji, the elder, was of weak intellect as the Will indicates. Jehangirji entered upon the management of the whole estate, having obtained Probate of the Will in 1867. This state of matters lasted for 30 years, *viz*., till 1897, when Pallonji died. Pallonji was twice married but had no son. He left a widow and other representatives, who are respondents in this appeal and are his heirs according to the Parsi Intestate Succession Act. The nature of the suit by these heirs is for an account for an ascertainment of the rights and interests of the parties in the estate and for partition, and the claim is grounded on the right of Pallonji as, it is contended, the owner of one-half of the estate from the date of the testator, Dadabhoy's death.

One other fact may now be mentioned, *viz*., that it is alleged that on 3rd December 1886 Pallonji adopted, as his *palak*, Byramji, his nephew and son of Jehangirji. Jehangirji and his son Byramji resist the suit, maintaining that Byramji as *palak*, or adopted son, of Pallonji succeeds in terms of the settlement to the half of the estate which Pallonji so long enjoyed. It is, of course, also maintained that under the terms of the settlement Pallonji never was owner of the one-half of the estate, or, as it would be expressed in English phraseology, the terms of the Will were such as to prevent vesting in Pallonji.

The learned Judges of the Court below have not only dealt with this question but with certain others, including the special situation of Byramji as *palak* of his uncle. The points among others discussed were (1) whether such a *palak* could ever take under the Will, looking to the fact that it remained uncertain until Pallonji's death that the condition of a *palak* taking could ever be purified, *viz*., that Pallonji should die without a son, and (2) the peculiar point as to the office of a *palak* to a Parsi becoming effectual only three days after the adoptive father's death. (3) A further question was keenly argued, *viz*., whether the Will contained in itself sufficient words of grant or gift to the *palak*.

In the view taken of this case by their Lordships these questions, however interesting, are not necessary for the decision about to be pronounced. For their Lordships are clearly of opinion that under the terms of Dadabhoy Byramji's Will one-half of the estate conveyed vested in Pallonji *a morte testatoris*. The result of the argument presented would be that if Pallonji had had a son who reached 21 during his father Pallonji's life, then in that event that son would have taken so as to cut out Pallonji from all rights under this Will. The right of Pallonji would accordingly be restricted to that of enjoyment, not even for life, but until the majority of his own son. Their Lordships cannot agree with such a construction.

The destination over to a son who should take upon attaining 21 years of age, would appear to their Lordships to be language appropriate to the events of the death of Pallonji during the life-time of the testator and of his having left a son—the situation also being provided for of that son being at that period of time under 21.

But when the father Pallonji himself survived the testator, it does not appear to their Lordships that there are any words in the Will sufficient to cut down the right of Pallonji to one-half of the estate to a tenancy for life therein, or for a less period, according to the argument. On the contrary, the words employed seem to fit the case of the entire estate being on the testator's death divided into two portions, and of each portion becoming then the absolute property of one of the two sons.

While these are the general principles which would be applicable in the construction of such a Will, in their Lordships' opinion the same result is precisely reached by the application of section 111 of the Indian Succession Act. Their Lordships agree with the view that has been taken as to the applicability of that section in the Courts below. No further question, this being so, need be dealt with.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed

and that the appellants will pay the costs.

Appeal dismissed.

Solicitors for the Appellant:—Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondents:—Messrs. *Ranken, Ford, Ford & Chester.*

Order XXXIX, rule 1 or 2. It was, therefore, not within the competence of the learned Judge below to grant the temporary injunction complained of, and we think that this appeal must be allowed, and the order granting the plaintiff a temporary injunction must be set aside and that injunction dissolved. Costs to be costs in the cause.

Rule made absolute.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 62 OF 1913.

August 12, 1914.

Present:—Mr. Justice Beaman and Mr. Justice Hayward.

CHHOTALAL HIRACHAND—DEFENDANT—APPELLANT

versus

JETHALAL VARAJBHAI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI rr. 99, 103, O. XXXIX, rr. 1, 2—Execution proceedings—Suit to remove obstruction—Temporary injunction.

A temporary injunction restraining defendant from taking possession of the property in suit is not within the terms or the intention of Order XXXIX, rule 1 or 2, and cannot, therefore, be granted to a person who, after beening defeated under Order XXI, rule 99, brings a suit under rule 103 of the same Order.

Appeal from an order passed by the First Class Subordinate Judge at Ahmedabad, in Civil Suit No. 659 of 1913.

Messrs *G. S. Rao* and *T. R. Desai*, for the Appellant.

Mr. *G. K. Parekh*, for the Respondent.

JUDGMENT.—Without going into the entangled story of the litigation which has preceded the present suit, it is enough for all purposes of this appeal to say that the plaintiff after having been defeated under Order XXI, rule 99, has brought a suit under rule 103 of the same Order. In that suit he sought for and obtained from the trial Judge a temporary injunction restraining the defendant in the suit from taking possession of the property. Such a temporary injunction, we think, cannot be brought within the terms or the intention of

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CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 915 OF 1911.

February 4, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT. and Mr. Justice Beachcroft.

RAJANI KANTA GHOSE AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAMA NATH ROY AND OTHERS—DEFENDANTS—RESPONDENTS.

Contribution, suit for—Payment of decree for rent by one of the judgment-debtors—Execution by assignee of decree—Bengal Tenancy Act (VIII of 1885), s. 48 (h)—Contract Act (IX of 1872), ss 69, 70,—Suit for contribution not cognisable by Small Cause Court—Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 41.

Where an assignee of a decree for rent, without obtaining assignment of the landlord's interest in the land, applies for execution, and one of the judgment-debtors satisfies the decree by payment under compulsion of legal process, the latter is entitled under sections 69, 70 of the Contract Act to call upon the other judgment-debtors for contribution.

There is nothing in section 148 (h of the Bengal Tenancy Act to prevent the assignee from accepting the payment of the decree and certifying such payment to the execution Court.

A suit by some of several persons, bound by a common liability of tenancy, who have discharged the joint obligation, to compel their co-sharers to make good their shares, falls within the scope of Article 41 of the second Schedule to the Provincial Small Cause Courts Act, and hence, it is excluded from the jurisdiction of the Small Cause Court.

Appeal against the decree of the District Judge of Nadia, dated the 9th March, 1911,

modifying that of the Munsif of Chuadanga, dated the 6th June 1910.

Babu *Surendra Nath Ghosal*, for the Appellants.

Babus *Soroshi Charan Mitra, Upendra Narayan Bagchi* and *Ambicapada Chowdhry*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiffs in a suit for contribution. The circumstances antecedent to the litigation are not in controversy and may be briefly stated. The first two defendants and the predecessor-in-interest of the plaintiffs held a tenancy under the fourth defendant. The rent fell into arrears, with the result that the fourth defendant brought a suit for rent and obtained a decree on the 18th June 1907. On the 23rd January 1908 the plaintiffs made a payment of Rs. 8 to the decree-holder. On or about the 24th January 1908 the decree-holder assigned the decree to the third defendant who applied for execution on the 25th January 1908. The Court made an order for execution and a decree obtained by the plaintiffs against one of their debtors was attached. On the 14th March 1908 the assignee, by process of execution, realised Rs. 119-8. Subsequently on the 29th April 1908 he realized another sum of Rs. 73 and on the 27th May 1908 after the moveables of the plaintiffs had been attached, they paid to the assignee Rs. 390-15-3 in satisfaction of the decree. On the 19th August 1909 the plaintiffs commenced this suit to compel the first two defendants to contribute in respect of the sums they had paid in satisfaction of the joint decree. The defendants resisted the claim on various grounds. The Court of first instance overruled their objections and made a decree in favour of the plaintiffs for one-third of the admitted amount paid by them, against each of the first two defendants. The first defendant appealed to the District Judge and persuaded him to hold that no contribution could be claimed in respect of payments made to the assignee of the decree, inasmuch as under section 148, clause (*h*), of the Bengal Tenancy Act the assignee was not entitled to execute the decree as he had not obtained an assignment of the land itself. The District Judge accordingly allowed the appeal and made a decree in favour of the plaintiffs in respect of the payment made to the original decree-holder himself. The plaintiffs have now appealed to this Court.

On behalf of the respondents a preliminary objection has been taken that the appeal is incompetent under section 102 of the Code of Civil Procedure, which provides that no second appeal shall lie in any suit of the nature cognizable by the Court of Small Causes when the amount or value of the subject-matter of the original suit does not exceed Rs. 500. The amount claimed in the suit is less than Rs. 500. Consequently the question arises whether the suit is of a nature cognizable by a Court of Small Causes. On behalf of the appellants, it has been contended that the suit is excluded from the cognizance of the Court of Small Cause by Article 41 of the second Schedule to the Provincial Small Cause Courts Act of 1887. That clause excludes from the jurisdiction of Small Cause Courts a suit for contribution by a sharer in joint property in respect of payments made by him of money due from a co-sharer. On behalf of the respondents, it has further been contended that assuming the decree to be capable of execution at the instance of the assignee, it could be executed only as a money-decree and that consequently the liability which was satisfied by the payment made by the plaintiff was a personal liability of the judgment-debtor, and not a liability which rested upon their joint property. In our opinion there is no foundation for the contentions of the respondents.

Article 41 of the second Schedule to the Provincial Small Cause Courts Act clearly contemplates suits of three classes: *first*, a suit for contribution by a sharer in joint property in respect of payments made by him of money due from a co-sharer; *secondly*, a suit for contribution by a mortgagor of joint property in respect of payments by him on account of the property; and *thirdly*, a suit for contribution by a member of an undivided family in respect of payments made by him on account of the family. The case before us falls within the first description of suits. It is clearly a suit for contribution as it is a suit by some of several persons, bound by a common liability, who have discharged the joint obligation, to compel their co-sharers to make good their shares: *Satya Bhusan*

Bandopadhyaya v. *Krishnakali Bandopadhyaya* (1). It has been commenced by persons who are sharers in joint property; at any rate, they were sharers in joint property at the time when the money fell due from their co-shares and the suit is in respect of payments made by them of money due from their co-sharers. All the three elements are consequently satisfied and the case falls within the scope of Article 41. The preliminary objection consequently fails.

As regards the merits of the appeal, it has been argued on behalf of the respondents in support of the view taken by the District Judge that the case does not fall either within section 69 or section 70 of the Indian Contract Act. It has been contended that the assignee of the decree for rent was not entitled at all to execute the decree in view of the provisions of section 148 (*h*) of the Bengal Tenancy Act, that is, he was not free to execute the decree either as a decree for rent or as a decree for money. It is not necessary for us to determine whether the contention is or is not well-founded. As was pointed out by this Court in the case of *Manurattan Nath* v. *Hari Nath Das* (2), there is a conflict of judicial opinion upon this question; while some of the authorities are in favour of a strict and literal construction of section 148, clause (*h*), of the Bengal Tenancy Act, there are other cases which support a liberal interpretation of this provision of the law. We shall, however, for the purpose of the argument placed before us, assume in favour of the respondents that the assignee of the decree was not entitled to execute the decree even as a decree for money as he had not obtained an assignment of the landlord's interest in the land. It does not follow, however, that the effect of the assignment was to extinguish the liability of the judgment-debtor under the decree. In the first place, it is plain that if at any time before the decree was extinguished by limitation, the assignee of the decree obtained an assignment of the landlord's interest in the land, the bar imposed by clause (*h*) of section 148 would be removed and he would be in a position to enforce the decree. In the second place, it is equally clear that if the assignee re-transferred the decree to the assignor, the latter would be in a position to enforce the decree. Neither of these positions could be supported if the view were maintained that the effect of the assignment was to extinguish the judgment-debt completely. The true position consequently is this. The judgment-debtors were liable under the decree, but the person who held the decree was not in a position to apply to the Court for execution till a certain contingency had happened. It was in these circumstances that an application for execution was made by the assignee, and the Court ordered execution to issue. Execution was taken out against the plaintiffs and they satisfied the decree by payment made to the assignee under compulsion of legal process. In these circumstances it is plain that what was done by the plaintiff was done lawfully within the meaning of section 70 of the Indian Contract Act. To bring a case within the scope of that section three conditions must be fulfilled. *First*, the thing must be done lawfully; *secondly*, it must be done by a person not intending to act gratuitously; and *thirdly*, the person from whom the act is done must enjoy the benefit of it. Now we have held that the payment was made lawfully, and in this view we are supported by the decision of this Court in the case *Mohendra Ghoshal* v. *Bhuban Mardana Lal* (3). Was the nthis payment made by persons who did not intend to act gratuitously? It is obvious that when they made the payment, they did not intend to act gratuitously. *Finally*, the question arises, whether the person for whom the act was done has enjoyed the benefit of it. It has been argued on behalf of the respondents that as the decree was not capable of execution at the moment when the payment was made, the plaintiffs have not by the payment conferred any benefit upon the defendants. This argument is obviously fallacious. As we have already explained, the judgment-debt had not been extinguished and the defendants were still liable to have the decree executed against them by the assignee if he obtained

(1) 24 Ind. Cas. 259; 20 C. L. J. 196; 18 C. W. N. 1308.

(2) 1 C. L. J. 500 at p. 502.

(3) 6 Ind. Cas. 810; 38 C. 1; 12 C. L. J. 566, 14 C. W. N. 945.

an assignement of the landlord's interest or by the assignor if he obtained a re-transfer of the decree. The benefit which has been conferred upon them by the payment is that they have been absolved from the liability to be pursued either by the assignee or the assignor of the decree. It has been suggested on behalf of the respondents that the payment made to the assignee does not operate as a valid discharge of the decree. For this contention there is, in our opinion, no foundation. Section 148 (*h*) of the Bengal Tenancy Act does not provide either directly or by implication that if a payment is made to the assignee and is accepted, the decree is not thereby satisfied. There is nothing to prevent the assignee from accepting the payment of the decree and certifying such payment to the execution Court.

The position consequently reduces to this. The defendants along with the plaintiffs were liable to satisfy the judgment-debt under a decree held by the fourth defendant. The decree was assigned to the third defendant. He was, under certain circumstances, entitled to execute the decree, and it was not impossible that the fourth defendant might also be placed in a position to execute it by re-assignment. The third defendant did, as a matter of fact, take out execution of the decree. Under compulsion of legal process, the plaintiffs have satisfied that decree. We are clearly of opinion that the case is covered by section 70 of the Indian Contract Act, and that the defendants are liable to be called upon by the plaintiffs to contribute. It is not necessary to discuss in detail the terms of section 69 of the Indian Contract Act, but it is obvious that the case is covered by the section as well. That section provides that a person who is interested in the payment of money which another is bound by law to pay and who, therefore, pays it, is entitled to be reimbursed by the other. Here the plaintiffs were interested in the payment and were even bound by law to make it. It is by reason of that payment that the decree-holder, who would otherwise have proceeded with execution, has not enforced the decree. The view we take is supported by the decision of this Court in the case of *Pankhabati Chaudhurani* v. *Nonihal Singh* (4) where the earlier decisions will be found reviewed. We are, therefore, of opinion that whether we apply section 69 or 70, it is clear that the plaintiffs are entitled to succeed and this conclusion is obviously in harmony with the principles of justice, equity and good conscience.

The result is that this appeal is allowed, the decree of the District Judge set aside and the suit decreed against each of the first two defendants for the sum claimed in the plaint together with interest and costs. The other defendants will bear their own costs.

Appeal allowed.

(4) 21 Ind. Cas. 207; 19 C. L. J. 72, 18 C. W. N. 778.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 166 OF 1913.

August 7, 1914.

Present:—Sir Basil Scottt, KT., Chief Justice, and Mr. Justice Beaman.

LAXMANDAS HARAKCHAND—DEFENDANT—APPELLANT

versus

BABAN BHIKARI—PLAINTIFF—RESPONDENT.

Dekkhan Agriculturists' Relief Act (XVII of 1879), ss. 15D, 16—Mortgage transactions—Subsequent money-dealings—Claims for both accounts not to be combined.

Under section 15D of the Dekkhan Agriculturists' Relief Act, a suit for an account may be filed by a mortgagor-agriculturist even where the time named for payment has not yet expired under the mortgage, and he may have either a declaration of the amount due on the mortgage or he may combine a declaration of the amount due with a decree for redemption.

Section 16 enables him to sue for a general account of money dealings between him and the lender and for a bare declaration of the amount due, without any relief being claimed.

But he is not permitted to import the relief to which he is entitled by way of redemption under section 15D into his claim for an account under section 16, and thus to get the benefit of surplus profits remaining in the hands of the mortgagee under the usufructuary mortgage.

First appeal from the decision of the Additional First Class Subordinate Judge at Dhulia, in Civil Suit No. 943 of 1910.

Mr. *G. S. Rao*, for the Appellant.

Mr. *P. B. Shingne*, for the Respondent.

JUDGMENT.—The defendant in this suit has had dealings with the plaintiff for many

years and has advanced money to him upon mortgage, and balances due on old accounts have been secured by the mortgage of property of the plaintiff. The mortgage-bonds outstanding at present are Exhibits 63, 64 and 65, which do not all relate to the same property, Exhibit 65 relating to property entirely different from that to which Exhibits 63 and 64 relate. The last of these mortgage-bonds was executed in December 1903. Further monetary dealings took place between the plaintiff and the defendant which are evidenced by promissory notes commencing with the 1st of August 1905. The defendant in 1909 and 1910 brought four suits in the Jalgaon Court upon promissory notes executed by the plaintiff subsequent to July 1905.

The plaintiff then instituted a suit for a general account under the Dekkhan Agriculturists' Relief Act, and for redemption of the mortgaged property, and upon his application the four suits filed in Jalgaon on promissory notes were transferred by the District Court, Khandesh, to the First Class Subordinate Judge in Dhulia. That Judge has now tried the plaintiff's suit for account and redemption, and in taking an account he has made up one general account of the mortgage transactions and the promissory note transactions. The mortgages, he finds, were satisfied by profits received by the defendant some time prior to April 1906, and he has taken the defendant as being in receipt of profits at the rate of Rs. 2,000 a year under his mortgages, which profits subsequent to the date of the satisfaction of the mortgage-debts he has applied in the account in reduction of the defendant's claim upon the promissory notes.

That manner of taking an account has been challenged in this appeal. It is contended on behalf of the defendant that every mortgage of separate property, even where the suit relates to more than one mortgage, must be the subject of separate account under section 13 of the Dekkhan Agriculturists' Relief Act and that under each separate mortgage the mortgagee is entitled to retain such surplus profits as he may have got before the date of the redemption suit or the date of the redemption decree, and as an authority for that contention, the judgments of Sir Charles Sargent in *Janoji* v. *Janoji* (1) and *Ramachandra Baba Sathe* v. *Janardan Apaji* (2) are referred to. Now if those authorities apply here they are binding upon us. But it appears to me that the case may be decided in favour of the appellant upon a somewhat different ground.

The mortgagor's right to file a suit for an account and redemption rests upon the provisions of the Dekkhan Agriculturists' Relief Act, and that Act makes provision for two different classes of suits for account by agriculturists. Under section 15D a suit for an account may be filed by a mortgagor-agriculturist even where the time named for payment has not yet expired under the mortgage, and he may have either a declaration of the amount due on the mortgage or he may combine a declaration of the amount due with a decree for redemption, That is a section which relates purely and exclusively to mortgage transactions. Then there is another section, section 16, which enables him to sue for a general account of money dealings between him and the lender, and that section 16 enables him to sue for a bare declaration of the amount due without any relief being claimed. It says:—"Any agriculturist may sue for an account of money lent or advanced by a creditor and for a decree declaring the amount, if any, still payable." But naturally he does not require any further reliefs than that. The plaintiff does not wish to be authorised to pay if the payment is inconvenient to him, as soon as the amount due is ascertained. Therefore, the two sections where accounts are contemplated stand on a different footing. The plaintiff here, however, has combined his claim for account of the mortgage transactions with his claim for an account of the moneys lent upon promissory notes, and he has sought to import the relief to which he is entitled by way of redemption under section 15D into his claim for an account under section 16, and thus to get the benefit of surplus profits remaining in the hands of the mortgagee under the usufructuary mortgage. This we do not think he is permitted to do by

(1) 7 B. 185.
(2) 14 B. 19.

the provisions of the Act, and if it were necessary to go further, it would be sufficient to point out that the result would be contrary to the decisions of Sir Charles Sargent which I have already referred to.

We, therefore, cannot accept the account taken by the lower Court, and the decree must be set aside and the suit remanded for a fresh account, treating the mortgage account as entirely separate from the promissory note account, so that the lender-mortgagee will not be accountable for surplus profits received by him after the date when it has been found that the mortgage-claims were satisfied.

The other point relating to the account which was argued on behalf of the appellant related to the amount of profits with which the mortgagee has been charged, namely, Rs. 2,000 per annum. We do not think that we should interfere with the decision of the lower Court upon that point which was come to after careful consideration of all the evidence, for we are not satisfied that the lower Court was wrong.

As the learned Pleaders for the parties do not wish the mortgage-account to be reopened or to be taken again, we remand the case simply in order that the promissory note account may be taken separate from the mortgage account. The plaintiff will be entitled to take back his mortgaged property on the footing of the mortgages having been discharged, and the suits on promissory notes will be dealt with by the lower Court in accordance with the result of the promissory note account upon the basis indicated in this judgment.

The defendant must pay half the costs in the lower Court and have his costs of this appeal. One set of costs to be set off against the other. The rest of the costs of the suit on remand to be dealt with by the lower Court.

Decree reversed.

CALCUTTA HIGH COURT.
FULL BENCH.

APPEAL FROM ORDER No. 455 OF 1907.
APPEAL FROM APPELLATE DECREE No. 2388 OF 1908.
LETTERS PATENT APPEAL No. 15 OF 1910.
June 2, 1914.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, Justice Sir Harry Stephen KT., Mr. Justice Woodroffe, Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Holmwood.

IN APPEAL No. 455 OF 1907
DAYAMOYI—APPELLANT
versus
ANANDA MOHAN ROY CHOWDHURI AND ANOTHER—RESPONDENTS.

IN APPEAL No. 2388 OF 1908
Shaikh AZIM—APPELLANT
versus
GOLUK CHUNG *alias* CHANDAR NATH CHUNG AND OTHERS—RESPONDENTS.

IN L. P. A. No. 15 OF 1910
AMBIKA CHARAN MANDAL—APPELLANT
versus
RAM CHARAN PRAMANICK AND OTHERS—RESPONDENTS.

Occupancy holding—Transfer for value, validity of—Principles governing transfer—Sale in execution of rent-decree—Application to set aside sale—Transferee a representative of judgment-debtor—Civil Procedure Code (Act V of 1908), s 47.

The principles regarding the transfer for value of occupancy holdings apart from custom or local usage as based upon modern authority are:

1. The transfer of the whole or a part is operative as against the *raiyat*

(*a*) where it is made voluntarily,

(*b*) where it is made involuntarily and the *raiyat* with knowledge fails or omits to have the sale set aside.

A sale is made involuntarily where it is in execution of a money-decree, but not of a decree founded on a mortgage or charge voluntarily made.

2. The transfer is operative as against the landlord in all cases in which it is operative against the *raiyat*, provided the landlord has given his previous or subsequent consent. Where the transfer is a sale of the whole holding, the landlord, in the absence of his consent, is ordinarily entitled to enter on the holding, but where the transfer is of a part only of the holding, or not by way of sale, the landlord, though he has not consented, is not ordinarily entitled to recover possession of the holding, unless there has been (*a*) an abandonment within the meaning of section 87 of the Bengal Tenancy Act, or (*b*) a relinquishment of the holding, or (*c*) a repudiation of the tenancy.

Whether there has been a relinquishment or repudiation or not, depends on the substantial effect of what has been done in each case.

3. The transfer of the whole or a part is operative as against all other persons where it is operative against the *raiyat*.

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A person, who without the landlord's consent purchases from a *raiyat* a portion of an occupancy holding which is not transferable by local custom or usage, is a person whose immoveable property has been sold and is a representative of the judgment-debtor within the meaning of section 47 of the Code of Civil Procedure, 1908, and is entitled to have a sale of the holding in execution of a decree for arrears of rent set aside on the ground of fraud.

Where a portion of an occupancy holding is transferred, the transferee can by suit recover possession from the landlord who has forcibly dispossessed him.

A right of occupancy, which is not transferable by custom or local usage, can be transferred.

A holding apart from the right of occupancy cannot be transferred.

Full Bench Reference against the order of the Subordinate Judge of Tippera, dated the 21st May 1907, confirming that of the Munsif of Nobinagar, dated the 26th December 1906, in Appeal from Order No. 455 of 1907.

Full Bench Reference against the decision of the Subordinate Judge of Mymensingh, dated the 28th May 1908, modifying the decision of Munsif of Mymensingh, dated the 8th July 1907, in Appeal from Appellate Decree No. 2388 of 1908.

Full Bench Reference under section 15 of the Letters Patent from a decision of Mr. Justice Digambar Chatterjee, dated the 25th January 1910, in Appeal from Appellate Decree No. 2379 of 1908, against the decision of the Subordinate Judge of Jessore, dated the 17th July 1908, modifying that of the Munsif of Narail, dated the 29th November 1907, in Letters Patent Appeal No. 15 of 1910.

FACTS of Appeal from Order No. 455 of 1907 appear fully from the following Order of Reference made by Coxe and Doss, JJ., on the 14th July 1908.

In this case the respondent No. 2 was the owner of an occupancy holding which was not transferable by local custom or usage. He sold a portion of it to the appellant. The landlord afterwards sued for rent and obtained a decree. In execution he sold the holding and purchased it himself. The appellant then applied under sections 244 and 311 of the Civil Procedure Code and section 173 of the Tenancy Act to have the sale set aside. The lower Appellate Court has decided against the appellant and hence this appeal.

Two points are taken in appeal—

First.—That the Subordinate Judge was wrong in holding that the appellant was not entitled to maintain the application under sections 311 and 244; and

secondly.—That he was wrong in holding that the decree-holder's purchase was not proved to have been effected on behalf of the judgment-debtor.

Taking the second point first, we think that the decision of the Subordinate Judge on this point is one of fact that cannot be questioned in second appeal.

With regard to the first point, the Subordinate Judge has decided the fourth point laid down for decision in his judgment in favour of the appellant. That point is thus stated: "Whether the sale notices were suppressed by fraud of the decree-holder." So we may take it as a finding of fact, with which we cannot interfere in second appeal, that the sale was obtained by the decree-holder by fraud. But the Subordinate Judge holds that the appellant being a purchaser of a portion of a non-transferable occupancy holding was not entitled to apply under section 244 of the Civil Procedure Code at all.

The question whether the appellant is entitled to apply under section 244 depends on the question whether he is representative of a party to the suit, which depends on the further question whether he has an interest in the judgment-debtor's property which is affected by the decree. This is laid down in *Ishan Chunder Sirkar* v. *Beni Madhub Sirkar* (1), which has been followed in several of the cases to which we propose to refer. It is clear enough that if the appellant has purchased any interest of the judgment-debtor, that interest is bound by the decree, and the appellant is so far a representative of the judgment-debtor and is entitled to apply under section 244. The question, therefore, narrows itself down to this, namely, whether a person who purchases without the landlord's consent a portion of an occupancy holding not transferable by local custom or usage without the landlord's consent, can be said to have purchased any interest at all in the property. The Subordinate Judge has relied on *Srimati Nissa Bibi* v.

(1) 24 C. 62 (F. B.); 1 C. W. N. 26.

Radha Kishore Manikya (2). In that case the applicant to set aside the sale was a mortgagee of the holding, and the learned Judges held that his right to have the sale set aside depended on the question whether or not the holding was transferable by local usage. They remarked: "If such interest was not transferable either according to law, custom or local usage, then we are of opinion that the applicant could not rightly be regarded as a representative in the proper sense of the word and as falling within the provisions of section 244, Civil Procedure Code." This finding was necessary for the decision of the case, for by necessary implication in the order of remand the learned Judges directed the lower Court to dismiss the application if it was found that the holding was not transferable by local usage.

The only distinction that the learned Pleader for the appellant can draw between this case and that quoted is that this is a case of a sale and that was one of a mortgage. But a perusal of the decision itself will show that it refers generally to all transfers. We think there is no real distinction between the cases. A sale of the holding for arrears of rent would have been as fatal to a mortgage as to a sale.

We think, therefore, that if this decision is sound, we are bound to dismiss the appeal and to hold that in the present case, in which the holding is not transferable by custom, the appellant obtains nothing by his purchase and cannot be regarded as a representative under section 244, inasmuch as if he bought no interest, he has no interest to be affected by the decree. There is, of course, authority for the view that a purchase such as this conveys nothing. We may refer to *Biramali Shaik Shikdar* v. *Gopikanta Shaha* (3), *Kuldip Singh* v. *Gillanders Arbuthnot and Co.* (4) and *Sadagar Sircar* v. *Krishna Chandra Nath* (5).

On the other hand, however, it seems to have been held by necessary implication in *Bhagirath Changa* v. *Sheikh Hafizuddin* (6), *Ambika Nath Acharjee* v. *Aditya Nath Moitra* (7) and *Ayenuddin Nasya* v. *Srish Chandra Banerjee* (8) that a purchaser of an occupancy holding not transferable by local custom or usage acquires a good title against his vendor and persons claiming through him, and it has been held further in *Kabil Sardar* v. *Chunder Nath Nag Chowdhury* (9), *Durga Prosad Sen* v. *Doula Gasee* (10) and *Sheikh Gozaffur Hossein* v. *E. Dablish* (11) that a transfer of a portion of an occupancy holding not transferable by local custom or usage does not entitle the landlord to re-enter on the portion so transferred. In view of these authorities, though they are not expressly referred to, it has been held in *Omar Ali Majhi* v. *Moonshi Basirudeen Ahmad* (12), following *Kunja Behari Mundal* v. *Sambhu Chandra Roy* (13), to which *Bungshidhar* v. *Kedar Nath* (14) may be added, that a purchaser of a portion of an occupancy holding, whether transferable or not, is entitled to apply under section 310A and, therefore, following *Asgar Ali* v. *Asaboddin Kazi* (15), quoted above (?), under section 244. It has been sought to distinguish the present case from *Omar Ali Majhi* v. *Moonshi Basirudeen Ahmad* (12) on the ground that the application in the latter case was under section 310A. The words in both section 310A and section 311 are "persons whose immoveable property has been sold," and the whole point is whether the purchaser can be said to have any property at all in the holding. In *Asgar Ali* v. *Asaboddin Kazi* (15), the application was under section 311 and section 244. We think there is nothing in this distinction and that if the decisions in *Omar Ali Majhi* v. *Moonshi Basirudeen Ahmad* (12) and *Asgar Ali* v. *Asaboddin Kazi* (15), are correct, we are bound in the present case to allow the appeal and to hold that the appellant is a person whose immoveable property has been sold and is a representative of the judgment-debtor under section 244.

We think, therefore, that there is a real conflict of authority and that the appeal

(2) 11 C. W. N. 312.
(3) 24 C. 355; 1 C. W. N. 396.
(4) 26 C. 615; 4 C. W. N. 738.
(5) 26 C. 937; 3 C. W. N. 742.
(6) 4 C. W. N. 679.
(7) 6 C. W. N. 624.
(8) 11 C. W. N. 76.
(9) 20 C. 590.
(10) 1 C. W. N. 160.
(11) 1 C. W. N. 162.
(12) 7 C. L. J. 282.
(13) 8 C. W. N. 282.
(14) 1 C. W. N. 114.
(15) 9 C. W. N. 134.

ought to be referred to a Full Bench, and we refer it accordingly. As Rule 11 of the rules for references to a Full Bench by implication requires that we should state our own opinion on the point referred, we may say that we agree with the decision in *Omar Ali Majhi* v. *Moonshi Basirudeen Ahmad* (12), and it necessarily follows that we differ from the view taken in *Srimati Nisa Bibi* v. *Radha Kishore Manikya* (2). We would formulate the point to be decided in the following way:

"Is a person, who without the landlord's consent purchases from a *raiyat* the whole or a portion of an occupancy holding, which is not transferable by local custom or usage, entitled to apply under section 244 of the Civil Procedure Code as a representative of the *raiyat* to have a sale of the holding in execution of a decree for arrears of rent set aside on the ground of fraud?"

Subsequently the terms of the reference were modified by an order which ran as follows:

"We direct that this reference do stand over generally, and the reference be treated as including the question whether the appellant can be considered as a representative of the judgment-debtor, regard being had to the fact that he purchased before suit and the words 'the whole or' be omitted from the present reference."

FACTS of Appeal from the Appellate Decree No. 2388 of 1908 appear from the following Order of Reference made by Chitty and N. Chatterjea, JJ., on the 23rd March 1911.

This is an appeal by the plaintiff in a suit brought by him to recover possession jointly with defendant No. 44 of certain land. His suit was dismissed by the Munsif, but the Subordinate Judge has given him a decree for one-fourth of his claim, on the ground that he had been recognized as tenant by some of the co-sharer landlords holding a share of 4 annas. As to the facts, it is found that the *jote* in question belonged to Hari Das Mondal and Parasuram Nama Das, two brothers, in equal shares. Defendants Nos. 1 and 2 are the sons of Hari Das. On Parasuram's death, his widow, defendant No. 44, succeeded to his 8-annas share, and sold 7 annas 15 *gandas* to the plaintiff on 25th *Asar*, 1308 (9th July 1901). Within two years before suit filed, the plaintiff was dispossessed of his portion of the holding by the 12-anna co-sharer landlords, who settled these lands with defendants Nos. 6, 8 and 12. It appears that defendent No. 44, plaintiff's vendor, and her co-sharers are in possession of the remainder of the holding, and it is not alleged that they had ceased to pay the rent of the entire holding before the ouster of the plaintiff by the 12-anna co-sharer landlords. It was conceded by the learned Vakil for the appellant that if the case of *Kuldip Singh* v. *Gillanders Arbuthnot and Company* (4) is to be followed, then his client has no case. That case is a distinct authority for the proposition that the mere fact of a plaintiff having once had possession would not entitle him as against the landlord to recover possession in a suit not under section 9 of the Specific Relief Act. As against the landlord he must show some title. In that case as the transfer to the plaintiff of a portion of the *jote* was not binding on the landlords, he was unable to show a title on which he could claim to be reinstated in possession. That case is on all fours with the present. It was distinguished in the cases of *Benodini Dassi* v. *Peary Mohan Haldar* (16) and *Asgar Ali* v. *Asaboddin Kasi* (15). In each of these cases the Court remarked that had the case of *Kuldip Singh* v. *Gillanders Arbuthnot & Company* (4) been directly in point, they would have had to consider whether the matter ought not to be referred to a Full Bench. The same remark was made in the case of *Rai Kamaleswari Persad Singh Bahadur* v. *Maharaja Harbullabh Narain Singh Bahadur* (17). *Kuldip Singh's* case (4) was again distinguished, but without any note of dissent, in *Ashok Bhuiyan* v. *Karim Bepari* (18). In that case the Court pointed out that *Kuldip Singh's* case (4) is no authority for the proposition that a purchaser of a portion only of a *jote* gets no title at all. It was again distinguished in the case of

(16) 8 C. W. N. 55.
(17) 2 C. L. J. 369.
(18) 9 C. W. N. 843.

Gour Kaibarta v. *Srimati Tarajan Bibi* (19), where the plaintiff sued not the landlord but other tenants. On the other hand, we find that *Kuldip Singh's* case (4) was followed in the case of *Manoda Sundari Dasi* v. *Modhu Sudan Das* (20), one of the Judges being a member of the Bench in both cases. We cannot find that *Kuldip Singh's* case (4) has ever been overruled. At the same time it is questionable whether the principle upon which it proceeds is entirely consistent with the principle on which the cases of *Kabil Sardar* v. *Chunder Nath Nag Chowdhry* (9), *Durga Prosad Sen* v. *Doula Gazee* (10), *Sheikh Gosaffur Hossein* v. *E. Dablish* (11) and *Rai Kamalesvari Persad Singh Bahadur* v. *Maharaja Harbullabh Narain Singh Bahadur* (17) are based. These cases appear to rest upon the principle that where an occupancy *raiyat* transfers a portion of his holding but remains in possession of the remainder and pays rent for the entire holding, the tenancy still subsists and there is no abandonment of the entire holding, which alone can entitle the landlord to eject the transferee.

If *Kuldip Singh's* case (4) was correctly decided, it follows that so long as the transferee of a portion of a holding can remain in possession, he can shelter himself under the title of his transferor, the occupancy *raiyat*, and the landlord cannot evict him by process of law. If, however, the landlord can by any means prevent his getting into possession, or, when he has got into possession, can oust him by force, the transferee has no remedy at law by suit against the landlord. This is no doubt somewhat of an anomaly, and puts a premium upon violence, the landlord being tempted to take the law into his own hands. *Kuldip Singh's* case (4) is perhaps indirectly supported by the decision in the recent case of *Agarjan Bibi* v. *Panaulla* (21).

As serious doubts have been cast on the correctness of the decision in *Kuldip Singh's* case (4) and as the questions raised are of very great importance, we would refer for decision by a Full Bench the question whether in the case of a transfer of a portion of an occupancy holding, such transfer not binding the landlord unless made with his consent, the transferee can by suit recover possession from the landlord who has forcibly dispossessed him.

FACTS in Letters Patent Appeal No. 15 of 1910 appear from the following Order of Reference, made by Jenkins, C. J., and N. Chatterjea, J., on the 25th June 1912:—

The plaintiffs sued to recover possession of an occupancy holding, alleging that they had purchased the same at a sale held in execution of a money decree against one Kristo Dass. The defence was that Kristo Dass had no title to the lands, that the holding being non-transferable no right passed to the plaintiffs and that the suit was not maintainable, as one Narain, the nephew of Kristo Dass, who had a share in the holding, had not been made a party. The Court of first instance held that only a four-annas share of the holding belonged to Kristo Dass, four annas to Narain, and the remaining eight-annas share belonged to the contesting defendants Nos. 1 and 2; that the holding not being transferable nothing passed to the plaintiffs at the sale, and that the suit was bad for non-joinder of Narain, and dismissed the suit. On appeal the lower Appellate Court held that the suit could not be dismissed for non-joinder of Narain, but that he would not be bound by the decree, and that defendants Nos. 1 and 2 who were Kristo Dass's co-sharers in the holding could not raise the question of transferability of the holding, and gave a decree to the plaintiffs for joint possession in respect of a four-annas share of the lands. That decree having been confirmed on second appeal by Mr. Justice Digambar Chatterjee, the present appeal has been preferred by the defendants Nos. 1 and 2 under the Letters Patent against his judgment. It appears that Kristo Dass, whose interest was purchased by the plaintiffs, did not contest the plaintiffs' claim. The landlord of the holding brought a suit for arrears of rent against the defendants Nos. 1 and 2 and Narain, and so far has not recognized the plaintiffs as tenants and is no party to the suit,

(19) 8 C. L. J. 161.

(20) S. A. No. 528 of 1901 decided on August 13th 1903, (unreported).

(21) 6 Ind. Cas. 452; 87 C. 687; 14 C. W. N. 779; 12 C. L. J. 169.

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The point for consideration in this appeal is whether the question of transferability of Kristo Dass's share in the holding can be raised by the defendants Nos. 1 and 2, and this depends upon the question whether a right of occupancy not transferable by custom or local usage is a right that is merely personal to the *raiyat* and as such cannot be transferred at all, or is a right the transfer of which is valid against all persons other than the landlord so that no one except the landlord can take exception to the validity of the purchaser's title. There is a considerable conflict of judicial opinion on the point.

Before the Bengal Tenancy Act was passed, it was settled by a Full Bench in the case of *Narendra Narain Roy* v. *Ishan Chundra Sen* (22) that a right of occupancy was a right that was personal to the *raiyat* and could not be transferred. The question there arose between the landlord and the transferee. Subsequent to the passing of the Bengal Tenancy Act, in the case of *Biramali Sheikh Shikdar* v. *Gopikanta Shaha* (3), the learned Judges, after a consideration of the provisions of the Bengal Tenancy Act, came to the same conclusion, and it was held in that case that the tenant whose occupancy holding had been sold in execution of a money-decree could himself raise the question that the holding was not transferable in a suit by a purchaser for possession of the holding and that the tenant was not barred by the provisions of section 244, Civil Procedure Code. *Biramali's* case (3) was followed in a number of cases where such a question was raised by the tenant, with this qualification that if the tenant was aware of the execution proceedings and having had opportunity of objecting did not object, he was precluded by the provisions of section 244, Civil Procedure Code, from raising the question subsequently. The case of *Durga Charan Mandal* v. *Kali Prasanna Sarkar* (23) may be cited as an instance of this class of cases.

In the case of *Agarjan Bibi* v. *Panaulla* (21), a suit for possession by the purchaser of a share of an occupancy holding was resisted, not by the tenant who had transferred his share, but by his co-sharers, and it was held that it was open to tenants in occupation of a portion of the *jote*, *i. e.*, the co-sharers of the vendor, to question the validity of the transfer.

A different view has been taken in other cases, *viz.*, that the question of transferability is one that might be raised by the landlord but cannot legitimately be raised by trespassers, and that whatever might be the precise nature of the tenants' interest which is purchased, it has a market-value and the transfer is capable of being recognised by the landlord, and that the purchaser is entitled to be protected in the enjoyment of his purchase against all the world except possibly his landlord, see *Basarat Mandal* v. *Sabullah Mandal* (24), or in other words, as observed in the case of *Hari Das Bairagi* v. *Udoy Chandra Das* (25), the transfer of an occupancy holding is not a void transaction, and is voidable only at the option of the landlord. And in several cases, for instance in *Ayenuddin Nasya* v. *Srish Chandra Banerji* (8), it has been held that in a suit between two rival claimants (both of whom derive their title from the tenant), neither of whom is the original tenant nor the landlord, the question of transferability does not arise. These cases, however, can be explained by the doctrine of estoppel.

A sale of occupancy holding has been held to be valid if settlement is made by the landlord with the auction-purchaser as soon as can reasonably be expected after the sale, see *Dwarka Nath Pal* v. *Tarini Sankar Roy* (26), and an objection to the sale of a holding with the consent of some of the landlords was overruled in the case of *Shukuruddin Chowdhury* v. *Rani Hemangini Debi* (27), on the ground that the non-consenting landlords might give their consent after the sale is held, but that the decree-holders must take the risk and the purchaser must purchase at his peril.

In the case of a voluntary transfer it has been held that the transferor cannot question

(22) 22 W. R. 22; 13 B. L. R. (F. B.) 374.
(23) 26 C. 727; 3 C. W. N. 586.
(24) 2 C. W. N. cclxxix.
(25) 8 C. L. J. 261; 12 C. W. N. 1086.
(26) 34 C. 199; 11 C. W. N. 513; 5 C. L. J. 294.
(27) 13 Ind. Cas. 492; 16 C. W. N. 420.

the validity of the transfers. See *Bhagirath Changa* v. *Hafizuddin* (6), but such cases proceed on the ground that the transferor is estopped from impugning the validity of his own transfer.

If the view that the transfer of an occupancy holding is valid against all persons excepting the landlord, is correct, it is difficult to see how the *raiyat* himself whose right is sold at an execution sale can question the validity of the purchaser's title, or why the validity of the transfer should depend upon recognition by the landlord in cases where the landlord does not impugn the transfer. If, on the other hand, occupancy holdings are not transferable at all, there does not seem to be any reason why persons in the position of the defendants in the present case or even trespassers in the possession of the land should not be entitled to question the validity of the transfer, or why the purchaser should acquire a right of occupancy by consent of the landlord, although he might by virtue of fresh settlement become a non-occupancy *raiyat*.

The facts of the present case are similar to those of *Agarjan Bibi* v. *Panaulla* (21) referred to above, except that in that case the purchase was made by a *kobala* which, however, does not make any difference in principle (the doctrine of estoppel not coming into operation either in that case or in the present), but having regard to the conflict of views noticed above and having regard to the great importance of the questions involved, we think the case should be referred to a Full Bench.

The questions referred to the Full Bench are:

(*i*) Whether a right of occupancy which is not transferable by custom or local usage, is a right which can be transferred at all.

(*ii*) If not, whether the holding apart from the right of occupancy can be transferred.

(*iii*) In either case, whether the validity of the transfer can be questioned by any person other than the landlord of the holding.

As these questions arise in a second appeal, the whole case is referred to the Full Bench.

JUDGMENT OF THE FULL BENCH.

JENKINS, C.J.—These several references have been heard consecutively, and as they involve many of the debatable points that relate to the transferability of occupancy holdings, apart from local usage, it will be convenient to state our conclusion in general terms. This conclusion rests largely on a recognition of the paramount importance of upholding decisions on which dealings with property have been extensively based. These decisions probably mark a departure from earlier judicial pronouncements and the opinions of those who have studied this question in the past. The life of the law, however, it has been said, is not logic but experience, and the modern departure is probably due to a change in economic conditions, which has brought into prominence problems that did not previously call for solution.

The weight of modern authority establishes the following propositions regarding the transfer for value of occupancy holdings apart from custom or local usage:—

1. The transfer of the whole or a part is operative as against the *raiyat*,

(*a*) where it is made voluntarily,

(*b*) where it is made involuntarily and the *raiyat* with knowledge fails or omits to have the sale set aside.

A sale is made involuntarily where it is in execution of a money-decree, but not of a decree founded on a mortgage or charge voluntarily made.

2. The transfer is operative as against the landlord in all cases in which it is operative against the *raiyat*, provided the landlord has given his previous or subsequent consent. Where the transfer is a sale of the whole holding, the landlord, in the absence of his consent, is ordinarily entitled to enter on the holding; but where the transfer is of a part only of the holding, or not by way of sale, the landlord, though he has not consented, is not ordinarily entitled to recover possession of the holding, unless there has been (*a*) an abandonment within the meaning of section 87 of the Bengal Tenancy Act, or (*b*) a relinquishment of the holding, or (*c*) a repudiation of the tenancy. Whether there has been a relinquishment or repudiation or not depends on the substantial effect of what has been done in each case.

3. The transfer of the whole or a part is

operative as against all other persons where it is operative against the *raiyat*.

Applying, then, these propositions to the questions propounded, we answer them as follows:

(*i*). The question in appeal from Order No. 455 of 1907 is answered in the affirmative. We accordingly hold that the appellant is a person whose immoveable property has been sold and is a representative of the judgment-debtor under section 244 of the Civil Procedure Code of 1882. This appeal must, therefore, be allowed and an order made as prayed. Each party, however, will bear his own costs throughout.

(*ii*). The question in Appeal from Appellate decree No. 2388 of 1908 is answered in the affirmative. The decree of the lower Appellate Court is set aside and a decree will be passed in favour of the plaintiff for possession, but each party will bear his own costs throughout.

(*iii*). The questions in Appeal from Appellate Decree No. 2379 of 1908 are answered as follows: (1) in the affirmative; (2) in the negative; (3) in accordance with the propositions above set out. The result will be that this appeal will be dismissed. There will be no order as to costs of the Letters Patent Appeal on this reference.

We would only add that the uncertainty as to the transferability of holdings has been one of the most fruitful sources of litigation, and it is urgently necessary that it should be set at rest by the Legislature.

Reference answered.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 11 OF 1913-14, OF RAE BARELI DISTRICT.

March 26, 1914.

Present:—Mr. Tweedy, J. M.

LACHHMAN—PLAINTIFF—APPELLANT

versus

KANDHAI PRASAD—DEFENDANT—RESPONDENT.

Ejectment, notice of, validity of—Statutory period, computation of.

Where with reference to the *patta* and *kabuliat* the statutory period of a tenant was to expire in June 1913, while the notice of ejectment served upon him required him to vacate his holding in May 1913:

Held, that the notice was perfectly good in law, inasmuch as the time for ejectment fixed by the Oudh Rent Act is with a view to enable both the landlord and the tenant to make their arrangements, respectively, in time for the next year.

Appeal from the decree of the Commissioner, Lucknow, dated 15th October 1913, upholding that of the Assistant Collector, Rae Bareli, dated 2nd June 1913.

FACTS.—A tenant held some land under a *patta* and *kabuliat*, with reference to which his statutory period was to expire in June 1913. The landlord issued against the tenant a notice of ejectment in 1912, according to which the latter was required to vacate his holding on or before the 15th of May 1913. The question for decision, therefore, was whether the notice was to be considered good in law or bad as premature.

Babus *Kismat Rai Jagdhari* and *Ganga Dayal*, for the Appellant.

Mr. *E. Manuel*, *Pandit Sheo Dularey Lal*, Pandit *Savitri Sahay Shukla* and Sardar *Gurumukh Singh*, for the Respondent.

JUDGMENT.—The points raised in this appeal are, with one exception, points of fact which cannot be touched in second appeal. The only legal point is that concerning the statutory period and I think that the Courts below are right. The notice is issued in November for ejectment from the beginning of the next *Fasli* year. No doubt, the notice requires the tenant to vacate on or before 15th May which is before the end of the year, but that, as the Assistant Collector has held, is simply for the convenience of the parties in order that the *zemindar* may be able to make arrangements for the next year's cultivation and that the tenants also may take up other land. On 15th May there are no crops standing and there is nothing that the tenant can remain in possession of.

I dismiss the appeal with costs.

Appeal dismissed.

MAHARAJ KISHEN *v.* HAR GOBIND.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 946 OF 1912.

May 6, 1914.

Present:—Mr. Justice Johnstone and Mr. Justice Rattigan.

MAHARAJ KISHEN—DEFENDANT—APPELLANT

versus

HAR GOBIND AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Partnership—Joint Hindu family—Death of member of family—Partnership not dissolved—Contract Act (IX of 1872), s 253 (10)—Principle—Partnership continued after its determination by death—Limitation—Manager's statement as to date of dissolution—Estoppel—Surety bond to be read in conjunction with partnership deed.

A partnership between certain individuals and a joint Hindu family is not dissolved by the death of a member of the joint family.

The principle of law embodied in section 253 (10), Contract Act, is based on the ground that partners cannot be expected to acquiesce in new partners being forced upon them. But this principle cannot apply when all that happens is that one of the existing partners becomes, by operation of law, entitled on the death of his co-parcener to a larger share in the partnership than he previously possessed in his individual capacity.

When a partnership is determined by death and the surviving partners continue to carry on the business, the statute of limitation is no bar to taking the accounts of the new partnership by going into the accounts of the old partnership which have been carried on into the new partnership without interruption or settlement.

Ahmad Bibi v. *Abdul Kader Saheb*, 25 M. 26 at pp. 31, 32, referred to.

Where the managing partner of a firm himself issues notices to its constituents informing them that the partnership had dissolved from a particular date, it is not open to him subsequently to contend that this was false and that the partnership had actually terminated sometime before.

A surety bond executed in connection with a partnership must be read in conjunction with the partnership agreement to which it makes express reference. A bond of this kind is to be construed strictly, and the liability of the surety cannot be extended beyond the period for which he was undertaking liability simply by showing that the partnership, which, according to the express provision of the partnership agreement, he was led to believe was to terminate within a specified period, was in fact, by subsequent mutual agreement of the partners to which he was no party, continued beyond that period.

First appeal from the decree of the District Judge, Delhi, dated the 20th May 1912.

Rai Bahadur Pandit *Sheo Narain* and Lala *Madan Gopal*, for the Appellant.

The Hon'ble Mr. *Muhammad Shafi*, K. B., for the Respondents.

JUDGMENT.—Plaintiffs, Hargobind and Basheshar Lal, trading under the name of Basheshar Lal-Hargobind, allege that by a written agreement, dated the 1st of January 1901, a contract of partnership was entered into between (1) Maharaj Kishen, defendant No. 4, of the one part, and (2) plaintiffs' firm and the firm of Ganga Ram-Jamna Das, represented by defendants Nos. 1, 2 and 3, of the second part; that under the terms of this agreement the two said firms were to supply the capital for the business of the partnership; and that defendant No. 4 was to act as manager, the profits being shared equally by the two parties. The agreement was, according to paragraph 6, to remain in force for three years from the date of starting work. By a bond, dated the 27th of March 1901, Rai Bahadur Gursahai Mal, the father of defendant No. 4, undertook to stand security for all losses suffered by the two firms to the extent of defendant No. 4's share. The said surety died before suit and defendants Nos. 4, 5 and 6 represent his estate. Plaintiffs in their plaint, which was presented to the Court on the 22nd of December 1910, allege that the partnership in question was carried on up to the end of December 1907 and was dissolved on the 1st of January 1908, except in so far as the carrying on of the business was necessary for winding-up purposes. They further state that the representatives of the firm of Ganga Ram-Jamna Das have settled matters with themselves and are merely *pro forma* defendants in the present suit. The plaint further sets out that the business of the partnership was hopelessly mismanaged and that plaintiffs are entitled to claim a settlement of accounts from the late Manager of the concern—Maharaj Kishen. They accordingly claimed the following alternative relief:—

(*a*) that the partnership be wound-up and after settlement of accounts a decree be passed in favour of plaintiffs for such sums as they might be found entitled to, and

(*b*) that in the event of the Court finding that the partnership had not been dissolved prior to institution of suit that it should now be dissolved, accounts made up and decree passed in accordance therewith.

The plaintiffs' claim was contested by defendants Nos. 4, 5 and 6, and a number of pleas were urged with which we are not

concerned upon this appeal. The main ground of defence was that the claim was barred under Article 106 of the Limitation Act inasmuch as the partnership had been dissolved more than three years before suit, and further that the agreement by Rai Bahadur Gursahai Mal to stand surety determined on the lapse of the period of three years for which the partnership was to continue in force according to the terms of the agreement, *i. e.*, from the 1st of January 1901 to the 1st of January 1904. Defendant No. 4 in his written pleas maintained that the partnership in question was dissolved by the death of Munna Lal, one of the partners in the firm of Ganga Ram-Jamna Das, who died in July 1907.

Subsequently, however, when giving evidence before the Court Maharaj Kishen deposed that the partnership remained in existence till November 1907, when it came to an end by arrangement between the partners. The District Judge found that the firm was dissolved at the death of Munna Lal in July 1907, but was continued after his death by mutual consent of the remaining partners, that in point of fact it was not dissolved till the 31st of December 1907, and that consequently plaintiffs' claim against defendant No. 4 was within time. On the other hand, the learned Judge held that the suretyship of Rai Bahadur Gursahai Mal determined after the lapse of the period of three years mentioned in the partnership agreement and that consequently plaintiffs had no claim against the estate of the late surety. A preliminary decree was passed in favour of plaintiffs on the 20th of May 1912, declaring that the partnership of the firm of Maharaj Kishen-Basheshar Lal was dissolved on the 31st of December 1907 and directing Maharaj Kishen, defendant No. 4, to file within one month a balance-sheet showing profits and losses of the partnership.

From this decree Maharaj Kishen has appealed to this Court and on behalf of the appellant Mr. Sheo Narain, his Advocate, has declared that he gives up grounds 3 and 4 of the grounds of appeal and that his sole contention is that the claim is barred by time, on the ground that the partnership terminated either on the death of Munna Lal or in November 1907; and that in either case the suit was instituted more than three years after the cause of action accrued. The plaintiffs have also filed a cross-appeal, taking exception to the finding of the District Judge that the surety bond of Rai Bahadur Gursahai Mal terminated upon the expiry of three years after the date of the partnership starting work.

We have heard lengthy arguments as to the date when the partnership between the parties actually terminated, but the question does not appear to us to be very difficult. The agreement by which the partnership was constituted is set out at pages 4 and 5 of part I of the paper-book, and upon a consideration of its terms, we have no hesitation in accepting Mr. Shafi's contention that the partnership was one between (*a*) Maharaj Kishen, of the one part and (*b*) the two *firms* of Ganga Ram-Jamna Das and Basheshar Lal-Har Gobind, of the second part, and not (as contended by Mr. Sheo Narain) between the five individuals who signed the deed in their personal capacities.

It is further established by the evidence on the record, and indeed not now contested, that the firm of Ganga Ram-Jamna Das was constituted of three partners, *viz.*, Munna Lal, Piyari Lal and Hardwari Mal. Munna Lal and Piyari Lal (uncle and nephew) constituted a joint Hindu family, so far at all events as their property was concerned, and when Munna Lal died in July 1907, Piyari Lal at once became his heir by the rule of survivorship and represented his estate for all purposes. Thus the death of Munna Lal in no way affected the partnership up to that moment existing between him, his co-parcener, Piyari Lal and Hardwari Mal. Piyari Lal, his heir by survivorship, was at the time one of the partners. The principle of law embodied in section 253 (10) of the Indian Contract Act is based on the ground that partners cannot be expected to acquiesce in new partners being forced upon them. In the event of one partner dying, they may well object to the executors or administrators of a deceased partner coming into the business. But this principle can obviously not apply when all that happens is that one of the existing partners becomes by operation of law entitled, on the death of his co-parcener, to a larger share in the partnership than he previously possessed in his individual right. We hold, therefore, that the death of Munna Lal did not dissolve the partnership firm of Ganga Ram-Jamna Das and as a

result, did not dissolve the partnership existing between Maharaj Kishen and the two firms of Ganga Ram-Jamna Das and Basheshar Lal-Har Gobind.

Mr. Sheo Narain contended that as a son was adopted to Munna Lal after the latter's death, Piyari Lal cannot be regarded as Munna Lal's heir. A son, no doubt, was eventually adopted to Munna Lal, but this happened admittedly after Munna Lal's death and there is nothing to show that the adoption in question took place before the 31st December 1907. Some time obviously must have elapsed before the adoption was effected, and until it was completed, Piyari Lal was admittedly Munna Lal's heir.

But even if it be held that the death of Munna Lal had the technical effect of dissolving the partnership of which he was a member, it is clear from the evidence of Maharaj Kishen himself that all parties agreed, expressly or by necessary implication, to continue the partnership as if no dissolution had taken place. Possibly, the legal effect of such agreement would be the creation of a new partnership. But even so it is obvious that the new partnership was founded on the basis of taking up matters exactly as they stood at the time of Munna Lal's death and of carrying on the business upon the understanding that the accounts of the old partnership were to be incorporated just as they were into the new partnership. Maharaj Kishen, when giving evidence in Court, expressly admitted that the partnership between the parties remained in existence till November 1907, whereas Munna Lal had, to the knowledge of all parties, died in July 1907. Presumably, Maharaj Kishen is well aware of the legal proposition that the death of one partner, in the absence of a contract to the contrary, terminates a partnership, and his meaning, therefore, must be that the parties either did not regard the death of Piyari Lal's co-parcener as dissolving the partnership, or that if they did, they agreed to continue the partnership just as if no such dissolution had taken place. In either event, the provisions of Article 106 of the Limitation Act would not bar the present claim, for as held in *Betjemann* v. *Betjemann* (1), "when a partnership is determined by death and the surviving partners continue to carry on the business, the statute of limitation was no bar to taking the accounts of the new partnership by going into the accounts of the old partnership which have been carried on into the new partnership without interruption or settlement" [see also *Ahinsa Bibi* v. *Abdul Kader Saheb* (2)].

But the present suit was not instituted till the 22nd of December 1910, and the claim would consequently be still barred by Article 106 of the Limitation Act if defendant's allegation is true that the partnership was finally dissolved by consent of parties in November 1907. In our opinion this allegation is not true, and we cannot concede the right of defendant to put it forward. He has had to admit in his evidence that he himself issued notices to constituents of the firm informing them that the partnership was dissolved from the 1st January 1908, and it is not open to him now to contend that this was in fact false and that the partnership had actually terminated in November 1907. But apart from this objection, it is clear from the evidence of his own witness (Gonjeveram, D. W. No. 3) that about the end of 1907, he went to Calcutta to arrange for the further financing of the business. Clearly, then, the partnership had not terminated up to the time of defendant's visit to Calcutta which took place in November or December 1907. Then again, in his letter to plaintiffs, dated 16th of January 1908 (Exhibit P. 8), he states: "I did no new business after the 31st December as desired by you." The inference is obvious that plaintiffs had instructed him to close the business of the partnership with effect from the 1st January 1908, an inference which becomes irresistible when we read with this letter the notices admittedly issued by defendant to the firm's constituents.

We hold, therefore, that the present suit is not barred by Article 106 of the Limitation Act and that defendant's appeal must be dismissed.

There remains the cross-appeal by plaintiffs, and here again we agree with the District Judge's conclusions. The surety bond executed by Rai Bahadur Gursahai

(1) (1895) 2 Ch. 474; 64 L. J. Ch. 641, 12 R. 455; 73 L. T. 2; 44 W. R. 182.

(2) 25 M. 26 at pp. 31, 32.

Mal must be read in conjunction with the partnership agreement to which it makes express reference, and under the provisions of paragraph 6 of that agreement the partnership was to continue in force for the period of three years, though it was terminable earlier. A bond of this kind is to be construed strictly, and the liability of the surety cannot be extended beyond the period for which he was undertaking liability simply by showing that the partnership, which he was led to believe was to terminate within three years, was in fact, by mutual agreement of the partners to which he was no party, continued beyond that period. Mr. Shafi relies upon the words in the bond:—"During the time the said firm or any branch of it constituted hereafter carries on any business," etc., as indicating that the surety undertook liability for an indefinite period. In our opinion, these words must be read subject to the provision in the partnership agreement that the period of the partnership was to be three years, unless it was terminated *earlier*.

We accordingly dismiss the cross-appeal also.

Both parties agree that in the circumstances they should be left to bear their own costs upon these appeals and we direct accordingly.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL No. 15 OF 1914.

November 16, 1914.

Present:—Mr. Stuart, A. J. C., and Mr. Kanhaiya Lal, A. J. C.

DEPUTY COMMISSIONER, FYZABAD, FOR AJUDHYA ESTATE—DECREE-HOLDER—APPELLANT

versus

SANT BAKHSH PATHAK AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O XXXIV, rr. 4, 6—Preliminary decree on mortgage suit—Decree, combined, in suit for sale of mortgaged property and for recovery of balance due on mortgage—Mortgage, recovery of balance due on, separate decree for.

In suits on mortgage the proper course obviously is to confine the preliminary decree to a decree under Order XXXIV, rule 4, Civil Procedure Code, but where a Court goes further and passes a combined decree under Order XXXIV, rules 4 and 6, Civil Procedure Code, a separate decree under the latter rule is not necessary, and an application for such a decree is, therefore, superfluous.

Batuk Nath v. *Pitambar Das*, 13 A. 360; A. W. N. (1891) 127; *Lalji Lal* v. *C. J. Barber*, 15 A. 334; A. W. N. (1893) 121, *Tirbini Sahai* v. *Hurruk Narain*, 21 C 26, *Dina Nath Mitter* v. *Bejoy Krishna Das*, 7 C. W. N. 744; and *Dwabandhu Nandi* v. *Mashuda Khatun*, 17 Ind. Cas. 283; 16 C. L. J. 318, referred to.

A relief claimed under Order XXXIV, rule 6, Civil Procedure Code, against the defendant includes a relief against any property in his possession.

Appeal from the decree of the Subordinate Judge, Fyzabad, dated 7th February 1914.

Babu *Nagendra Nath Ghoshal*, for the Appellant.

Babu *Jiban Krishna Banerji*, holding brief of Pandit *Gokaran Nath Misra*, for the Respondents.

JUDGMENT.—This is an appeal from an order passed by the Subordinate Judge of Fyzabad, refusing to grant a decree under Order XXXIV, rule 6, of the Code of Civil Procedure. It appears that Ram Dhani Pathak and his son, Sant Bakhsh, obtained *thekas* of certain villages from the Maharaja of Ajudhya in their respective names, in respect of which some arrears of rent were due. On the 22nd October 1901 Ram Dhani Pathak executed a mortgage-deed for Rs. 7,831 due by him on account of the said arrears in favour of the Maharaja and agreed to pay the said money by instalments. He died subsequently in 1905 without making any payments. On the 10th September 1908 the Court of Wards representing the Ajudhya Estate filed a suit for the recovery of money due on the mortgage, impleading Sant Bakhsh and Ajudhya Prasad, two of the surviving sons of the deceased mortgagor, and *Musammat* Jagwanta, the widow of a predeceased son of his, parties to the suit. The Court of Wards claimed in that suit a decree for the sale of the mortgaged property, and in case the sale of the mortgaged property proved insufficient, a decree against the other property, moveable and immoveable, of the mortgagor which might be in the possession of the defendants. One of the issues raised in the case was whether Ram Dhani was

competent to mortgage the property in suit and whether the defendants or any of them were personally liable to the claim. The learned Subordinate Judge, who tried the case, found that Ram Dhani and his sons lived jointly, that Ram Dhani was the manager of the joint family and was competent to mortgage the family property, and that Sant Bakhsh, Ajudhya Prasad and *Musammat* Jagwanta would be personally liable for any sum which might remain due to the plaintiff after the sale of the mortgaged property, to the extent of the other property inherited by them from Ram Dhani. He passed a decree accordingly for the recovery of the amount claimed by sale of the mortgaged property and in case of deficiency for the recovery of the balance from the other properties of the deceased Ram Dhani in possession of Sant Bakhsh, Ajudhya Prasad and *Musammat* Jagwanta. The decree was thus a combined decree granting relief to the plaintiff under Order XXXIV, rules 4 and 6, of the Code of Civil Procedure. The decree was made absolute on the 5th February 1910 and both the reliefs originally granted were repeated in the said decree.

In suits on mortgages the proper course obviously is to confine the preliminary decree to a decree under Order XXXIV, rule 4, of the Code. But where a Court goes further and passes a combined decree under Order XXXIV, rules 4 and 6, a separate decree under the latter rule is not necessary. In *Batak Nath* v. *Pitambar Das* (1), which was followed in *Lalji Lal* v. *C. J. Barber* (2), it was held under similar circumstances that such a decree could be executed against the persons or other properties of the parties named therein without it being necessary for the decree-holder to obtain a separate decree under section 90 of the Transfer of Property Act. In *Tirbini Sahai* v. *Hurruk Narain* (3), *Dina Nath Mitter* v. *Bejoy Krishna Das* (4), *Dinabandhu Nandi* v. *Mashuda Khatun* (5), the Calcutta High Court recognised the same principle. The application for a decree under Order XXXIV, rule 6, of the Code was, therefore, superfluous. The reasons upon which the learned Subordinate Judge rejected the application cannot, however, be supported, for a relief claimed under Order XXXIV, rule 6, of the Code against a defendant includes a relief against any property in his possession.

We dismiss the appeal accordingly, leaving the right of the decree-holder to proceed against the non-hypothecated property as directed by the decree unaffected. The parties will, under the circumstances, bear their own costs throughout.

Appeal dismissed.

(1) 13 A. 360, A. W. N. (1891) 127.
(2) 15 A. 334, A. W. N. (1893) 121.
(3) 21 C. 26.
(4) 7 C. W. N. 744.
(5) 17 Ind. Cas. 263; 16 C. L. J. 318.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 17 OF 1912-13 OF BULANDSHAHAR.

March 27, 1914.

Present:—Sir Duncan Colvin Baillie, S. M., and Mr. Tweedy, J. M.

HARJAS BRAHMAN—APPELLANT

versus

MAKUND SARUP—RESPONDENT.

Res judicata—*Issues not framed, effect of—Miscellaneous proceedings, order passed in, force of—Decision, exhaustive, effect of*—Jamabandi, *correction of, case as to—U. P. Land Revenue Act* (*III of* 1901), *ss.* 42, 44.

Where in a correction of *jamabandi* case, a Court does not frame specific issues for trial as provided by section 42 of the U. P. Land Revenue Act, but clearly and definitely understands those issues, and pronounces its decision after hearing the pleadings and arguments and consulting the rulings advanced on behalf of both the parties, that decision, although passed in a miscellaneous proceeding and without a formal drawing up of issues, does, in view of the provisions of section 44 of the U. P Land Revenue Act, operate as *res judicata* in a subsequent case for declaration of tenure between those parties as regards the kind of tenure already determined in the *jamabandi* case.

Appeal from the decree of the Commissioner, Meerut, dated 2nd May 1913.

JUDGMENT.

BAILLIE, S. M. (*March 5th*, 1914).—Appellant was, as appears from the judgments of the lower Courts, the father of a tenant who died when Act XII of 1881 was in force. The son's

In the matter of HARUNNESSA.

widow succeeded on her husband's death and has died recently. The father claims that as heir of his son, entitled to succeed under Act XII of 1881, he is now the occupancy tenant of this land. The Court of first instance decided in his favour. The Commissioner has decided against him, on the ground that section 22 does not provide for the succession of a father. The claim is analogous to that decided in Petition No. 10 of 1911-12, Meerut, *Harbans* v. *K. Bishambhar Singh*, decided on 7th and 9th July 1913. But it appears entirely unnecessary to enter into the various questions raised in this case inasmuch as the matter is, in my opinion, *res judicata*. In a correction of *jamabandi* case Thakur Bhagwat Dayal Singh decided on the 15th June 1911 that Harjas was the occupancy tenant in succession to his son, Amin Chand. This case was decided after hearing the pleadings and the arguments advanced by Vakils on behalf of both parties. It is claimed that it does not make the matter *res judicata*, because it was a miscellaneous proceeding and no formal issues were drawn up. Section 44 provides that the decision shall be binding on all Revenue Courts precisely as if the miscellaneous proceedings were a regular suit. Section 42 provides that the procedure shall be as in a suit, and it has been customarily held that where the provisions of 42 were grossly ignored, decisions cannot be considered to be binding, but this cannot be held to be a case in which the provisions of section 42 were ignored. It is true that the Court did not write down separately certain issues as for trial, but it clearly and definitely understood what these issues were. It heard the Pleaders on behalf of parties in regard to the decision it was to pronounce and consulted rulings advanced on behalf of both parties. There was a deliberate, a careful and an intelligent judgment recorded. In my opinion, the decision was a binding one and the matter now in issue is *res judicata*. On this ground I would allow the appeal and cancel the Commissioner's decision and restore that of the Court of first instance.

Costs on respondent.

TWEEDY, J. M.—I agree.

Appeal allowed.

CALCUTTA HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPLICATION.

July 14, 1913.

Present:—Mr. Justice Chaudhuri.

In the matter of Musammat HARUNNESSA BIBEE.

Guardians and Wards Act (VIII of 1890)—Guardianship—Female minor—Muhammadan Law—Sister's husband and maternal uncle—None but mahram *to be appointed.*

No male has a right to the custody of a Mussalman female child unless he is a *mahram*, that is, stands to her within the prohibited degrees of relationship and cannot under any circumstances marry her.

The sister's husband of a girl is not entitled to be appointed guardian, specially in the presence of a person who is competent under the Muhammadan Law, for instance, the maternal uncle of the minor.

Mr. *B. C. Mitter* (with him Dr. *A. Suhrawardy*), for the Applicant, maternal uncle.

Mr. *C. R. Das* (with him Mr. *Akbari*), for the sister's husband.

Mr. *A. Rasul*, for the step-father.

JUDGMENT.—These are two applications for the guardianship of the person and property of a Muhammadan infant of the name of Harunnessa Bibee. I shall first deal with the application of Golam Kadir, the husband of the minor's sister.

The Guardians and Wards Act provides that in appointing the guardian of a Muhammadan, no appointment shall be made inconsistent with the Muhammadan Law. The point for me to decide is whether the appointment of Golam Kadir, the husband of the infant's sister, would be consistent with the Muhammadan Law. I am clearly of opinion that it would not. The Rt. Hon'ble Mr. Ameer Ali, in his Muhammadan Law, Vol. II, page 293 (3rd Edition), says: "No male has a right to the custody of a female child, unless he is a *mahram*, that is, stands to her within the prohibited degrees of relationship and cannot under any circumstances marry her."

It is contended on behalf of Golam Kadir that there is no authority for the statement "cannot under any circumstances marry her" in the passage I have quoted. In this connection I was referred to the case of *Aisunnissa Khatoon* v. *Karimunnissa Khatoon* (1), in which a question arose whether under the Muhammadan Law marriage with the wife's sister, who was legally married, was void or not. It was held that the children

(1) 23 C. 180.

of such marriage were illegitimate and could not inherit. In dealing with the question then before the Court, their Lordships referred to the passage I have quoted, but I do not find any authority or sanction for the contention that the words, "cannot under any circumstances marry her" have been wrongly introduced by the learned author.

Wilson's Muhammadan Law, page 205, section 108 (2nd Edition), was also referred to and Mr. Abdur Rahman's book on Mussalman Law and Mr. Tyabji's, but they throw no light on the point.

Now, it is conceded that the mother of a Muhammadan infant girl loses her right of guardianship by marrying a stranger. In the case of *Yakub Sheikh* v. *Nafujan Bibee* (2) it is stated, as seems to be the correct law, that the mother is not disqualified if she marries one related to the minor within the prohibited degrees. It would be very curious that if the mother were disqualified by marrying a stranger, that a sister would not be thus disqualified, and that a stranger marrying her would be qualified for appointment as a guardian. Learned Counsel appearing on behalf of the maternal uncle has placed certain original texts before me with translations, which were circulated among the parties to test their correctness. The texts and translations have not been challenged.

I.—"The woman entitled to the custody of a child loses her right by marriage with a person not within the prohibited degrees to it, *i.e.*, the minor." (*Durr-al-Mukhtar*, Vol. II, page 656, Ed. Cairo.)

II.—"'By marriage with a person not within the prohibited degrees to it':—*i. e.*, whether the marriage is consummated or not. The author (of the *Durr-al-Mukhtar*) should have said, 'a person not within the prohibited degrees on the ground of consanguinity. For, one within the proihibted degrees on the ground of fosterage is like a stranger as regards her loss thereby (marriage) of the right to the custody of the minor." (*Radd-al-Muhtar*, Vol. II, page 656, Ed. Cairo.)

III.—"'With a person not within the prohibited degrees':—*i. e.*, on the ground of consanguinity. So if he is one within the prohibited degrees not on the ground of blood-relationship (*e. g.*, a foster paternal uncle), or a relation on the ground of consanguinity but within the prohibited degrees on the ground of fosterage (*e. g.*, the child's uncle's son on the ground of consanguinity, but its uncle by fosterage), he is like a stranger." (*Radd-al-Mukhtar*, Vol. II, page 651, Ed. Cairo).

IV.—"'Then if there be no agnates, (the guardianship, belongs to uterine relations. So it (the child) should be handed over to the uterine brother, then to his son, then to uterine paternal uncle, then to full maternal uncle and then to uterine maternal uncle." (*Radd-al-Muhtar*, Vol. II, page 656, Ed. Cairo.)

V.—"A minor girl should not be handed over to an agnate not within the prohibited degrees (*e. g.*, an emancipated slave; the son of a paternal uncle), so long as there is a non-agnate within the prohibited degrees like the maternal uncle. She should rather be handed over to the maternal uncle to guard against mischief." (*Inayah*, Vol. IV, page 187, Ed. Cairo).

VI.—"If she (woman entitled to guardianship) dies or marries, then the full sister; then if she (full sister) dies or marries, then the uterine sister. . . . . The right to guardianship which belongs to these women is lost by marriage when they marry a stranger. But if they marry a blood-relation of the child standing to it within the prohibited degrees, *e. g.*, its grandmother (mother's mother) marries its grandfather (father's father) or if the mother marries the paternal uncle of the child; then, the right to guardianship is not lost. Thus it is laid down in the *Fatawa Qadi Khan*, (*Fatawa Alamgiri*, Vol. I, pages 728, 729, Ed. Calcutta.)

VII.—"When the minor girl has no agnate, she should be handed over to the uterine brother, then to his son, then to uterine paternal uncle, then to full maternal uncle, then to consanguine maternal uncle, then to uterine maternal uncle." (*Fatawa Alamgiri*, Vol. I, page 729, Ed. Calcutta).

These texts supply clear authority for the proposition that a brother-in-law not within the prohibited degrees is not entitled to be appointed guardian. That being so, I hold that the brother-in-law, Golam Kadir, is not entitled to be appointed guardian, specially in the presence of a person who is competent under the Muhammadan Law, *viz.*, the sister.

(2) 5 Ind. Cas. 571; 11 C. L. J. 632 at p. 634.

nal uncle, Syed Mohammed Yakub, who is the other applicant.

The step-father also appeared and stated through his Counsel that though he considered he had no right and was not in Court for the purpose of asserting any right in himself, yet he submitted that if the Court so desired, he was willing to be appointed. The maternal uncle has been examined and cross-examined before me. There were certain charges made against him in the affidavit of the step-father and both the step-father and brother-in-law were allowed to cross-examine him in order to help the Court to consider whether he was eligible or not. I do not think that any of the charges made against the maternal uncle has been substantiated. The only ground for alleging that he is a man of dissolute habits is that some years ago he went to a questionable quarter of the town, and heard some music with his brother-in-law in the house of a woman of bad repute. Nothing else is alleged against him. It is also strenuously contended that inasmuch as he instituted certain proceedings in the Police Court challenging the marriage of Khaja Golam Kadir, and because he subsequently withdrew from the prosecution and consented to Golam Kadir being appointed guardian of the person of his wife, stating that he was convinced that they had been legally married, showed that he was a person in whom the Court could not place any confidence, that he had by his conduct shown that he was disqualified from acting as the guardian of the infant. It was said that he had extorted Rs. 2,500 to give his consent as above and that he might utilise this occasion also for extorting some money from the young man, the son of a tailor, to whom the infant had been married. It appears that Syed Mohammad Yakub was promised payment of his costs in the Police Court and of the High Court in respect of the criminal proceedings, when the matter was amicably settled. He was not paid the amount, but that subsequently his Lordship Mr. Justice Imam, who arbitrated for the parties in certain matters and took evidence, allowed him Rs. 2,500 out of Rs. 3,500 which had been promised to be paid by Khaja Golam Kadir. His Lordship allowed Rs. 1,000 thereout to be paid to the wife. Even if the facts were as alleged by the other side, I could hardly have held that this man was disqualified. He is now living with his wife who is 18½ years old; a girl of that age is competent in this country to look after her own household. Mr. Rasul on behalf of the step-father urged that it was necessary in the interest of the minor that she should repudiate her marriage with the tailor's son on attaining puberty, as it was a marriage below her station in life and altogether undesirable. It is said that the repudiation must be at the exact moment of time that she attains puberty, and that some female ought to be present at that time, competent to ascertain that critical moment. Therefore some woman, preferably a female relative, ought to be placed near her so that at that very moment she might repudiate the marriage if so inclined, otherwise according to the Muhammadan Law the present marriage would become valid. The applicant's wife, I think, is quite capable of discharging this function. The applicant says, he disapproves of the marriage, and there is no reason to suppose that he will prevent the repudiation. It has been suggested that he is on friendly terms with this tailor's son. He denies it, and I have no reason to disbelieve his statement. I, however, think that having regard to the bitter feeling between the parties and the manner in which this matter and cognate matters are being fought out, some provision should be made for providing a governess, if possible, for the infant and that the guardian whom I intend to appoint—the maternal uncle, *i. e.*, the applicant Syed Mohammad Yakub—should be put on terms.

Mr. Rasul states that there is a Mohammadan lady of position who is keeping a school and that if an application be made to her, she may be in a position to help the guardian of the infant in finding a governess for her. It appears that Babu Panna Lal Dey, the Attorney for the applicant, went and visited this lady and a letter from her has been placed before me that she can recommend a lady of the name of Hamedunnessa Khatun as governess for the infant. It is stated that she will be able to stay with the girl at her house except from 11 A.M. to 4 P.M., when she has to attend the *Pardanashin* Madrassa, as teacher and that she is able to get this governess on a pay of Rs. 15 a month with free board and lodging. The applicant through

his Counsel undertakes to appoint her, or failing her, a proper person who would be able to remain with this girl and assist her with her studies and live with her as a companion. The property of this infant yields an income of about Rs. 150 a month; she can well afford to pay for a suitable governess. I also make it a condition that the applicant will at all convenient times allow the female relatives of the infant to visit her and also such male relatives as the custom of the country and the custom of the family may allow, that he will offer no difficulties in the way of their communicating with her, or coming to see her. I appoint him guardian of the person and property of the infant on the above conditions. The guardian will have to give proper security to the satisfaction of the Court.

It was said that in respect of certain properties belonging to the infant's paternal estate, the applicant's interest was adverse. The applicant explained that certain properties were acquired by the father of the minor in the applicant's name and that thereafter he made a deed of gift of these properties to him. The matter has been adjudicated upon in the administration proceedings, and I do not think that his interest in these properties is such as to disqualify him from being the guardian of the property of the infant upon his furnishing proper security. The Court has ample jurisdiction, should sufficient ground be made out, to change the guardian, when necessary in the interests of the infant. For the present, I see no reason to disallow the application.

Application allowed.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 104 OF 1913.

November 26, 1914.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Seshagiri Aiyar.

SREEMANTHU RAJAYARLAGODDA MALLIKARJUNA NAYUDU BAHADUR ZEMINDAR GARU OF CHELLAPALLI—PLAINTIFF—APPELLANT

versus

RAJALAPATI SOMAYYA AND OTHERS—DEFENDANTS—RESPONDENTS.

Madras Estates Land Act (I of 1908), ss. 3, 8, 185—Private land, meaning of—Conversion of ryoti into private land—Degree of proof—Onus—*Letting lands as kambattam, whether amounts to conversion—Landlord cultivating lands himself—Presumption.*

Per *Wallis, C. J.*—Section 8 of the Estates Land Act does not impose retrospectively an absolute prohibition of the conversion of *ryoti* into private land not to be found in the definition, or in the section specially dealing with evidence as to what is private land. It is necessary that an actual conversion should be proved by clear and satisfactory evidence.

Merely calling the lands *kambattam* and letting them on terms which negative occupancy rights, with a view to prevent the assertion of such rights, is not sufficient to convert them into private lands within the meaning of the definition.

The burden is on the *zemindar* to show that the suit lands come within the definition in section 3 as forming part of his domain or home-farm lands. Though the fact that the lands have been let as *kambattam*, is evidence under section 185 that they are private lands and though the provisions of section 188 do not apply to Civil Courts, still the fact that the lands really were at some time domain or home-farm lands must be strictly proved

Per *Seshagiri Aiyar, J.*—The object of the Act is to prevent the conversion of *ryoti* into *kambattam* land. The definition section and section 8 clearly show that the legislature demands the strictest proof of a land being *kambattam*.

The proviso to section 185 is not in the nature of an exception and raises the irrebuttable presumption in favour of a landlord who has by his own servants or by hired labour cultivated the land for 12 years preceding the Act that it should be regarded as his home-farm land.

First appeal against the decree of the Court of the Temporary Subordinate Judge of Masulipatam, in Original Suit No. 22 of 1910.

Messrs. *L. A. Govindaraghava Iyer* and *C.V. Ananthakrishna Iyer*, for the Appellant.

Messrs. *V. Ramesam* and *V. Ramadoss*, for the Respondents.

JUDGMENT.

WALLIS, C. J.—This case raises a question of considerable importance as to what constitutes private land under the Madras Estates Land Act, 1908. The Subordinate Judge has decided the question very largely with reference to speeches made while the Bill was passing through the Council, in which private lands were said to represent lands which were granted free of assessment by the Muhammadan Government to the *zemindars* as part of their remuneration for

their services. However this may be, what the Court has to see is whether the land in question comes within the definition in section 3 (10) of the Act, where private land is said to mean "the domain or home-farm land of a landholder by whatever designation known such as *kambattam khas*, *seri*, or *pannai*."

Here it may be well to note that the word "domain" in this connection is explained by Webster, citing Shantore, as meaning "the land about the mansion home of a lord and in his immediate occupancy." Section 185 prescribes certain rules of evidence as to whether any land is a private land or not; and provides that land shall be deemed not to be private land until the contrary is shown. That it is the intention of the Legislature that this should be strictly proved is also to be gathered from the provisions of section 183 as to ascertaining and recording whether any land is a private land, in which the Revenue Officer is directed to disregard any agreement or anything contained in any compromise, or in any decree proved to his satisfaction to have been obtained by fraud or collusion, and not to register the land as private unless it is proved to be such by satisfactory evidence of the nature prescribed in section 185. Under that section, regard is to be had to local custom and to the question whether the land was before the first day of July 1898 specifically let as private land, and to any other evidence that may be produced. Then we have the proviso: "Provided that all land which is proved to have been cultivated as private land by the landholder himself by his own servants or by hired labour with his own or hired stock for twelve years immediately before the commencement of this Act, shall be deemed to be the landholder's private land."

Mr. Govindaraghava Aiyar very properly relied on the fact that this provision is enacted by way of proviso to the body of the section and not by way of exception, and argued that it should not be construed as inconsistent with the body of the section, and, therefore, that the fact that the land had been so cultivated by the proprietors would have been evidence that the land was private land, apart from the proviso. This is, no doubt, a sound principle of construction and was recently applied by the Privy Council in *Maha Prasad Singh* v. *Ramani Mohan Singh* (1); but it is scarcely necessary to rely upon it because it is expressly provided in the body of the section that the fact that the land has been let as private land is evidence of its being such, and the case of its being cultivated as such by the owner himself is, of course, much stronger. For the respondent, however, it is contended that once it is shown that the land in question was at one time ordinary *ryoti* land or *seri*, as it is called in the district in question, evidence that subsequently it has been dealt with as private land, though admissible under section 185, is of no avail, because by virtue of the provisions of section 8, which are retrospective, the land must be taken not to be private land, unless the conditions of the proviso to section 185 are satisfied. As to this it may be observed that, if this be so, the proviso should rather have appeared as an exception to section 8.

Now it is well-settled that retrospective enactments must be strictly construed, and it is, therefore, necessary to examine carefully the provisions of section 8 to see if they really have the result contended for. Sub-section (1) provides that whenever before or after the commencement of the Act the entire interests of the landholder and the occupancy *ryot* in any land in the holding have become united in the same person in the circumstances specified in the section, such person shall have no right to hold the land as a *ryot* but shall hold it as a landholder, and sub-section (3) further provides that such merger shall not have the effect of converting *ryoti* land into private land. I do not think the latter provision is of much importance, as it only provides that the merger in question shall not convert *ryoti* land into private land, and cannot be read as enacting that such land shall not be converted into private land by being subsequently cultivated or let as such. This effect must be produced, if at all, by virtue of the provision in sub-section (1) that in such a case the owner "shall have no right to hold the land as

(1) 25 Ind. Cas. 451; 27 M. L. J. 459 at p 466 (P. C.); 18 C. W. N. 904; (1914) M. W. N. 565; 1 L. W. 619; 20 C. L. J. 231; 16 Bom. L. R. 824; 16 M. L. T. 105

a *ryot* but shall hold it as a landholder;" but for this provision a landholder who had acquired the *kudivaram* rights in a holding could have escaped from the operation of the Act by purporting to let the lands in his capacity of a *ryot*, seeing that *ryots* are free to sublet their lands on what terms they please, whereas the powers of a landholder are governed by the provisions of the Act. This provision, that the owner shall not hold the land as a *ryot*, was intended to guard against this mischief, and is not, in my opinion, of itself sufficient, if the section be construed strictly, to prevent the owner from subsequently converting such land into private land by cultivating or letting it as such. We have then to see whether the further provision that after such merger the owner shall hold the land as a landholder has that effect. Now "landholder" is defined in section 3 (5) as meaning a person holding an estate, and the definition of estate in section 3 (2) is such as to include both *ryoti* and private land; and as already pointed, out private land is defined as "the domain or home-farm land of a landholder." In this state of things and construing the sub-section strictly, as we are bound to construe it, I do not think it can be said that a landholder holding land as private land is not holding it as a landholder rather than as a *ryot*, for that is the distinction contemplated in the section. This appears to be in accordance with the opinion expressed by Sadasiva Aiyar, J., in *Upadrasta Venkata Sastrulu* v. *Divi Sitaramudu* (2).

In the decision in *Chintamreddi Sanyasi* v. *Sri Rajasagi Appala Narasimha Raja Garu* (3), to which I was a party, the provisions of section 8 are not referred to in the judgment, but as appears from a reference to the printed papers that was a case of immemorial waste being cultivated as private land, and not a case in which the interests of a landholder and an occupancy *ryot* had become merged in the manner specified in section 8. I have come to the conclusion that the effect of section 8 is not to impose retrospectively an absolute prohibition of the conversion of *ryoti* into private land not to be found in the definition, or in the section specially dealing with evidence as to what is private land; and I may say that, if the Legislature had intended to exclude from the category of domain or home-farm land, lands which had been cultivated as such for a century or more on the ground that such land had at some remote period been held as ordinary *ryoti* land, it would, I think, have expressed its intention in clear and unambiguous language. While I feel bound to arrive at this conclusion, I think that it is very necessary that an actual conversion from *ryoti* into private land should be proved by very clear and satisfactory evidence.

We have next to see whether the evidence in this case is sufficient for the purpose. In this connection it is to be borne in mind that numerous instances have come before the Courts in which subsequent to the decision of *Chockalinga Pillai* v. *Vythealinga Pundara Sunnady* (4), *zemindars* succeeded in inserting in *pattas* and *muchilikas* terms negativing the existence of occupancy right, and that one way of effecting this purpose was to deal with the land as *kambattam* or home-farm land, even though it had never been cultivated by the *zemindar* himself and there was no intention of so cultivating it. Now in the present case, we find that the earliest accounts of the village of the year 1836 show that it contained 6 *puttis* or about 102 acres of *savaram* lands in which the suit lands were not included, and that 800 acres or more than a third of the whole acreage of the village is now classed as *kambattam*. So too the accounts of 1886, Exhibits 18 and 19, and of 1867. Exhibits 3 and 12 show only 49 acres and 45 acers under cultivation as *kambattam* in these years. The evidence in the present case shows how the extension came about. The character of the suit lands was called in question in Original Suit No. 10 of 1881 in the District Court of Masulipatam when the District Judge decided that the predecessors of the present owners had executed *muchilikas* agreeing to hold the land as *kambattam*, but did not knowingly

(2) 24 Ind. Cas. 224; 26 M. L. J. 585 at p. 590.
(3) 27 Ind. Cas. 507 (1914) M. W. N. 706.

(4) 6 M. H. C. R. 164.

consent to the change from *seri* to *kambattam*. The High Court in Exhibit J set aside his decree on the ground that the only defence set up by the defendants was that they had not executed the *muchilikas*. This was all that was decided, but the learned Judges observed that the District Judge found that the *zemindar* was at liberty to change *seri* into *kambattam* on the occurrence of a vacancy and had overlooked the fact that such a vacancy had occurred in 1874 on the death of Korrapati Venkanna in whose name the lands then stood. It may fairly be inferred that no documents were then preferred in evidence in which the land was treated as *kambattam* prior to 1875 and the documents relied on in the present case are even later. In that case the learned Judges put the onus of proving that the land was *seri* on the defendants, and held they had not discharged it. As the law now stands, the burden is on the *zemindar* to show that the suit lands come within the definition in section 3, as forming part of his domain or home-farm lands. There was no evidence in that case that he had ever cultivated them himself. The earliest evidence that they had been treated as *kambattam* related to 1875, shortly after the decision in *Chokalinga's* case(4), after which the *zemindars* endeavoured to get their *ryots* to contract themselves in one way or another out of their occupancy rights, a process which apparently explains the extraordinary increase in the amount of land classed as *kambattam* in recent years. The evidence that the *zemindar* cultivated these lands in recent years is negatived by the *karnam*, who otherwise shows himself favourable to the *zemindar*. He says that out of 2300 acres in the village 800 are classed as *kambattam* and that of these the *zemindar* cultivates 200 acres himself but not always the same 200 acres. It is not shown that he ever cultivated the suit lands. On the contrary the evidence is that they have always been cultivated by tenants.

Though the fact that the lands have been let as *kambattam* is evidence under section 185 that they are private lands, and though the provisions of section 183 do not apply to the Civil Court still, as I have already said, I think the fact that the lands really were at some time domain or home-farm lands should be strictly proved. Once it is shown as here that they were *ryoti* down to a certain date, the effect of section 8 is that even if the *zemindar* subsequently acquired the *kudivaram* right, that would not of itself convert them into private land, and we have to see whether what has happened subsequently is sufficient to convert the land into private lands, that is to say, into domain or home-farm lands. It does not seem to me that calling the lands *kambattam* and letting them on terms which negative occupancy right with a view to prevent the assertion of such rights, is sufficient to convert them into private lands within the meaning of the definition.

The Subordinate Judge has found, and I agree with him, that the suit lands were never cultivated by the *zemindar* as part of his home-farm lands, and it seems to me that his treatment of them as *kambattam* was merely colourable for the purpose of defeating the occupancy rights of the tenants. In some parts of India lands of this kind are known as *sir* lands and this is one of the terms mentioned in the definition. In *Budley* v. *Bukhtoo* (5) it was held that *sir* land is land which a *zemindar* has cultivated himself and intends to retain as resumable for cultivation by himself even when from time to time he demises it for a season. I think that this test may well be applied here, and that as the plaintiff has failed to satisfy it, the appeal fails and must be dismissed with costs.

SESHAGIRI AIYAR, J.—The plaintiff sues for a declaration that the lands in suit are his home-farm lands. The defendants claim them as their *jeraiti*. The Subordinate Judge dismissed the suit.

I see no reason to differ from the conclusion at which the lower Court has arrived. The Subordinate Judge found that from the year 1884, the lands were treated by the plaintiff as his *kambattam* or home-farm lands and that they were held as *seri* or *jeraiti* lands from 1866 to 1883 by the defendants and their predecessors. The appellant has convinced us that in the year 1879 the lands were treated as *kambattam*. Exhibit J, the judgment of the High Court, Exhibit V, the cultivation account for 1880, Exhibit XIII, the *hisab* account for 1879, show that from the year 1879 onwards the

(5) 3 N. W. P. H. C. R. 203.

plaintiff dealt with the lands as his *kambattam*. The Subordinate Judge's finding must be modified to this extent. As regards the earlier period, discussed by the Subordinate Judge in paragraph 11 of his judgment, Mr. Govindaraghava Aiyar contended that the documents commented upon do not support his finding. I see no force in this argument. Exhibit X, the Adangal Account of 1868, is against this contention. Whenever land is mentioned as *kambattam* in this account, the *zemindar* is entered as owner and the person actually cultivating the field under him is entered as being the cultivator. The two entries referred to by the Subordinate Judge fully support this view. With reference to the plaint lands, the *zemindar* is not entered as owner. Exhibit XVIII, the *landvari* account of the plots in 1866, shows the defendant's predecessor as the owner. Exhibit XIX is to the same effect. Exhibits III and XII, the accounts for 1867, are of the same character as Exhibits XVIII and XIX. Exhibit XI for the year 1874, which is an account of *seri* lands, shows that one Korapatti Venkanna was the owner of the plaint lands. Even if we are not prepared to accept the suggestion that this Venkanna was a relation of the defendants, the entry shows that the *zemindar* was not the owner. The learned Vakil for the appellant suggested that the entries in these documents, especially in Exhibit X, may be due to the fact that the persons entered as cultivators were let in for the first time by the *zemindar*. There is no trace of this explanation in the evidence; on the whole, I see no reason to differ from the Subordinate Judge in his conclusion that from 1866 to 1874, the lands were held and enjoyed as *seri*.

On these facts, the question for determination is, whether lands once enjoyed as *seri* with tenant rights can be converted by the *zemindar* into his *kambattam*. The question is not free from difficulty. The only sections that have a bearing upon this point are 3 (10), 6, 8, 181 and 185. Section 3 (10) defines "private land." The meaning of the word domain is not given in the Act. The learned Chief Justice pointed out in the course of the argument that it was synonymous with demesne. In the Encyclopedia Brittannica, Volume III, it is explained as follows:—"Demesne (*Demenie*, Demain, Domain, etc.) that portion of the land of a manor not granted out in free-hold tenancy, but (*a*) retained by the Lord of the Manor for his own use and occupation or (*b*) let out as tenemental land to his retainers or '*villani*'. This Demesne land, originally held at the will of the Lord, in course of time came to acquire fixity of tenure and developed into the modern copyhold (see Manor). It is from demesne as used in sense (*a*) that the modern restricted use of the word comes, *i. e.*, land immediately surrounding the mansion or dwelling-house, the park or chase." I have no doubt that it is in a similar sense that the Legislature has used the expression. The special incidents of such property are that it must have been an appurtenance to the general holding and should have been in the personal occupation of the *zemindar*. Some indication of its characteristics is to be found in the fifth report relating to the Madras Presidency. In giving instructions to Collectors regarding the properties to be taken into account in making the Permanent Settlement with the *zemindars*, one of the items to be included is thus described:—"All private lands at present appropriated by the *zemindars* and other landholders to the subsistence of themselves and families, as well as all lands held by private servants and dependants, will be considered as forming part of the *Circar* land, and, therefore, responsible for the public *Jumma*." This is practically the definition of private land. Ordinarily a private land must have that character from prior to the Permanent Settlement, except in certain cases to which I shall refer later on. The theory is that *prima facie* a *jeraiti* or *seri* land cannot be converted into private land. This view is strengthened by the last explanation to section 6, which lays down that an occupancy right in land is not lost by the tenant becoming the landholder. The character of the holding remains whatever may be the change in the position of the owner of it. Then we come to section 8; clause (1) of that section deals with the merger of occupancy right in certain cases. A great deal of argument was directed towards the clause, "by transfer, succession

or otherwise." I think there can be no doubt that a bare surrender will not come under the expression "otherwise," because a surrender without more does not confer a right to the property. I had to consider this question at some length in *Venkata Sastrulu* v. *Sitaramudu* (2). I adhere to the view therein expressed that if the surrender has been accepted and acted upon, it would amount to a mode of acquisition and would come under the expression "otherwise." In that view, clause 3 of section 8 will preclude the conversion of a *ryoti* land, the occupancy right in which had become vested in the landholder by an accepted surrender, into a home-farm land. I cannot accede to the contention of Mr. Govindaragahava Aiyar that clauses (1) and (3) contemplate a bare merger without more and that when such a merger has been given effect to by treating the land as home-farm land, it will not be obnoxious to the rule enunciated in section 8. Although it may not be competent to Courts to examine the policy underlying an enactment apart from the actual language employed in the sections, it is our duty to give effect to such a policy when it appears clearly from the language employed. The definition section and section 8 leave no doubt in my mind that the Legislature demands the strictest proof of a land being a *kambattam*. This is made clearer still by section 181 which, while enacting that a landholder can allow his private land to be converted into *ryoti* land makes no provision for the converse case.

The only other section that has to be considered is section 185. There can be no doubt, as pointed out by Mr. Govindaraghava Aiyar, that the proviso to that section is not in the nature of an exception. *Mullins* v. *Treasurer of Surrey* (6) lays down that a proviso is in the nature of a substantive rule and should not be treated as an exception to the proposition stated in a section. See also *Mahaprasad Singh* v. *Ramani Mahan Singh* (1). Accepting this position, I think that the first part of section 185 deals with the determination of the question whether a particular field is *ryoti* or *kambattam*, where nothing is known about its origin. If it was originally *ryoti*, the rule of evidence contained in the first part of section 185 can have no application because that would practically abrogate the principle enunciated in section 8, clauses 1 and 3. The proviso to section 185 is really an exception to section 8, clause 3. The object of the proviso is to enable the landlord to say that although the land was *seri*, he has by his own servants or by hired labour cultivated the land for twelve years preceding the Act and that consequently it should be regarded as his home-farm land. An irrebuttable presumption is to be drawn from such a conduct. If one remembers that a home-farm land is that which has been ordinarily cultivated personally by the landlord at the outset, the meaning of such a reservation in favour of the landholder will be apparent. This conclusion carries out the scheme of the Legislature which seems to be opposed to the augmentation of the private land of the landholders, excepting the special instance mentioned in the proviso to section 185. This view receives support from the observations of the learned Judges who decided *Cheekati Zamindar* v. *Ranasooru Dhora* (7). The object of the Estates Land Act is to prevent the conversion of *ryoti* land into *kambattam* land, which process had been adopted largely since the decision in *Chockalinga Pillai's* case (4). My conclusion is in accordance with the decision of Mr. Justice Ayling and myself in Second Appeal No. 275 of 1913. Second Appeal No. 1402 of 1912 decided by Sadasiva Aiyar and Napier, JJ., is also to the same effect. The decision of the learned Chief Justice and Mr. Justice Ayling in *Chintamareddi Sanyasi* v. *Sree Rajasagi Appala Narasimha Garu* (3) is not opposed to this conclusion. The land in that case was never *ryoti* land. It only laid down that a private land can come into existence even after the Permanent Settlement. The proviso to section 185 is intended to enact such a rule.

The decision of the Subordinate Judge is right and this appeal must be dismissed with costs.

Appeal dismissed.

(6) 5 Q. B. D. 170 at p. 173.

(7) 23 M. 318.

SACHINDRA KISHORE DEY v. RAJANI KANTA CHAKRABARTY.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 3014 OF 1911.
January 30, 1913.
Present:—Mr. Justice D. Chatterjee.
SACHINDRA KISHORE DEY—
DEFENDANT—APPELLANT
versus
RAJANI KANTA CHAKRABARTY—
PLAINTIFF—RESPONDENT.

Limitation Act (XV of 1877), Sch. II, Art. 141, scope of —Succession vesting jointly in two female heirs—Suit by one on death of another, nature of.

A left him surviving two married daughters *B* and *C* and one daughter-in-law *D*, widow of his predeceased son. *D* continued to hold certain *jote* lands left by *A* to the exclusion of *B* and *C* for more than 12 years and then sold the *jote* to the father of the plaintiff, who in his turn, having got himself recognised as an incoming tenant by the landlord, remained in possession and also the plaintiff after him, until on the death of *D* the plaintiff was dispossessed by *C* and her two sons. The plaintiff brought a suit for recovery of possession.

Held, that as there was no partition between *B* and *C*, Article 141 of the Limitation Act, 1877, could not bar the suit so long as *C* was alive.

Where succession vests jointly in two female heirs, between whom no partition of the property is made, the suit by one on the death of the other for the property cannot be said to be one for recovery of possession.

Appeal against the decree of the Subordinate Judge, third Court of Mymensingh, dated the 25th of August 1911, modifying that of the Munsif, third Court, at Kishoreganj, dated the 14th of February 1911.

Babus *Govind Chandra De Roy* and *Upendra Kumar Roy*, for the Appellant.

Babu *Sasanka Jiban Roy*, for the Respondent.

JUDGMENT.—One Kirti Narain, who died about the year 1871, left him surviving two daughters Harasundari and Kashiswari and one daughter-in-law Umatara, being the widow of his predeceased son. Certain *jote* land belonging to the estate of Kirti Narain, which formed the subject-matter of contention in this case, continued to be held by Umatara to the exclusion of Harasundari and Kasiswari, who were the married daughters living in their husbands' house. After Umatara had been in possession for more than twelve years, that is, in the year 1291, she sold the *jote* to the father of the plaintiff and the father of the plaintiff, having got himself recognised as an incoming tenant by the landlord, remained in possession and also the plaintiff after him until the death of Umatara in 1315, when the plaintiff was dispossessed by Kasiswari and her two sons, defendants Nos. 1 and 2. In the suit of the plaintiff for recovery of possession defendant No. 1 pleaded that he had been in possession along with Umatara and that Umatara's daughter had made a gift to him of her 8-annas share so that he had become entitled to the whole 16-anna *jote*. This part of the defendant's case has been held as not proved and the result of the finding is that Umatara remained in possession adverse to both Harasundari and Kasiswari before the sale and that after the sale, the plaintiff's father and the plaintiff after him were in such adverse possession until dispossessed by the defendants. The Court of first instance held that as regards the 8-annas share of Kasiswari, her claim had been barred by twelve years' adverse possession after Umatara.

As regards the 8-annas share of Harasundari, Kasiswari had succeeded in 1899, that is within twelve years of the suit and with regard to that share plaintiff's suit was dismissed. The lower Appellate Court has, however, decreed the whole suit of the plaintiff holding that as the *zemindars* had accepted rent from Umatara, it must be taken that a fresh settlement was made with her and that the *zemindars* having recognised the father of the plaintiff as an incoming tenant must be taken to have made a fresh settlement with him, so that neither the daughters nor their heirs could have any further claim. It is contended before me in second appeal that the judgment of the learned Subordinate Judge decreeing the whole suit of the plaintiff is wrong and that in any case the suit as regards the share of Harasundari ought to have been dismissed. In support of this contention reliance has been placed upon Article 141 of the Limitation Act of 1877 which provides twelve years from the death of a female as the period within which the suit for recovery of possession is to be brought by a Hindu or a Muhammadan who is entitled to possession of the property on the death of the Hindu

or Muhammadan female. The question, therefore, for decision in this case is whether Article 141 has any application to a case of this kind in which succession vests jointly in two female heirs. It is settled law that when there are more daughters than one, they succeed jointly as one with a right of survivorship. In this case there was no partition of the property amongst the two daughters, so that no question that might arise in a case in which such a partition has taken place arises in this case. Apart from the question of adverse possession by Umatara and her alienees, the two heirs must be taken to have been in joint possession and that if they were in joint possession the suit by the survivor could not be one for recovery of possession. Therefore the suit by Kasiswari could not be said to be one for recovery of possession on the death of Harasundari. In this view of the case I think that so long as Kasiswari is alive, Article 141 has no operation. It would be premature now to say whether there would be any right in the defendants Nos. 1 and 2 to recover possession after the death of Kasiswari: that would be a matter for consideration when that case does arise. In the present case, however, the plaintiff is, I think, entitled to recover possession of the whole land.

The decree of the lower Appellate Court is, therefore, sustained and the appeal is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.
FIRST CIVIL APPEAL No. 461 OF 1912.
July 21, 1914.
Present:—Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.
SIB NARAYAN MOOKERJEE—PLAINTIFF—APPELLANT
versus
S. P. CHATTERJEE—DEFENDANT No. 1—RESPONDENT.

Santhal Parganas Settlement Regulation (III of 1872), ss. 25, 25A, scope of—"Proprietor"—Ownership of mourasi mokarari tenure—Decision of Settlement Court, whether final.

Section 25A of the Santhal Parganas Settlement Regulation III of 1872 is strictly limited to suits where only the rights of *zemindars* and other proprietors as between themselves are in controversy

A person who holds a derivative title under a *zemindar* cannot rightly be classed as a proprietor within the meaning of that word as used in the expression "*zemindars* and other proprietors" in section 25A of Regulation III of 1872

The decision of a Settlement Court under section 25, sub-section (1) of Regulation III of 1872 is conclusive, till it has been set aside by some method known to law at the instance of any person prejudicially affected thereby.

Appeal against the decree of the Subordinate Judge of Jamtara, dated the 5th September 1912.

Dr. *Rash Behary Ghose*, Babus *Umakali Mukherjee*, *Surendra Nath Roy*, *Biraj Mohan Mojumdar*, *Sasadhar Roy*, *Satyendra Nath Roy* and *Narendra Nath Sett*, for the Appellant.

Messrs. *S. P. Sinha* and *S. R. Das*, Babus *Jogendra Nath Mookerjee*, *Uma Churn Laha* and *Joges Chunder Basu*, for the Respondent.

JUDGMENT.—This is an appeal by the plaintiff in a suit for declaration that an entry in a Settlement Record in favour of the first defendant is erroneous, for establishment of his own title to the disputed property and for recovery of possession with mesne profits. The lands in suit are situated in village Mihijam appertaining to *Taluk* Pabiya included in *Touzi* No. 308 in the Sonthal Parganas. On the 9th September 1876, Raja Ran Bahadur Singh, the then *zemindar*, granted a *mourasi mokarari* lease of the lands now in suit to one W. H. Smith, whose representatives are defendants Nos. 2—8 in this litigation. The ninth defendant held a decree against the representatives of Smith, in execution whereof the right, title and interest of the judgment-debtors was sold and was purchased by the first defendant, Chatterjee, on the 5th August 1899, for a sum of Rs. 2,500. The plaintiff, Mookerjee, claims to have purchased shares in the property from some of the representatives of Smith by private conveyances on the 22nd July 1898 and 9th February 1899. Mookerjee asserts that he has acquired a preferential title to four-ninths of the property held in *mourasi mokarari* lease by Smith, while Chatterjee contends that he has acquired a good title to the whole of that property.

It is the common case of the parties that on the 29th April 1908, the Record of Rights of village Mihijam was finally published according to the provisions of section 24 of Regulation III of 1872. This Record of Rights contained an entry in respect of the disputed property to the effect that Chatterjee was then the owner of the *mokarari* by purchase for Rs. 2,500. The plaintiff seeks a declaration in this suit that this entry was erroneous, and that he himself was entitled to have his name recorded in respect of a four-ninths share. He subsequently amended the plaint by the insertion of an allegation that the entry in the record had been fraudulently and collusively secured by the first defendant; but no particulars of the fraud and collusion were set out, as required by rule 4 of Order VI of the Civil Procedure Code of 1908, and no question of fraud was raised in any of the twenty-one issues settled in this suit. The defendant resisted the claim, on the ground, amongst others, that the suit was barred under section 11 of Regulation III of 1872. The Subordinate Judge has given effect to this contention and the substantial point in controversy in this appeal is whether his view is correct in law.

Section 11 of Regulation III of 1872 is in these terms: "Except as provided in section 25A, no suit shall lie in any Civil Court regarding any matter decided by any Settlement Court under these rules; but the decisions and orders of the Settlement Courts made under these rules, regarding the interests and rights above-mentioned (that is, mentioned in section 9), shall have the force of a decree of Court." An endeavour has been made on behalf of the plaintiff to escape from the effect of this section by reliance on a two-fold ground, namely, *first*, that the present case falls within the scope of section 25A, and, *secondly*, that as the plaintiff was not an objector in the Settlement proceedings, there has been no decision by the Settlement Court regarding his interest in the lands.

As regards the first branch of this contention, reference has been made to section 25A which is in these terms: "Where only the rights of *semindars* and other proprietors as between themselves are concerned, a suit may, unless it is barred by section 13 of Act XIV of 1882, be brought in a Court established under Act XII of 1887, to contest the finding or record of the Settlement Officer, within three years from the date of the publication of the Record of Rights or of the final order of the Revenue Court. But no such suit shall be brought in any Court after the expiration of three years from such date. If in any such suit, it is found that the finding of the Settlement Officer is erroneous, the record shall be amended accordingly." As the present suit was instituted on the 19th July 1910, it is within time, because the Record of Rights was finally published on the 29th April 1908; but the fundamental question remains, whether this is a suit of the description contemplated by section 25A. That section is strictly limited to suits where only the rights of *semindars* and other proprietors as between themselves are in controversy. It has not been argued that the plaintiffs and the contesting defendant are *semindars*; but the view has been pressed on behalf of the appellant that the parties are proprietors within the meaning of section 25A, and in support of this position reference has been made to the cases of *Sonet Koer* v. *Himmut Bahadoor* (1), *Bejoy Chunder* v. *Kally Prosonno* (2) and *Megh Lal* v. *Raj Kumar Thakur Gridhari Singh* (3). The first of these cases is an authority for the proposition that lands belonging to a *semindari*, granted by the *semindar* under an absolute hereditary *mokarari* tenure, do not on the death of the grantee without heirs revert to the *semindari*; nor does the *semindar*, under such circumstances, take by escheat a tenure subordinate to and carved out of his *semindari*. The second and third cases recognise the doctrine that where a grantor has transferred to his lessee a heritable, transferable and perpetual interest, there is in substance no reversion; the ownership of the land is intended to pass entirely to the grantee and no rights are reserved in the grantor except the right to receive the rent. This principle is of no assistance to the appellant; it does not show that the expression "other proprietor" was

(1) 1 C. 391; 3 I. A. 92; 25 W. R. 239; 3 Sar. P. C. J. 608; 3 Suth. P. C. J. 257.

(2) 4 C 327; 2 Shome L. R. 106.

(3) 34 C. 358 at p. 367; 5 C. L. J. 208; 11 C. W. N. 527.

intended to include a *mourasi mokarari* tenant. It is argued, however, that the term "proprietor" is used in a very flexible sense and that a wide significance has been given to it in a variety of Statutes on different subjects; but plainly no safe guidance can be received from definitions given in Statutes the scope whereof was entirely different from that of the Regulation before us. Nor is any help derived from the ordinary definition to be found in Lexicons. "a proprietor is one who holds something as property or has the exclusive right or title to the use or disposal of thing; an owner" (Oxford Dictionary, Volume VII, page 1484). Our attention has finally been invited to different sections of the Regulation. Section 12, which authorises an inquiry by the Settlement Officer into landed rights, speaks of "the rights of the *zemindars* and other proprietors, the rights of the tenants or *raiyats*, the rights of the *manjhis* or other headmen as against both the proprietors and the tenants." This unquestionably does not support the contention of the appellant; on the other hand, this indicates that there may be tenants other than *raiyats* under "*zemindars* and other proprietors." Section 13, clause (*c*), mentions "under-proprietors:" it is difficult to appreciate who these under-proprietors can be, if permanent tenure-holders are treated as proprietors. The section also refers to occupiers or owners of a village; it is argued that the term "owners" is used in contradistinction to occupiers, and thus includes not only *zemindars* but also permanent tenure-holders and under-tenure-holders. But even if this were conceded, it would not follow that these persons were proprietors. Section 17 speaks of *manjhis* or village headmen, while section 18 deals with *raiyats* or occupiers; but neither section justifies the inference that a permanent tenure-holder is a proprietor. Section 20, which authorises the Settlement Officer to exercise his discretion in the adjustment of rents, speaks of proprietors, farmers, headmen and *raiyats*, but does not support the theory that permanent tenure-holders are proprietors. Finally, section 28 which was introduced in 1908 defines the lability of proprietors and other persons for default in certain specified matters; the provisions of this section do not show that the term "propietor" has the significance sought to be attached thereto by the appellant. We are consequently brought back to section 25A and are left to construe it without the assistance of any such statutory definition of the term "proprietor" as is to be found in the Bengal Land Revenue Sales Act, 1868, the Bengal Land Registration Act, 1896, and the Bengal Tenancy Act, 1885. Now, if we examine closely the terms "*zemindars* and other proprietors" in section 25A, it is plain that *zemindars* are proprietors, and the inference may fairly be drawn that the words "other proprietors" are intended to apply to persons who have some at least of the characteristics of a *zemindar*; one of these is that the *zemindar* holds his property directly under Government. It is well-known that the Legislature has always recognised that there are proprietors of land other than *zemindars*. This is clear from Regulations I of 1793 and VIII of 1793, in which the expression "*zemindars*, independent *talugdars*, and other actual proprietors of land" frequently recurs as also the phrase "the actual proprietors of the soil, of whatever denomination, whether *zemindars*, *talugdars* or *chaudhris*." Section 5 of Regulation VIII of 1793 specified the five classes of *talugdars* who were to be considered actual proprietors of land, while sections 16, 17 and 18 laid down rules respecting *mokarari* leases of lands, according as they were, or were not held by proprietors. It is indisputable, consequently, that the Legislature has recognised persons other than *zemindars* as proprietors who held their lands directly under Government. It is not necessary for our present purpose to attempt an exhaustive enumeration of the rights and obligations of such proprietors and to ascertain in what precise way, if any, their position was differentiated from that of *zemindars*. But one negative test may be safely formulated, namely, that a person who holds a derivative title under a *zemindar* cannot rightly be classed as a proprietor within the meaning of that word as used in the expression "*zemindars* and other proprietors" in section 25A of Regulation III of 1872. If the contrary view were maintained, it would follow that in the event of a contest between the admitted *zemindar* and a person who alleged himself to be *mokararidar* under him, but whose status was denied by the *zemindar*, the matter would be open for investigation by the Civil Court, notwithstanding a decision thereon by a Revenue Court, in other

words, the Civil Court would be called upon to decide a question of the existence of relationship of landlord and tenant between the parties, a question obviously intended by the Regulation to be determined by the Settlement Court and the superior Revenue Authorities. In the case before us, the question in controversy between the parties is, whether the *mourasi mokarari* lease-hold interest of Smith has, by devolution, passed entirely to Chatterjee or has vested partly in Mookerjee and partly in Chatterjee. Smith derived his title as permanent tenure-holder from the admitted *zemindar* and was in no sense of the term a proprietor. We cannot possibly hold that in the present suit only the rights of two proprietors as between themselves are in controversy. The view we take, namely, that a permanent tenure-holder who has derived title from a *zemindar* is not a proprietor within the meaning of section 25A of Regulation III of 1872 is in harmony with that adopted, explicitly or impliedly, in a long series of decisions of this Court, amongst which may be mentioned *Nadiar Chand Singh* v. *Chunder Sikhur Singh* (4), *Ram Churn Singh* v. *Dhaturi Singh* (5), *Ramranjan* v. *Nanda Lall* (6), *Kangal Chandra Mandal* v. *Madhu Sudan* (7), *Ram Ranjan* v. *Satish Chandra Singh* (8), *Mir Mozuffur Ali* v. *Kali Prosad* (9), *Digambar Das* v. *Jatindrabala Dasi* (10), *Digambar Das* v. *Harendra Narayan* (11) and *Nemo Deo* v. *Parbati Kumari* (12). Before we leave this point, we may add one observation with reference to two subsidiary reasons assigned by the appellant in support of his contention. It was said, in the first place, that he was not aware of the Settlement proceedings; if so, his remedy is by an application to the Settlement Court or to the superior Revenue Authorities to re-open the matter. It was said, in the second place, that the defendant has, under section 25A of Regulation II of 1886, taken steps to acquire the holdings of *raiyats* in the village, on the assumption that he had the status of a proprietor. This is clearly immaterial. If the defendant is not in law a proprietor, as we hold he is not, he cannot create a jurisdiction in the Civil Court contrary to the provisions of sections 11 and 25A of Regulation III of 1872. We hold accordingly that section 25A does not cover the present suit, as the question in controversy does not relate to the rights of proprietors as between themselves.

As regards the second branch of the contention of the appellant, it has been argued that there was no "decision" by the Settlement Court, because the plaintiff was not represented there and no contest took place between him and the defendant. This position cannot possibly be supported, for if the contention of the appellant were to prevail, any person might defeat the provision of section 11 by his omission, it might be a deliberate omission, to appear before the Settlement Authorities [*Mozuffur Ali* v. *Kali Prosad* (9)]. It was incumbent on the Settlement Court to ascertain and record the various interests and rights in the land under sections 9, 10 and 12 of Regulation III of 1872. It did ascertain such rights and decide that Chatterjee was the owner by purchase of the *mourasi mokarari* tenure originally held by Smith; indeed, under section 14 it was bound to inquire into, settle and record all the rights in the land, even though such rights might not have been urged by the parties interested. This decision is conclusive under section 25, sub-section (1), till it has been set aside by some method known to law at the instance of any person prejudicially affected thereby. The inference follows that the Subordinate Judge has rightly held that the suit is barred by section 11 of Regulation III of 1872. The result is that the decree of the Subordinate Judge is confirmed and this appeal dismissed with costs to respondent Chatterjee.

Appeal dismissed.

(4) 15 C. 765.
(5) 18 C. 146.
(6) 22 C. 473.
(7) 20 Ind. Cas. 417; 17 C. L. J. 587.
(8) 20 Ind. Cas. 503; 17 C. L. J. 599.
(9) 22 Ind. 789; 19 C. L. J. 29; 18 C. W. N. 271.
(10) 19 Ind. Cas. 874; 19 C. L. J. 233.
(11) 26 Ind. Cas. 992; 20 C. L. J. 112.
(12) 27 Ind. Cas. 5; 20 C. L. J. 103.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION No. 1154 OF 1914.

APPEAL AGAINST ORDER No. 176 OF 1914.

October 15, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Tyabji.

Sri Rajah PARTHASARADHI APPA RAO BAHADUR, *Zemindar*—PETITIONER IN C. M. P. No. 1154 OF 1914 AND APPELLANT IN APPEAL No. 176 OF 1914.

versus

Sri Rajah MAKA VENKATADRI APPA RAO BAHADUR, *Zemindar*, MINOR, UNDER THE COURT OF WARDS, AND OTHERS —RESPONDENTS IN BOTH.

Civil Procedure Code (Act V of 1908), s. 37—Court passing decree, whether entitled to execute it, when property transferred to jurisdiction of other Court—Different Courts having jurisdiction to execute decree—Convenience, jurisdiction determined on ground of.

A Court which originally passed a decree ceases to have jurisdiction to execute it if the properties comprised in the decree are transferred to another district.

In a case where different Courts have jurisdiction to execute a decree, the question which Court will execute it, is settled on the ground of convenience.

Subbiah Naicker v. *Ramanatham Chettiar*, 22 Ind Cas. 899, 26 M L J 189; (1914) M. W. N 205; 87 M. 462; 1 L. W 251, distinguished.

Petition praying that, in the circumstances stated therein and in the affidavit filed therewith, the High Court will be pleased to transmit His Majesty's order in Council in Privy Council's Appeal against Appeal Suit No. 32 of 1904 on the file of this Court to the Sub-Court, Ellore, with the following directions (*a*) that the Receiver be directed to file and pass his accounts, and on his passing the same be discharged, (*b*) that he be directed to deliver one-third of the profits of the estate now available for distribution to the petitioner, (*c*) that a Commissioner be appointed to divide the estate and its property into three shares and that one share be given to the petitioner, (*d*) that the Receiver be directed to deliver possession of all property of the estate to the Commissioner.

Appeal against the order of the District Court of Kistna, dated the 14th of April 1914, in Interlocutory Appeal No. 485 of 1914, in Original Suit No. 44 of 1899, Godavari District Court.

Mr. *T. Prakasam*, for the Petitioner.

Dr. *S. Swaminadhan* and Mr. *K. Srinivasa Iyengar*, for the Respondents.

JUDGMENT.—Dealing first with Civil Miscellaneous Petition No. 1154 of 1914, we observe that the decree has already been sent for execution to the District Court of Kistna.

No doubt the decree in Original Suit No. 44 of 1899 was passed by the District Court of Godavari. That Court has now lost jurisdiction, the items of property, with reference to which it had jurisdiction under section 19, Civil Procedure Code, having been transferred to another Court. *Subbiah Naicker* v. *Ramanathan Chettiar* (1) dealt only with pending execution proceedings. But the principle stated in it is applicable to proceedings at their institution. With reference to it and section 37, Civil Procedure Code, we must hold that the Godavari District Court has ceased to have jurisdiction to execute; jurisdiction will then lie with the Court which would have jurisdiction to try the suit, in which the decree was passed, if it were not instituted. It is not disputed that the suit properties are distributed between the jurisdictions of at least three Courts of which the Kistna District Court is one, each of which would have jurisdiction under section 19 to try the suit and each of which, therefore, might have jurisdiction to execute this decree.

We, therefore, must decide the question on the grounds of convenience. It is no doubt the case that petitioner is interested under the decree only in the Nidadavole Estate, of which he alleges that no part is within the present original jurisdiction of the Kistna District Court though this is not admitted by respondents. But, on the other hand, though the decree of the Privy Council disposes of two suits, there is no reason for regarding it as dealing only with one estate in petitioner's interest. Respondent is also entitled to consideration and will share both in the Nidadavole and Medur Estates. It is conceded that the division of the permanently settled portion of both will have to be made by the Collector of Kistna District. It is further we think material that (1) the Receiver of the estates has in fact been working under the Kistna District Court and (2) the District Judge, whose process runs direct throughout the District, will deal with the matter more conveniently than the Subordinate Judge of either Bezwada or Ellore, to the latter of whom petitioner contends

(1) 22 Ind Cas. 899. (1914) M W N. 205; 26 M, L. J. 189; 1 L W. 251; 87 M. 462.

that the decree should be transmitted. It is, moreover, advisable in view of the magnitude of the interests involved that an Officer of the standing of the District Judge should be entrusted with the case. In these circumstances we do not think that reason has been made out for modification of the order already passed transmitting the decree to the Kistna District Court. We, therefore, follow the previous order and direct transmission of the decree to that Court at petitioner's instance also. Petitioner will pay respondent's costs, two sets.

The decision in Appeal against Order No. 176 of 1914 follows that in Civil Miscellaneous Petition No. 1154. The appeal against the order is dismissed with costs; two sets.

Petition and Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 157 OF 1912.

October 13, 1914.

Present:—Mr. Justice Chevis.

KIRPA RAM—DEFENDANT—APPELLANT

versus

KIRPA RAV—PLAINTIFF—RESPONDENT.

Jurisdiction of Civil or Revenue Court—Claim by one proprietor against another for establishing occupancy rights—When decree of Civil Court cannot be registered in Revenue Court—Return of plaint—Punjab Tenancy Act (XVI of 1887), ss. 77 and 100.

A suit by one of the proprietary body against another for declaring that the former is the occupancy tenant of land belonging to the latter falls under section 77 (3) (*d*) and is consequently triable only by a Revenue Court. It is immaterial whether the dispute has arisen out of partition proceedings about the land. When a suit of this nature has been decided by a Munsif having no Revenue powers his decree cannot be registered as that of a Revenue Court by the Chief Court. The ordinary course in such a case is to return the plaint for presenting it to a competent Revenue Court.

Ram Jas v. *Ralla*, 1 Ind. Cas. 465; 25 P. R. 1909; 39 P. W. R. 1909; 70 P. L. R. 1909, referred to.

Second appeal from the decree of the Divisional Judge, Hoshiarpur Division, dated the 10th November 1911, affirming that of the Munsif, first Class, Una, dated the 31st August 1911, decreeing the claim.

Bakhshi *Tek Chand*, for the Appellant.

Mr. *Sundar Das*, for the Respondent.

JUDGMENT.—The plaintiff, in this case pleads that he and defendant No. 31 are occupancy tenants of the land in suit, and seeks a declaration of his rights as occupancy tenant.

I am at a loss to understand how the lower Courts have entertained the case, for it appears to me clear that the cognizance of the Civil Courts is barred by section 77 of the Punjab Tenancy Act, this being a suit by a tenant to establish his claim to occupancy rights. The fact that plaintiff is also one of the landlords of the joint *khata* of which the land in suit forms a part makes no difference whatever. This suit is brought by plaintiff in his capacity of tenant of the land which is in his possession, and he is clearly seeking to establish his claim to occupancy rights which has been denied. It is quit incorrect to say (as has been urged before me) that plaintiff is objecting to partition, for reference to the plaint will show clearly that he has no objection to the partition of the proprietary rights, and only wants his possession of the land in suit to be preserved on the ground that he and defendant are occupancy tenants. The case, in my opinion, falls under section 77 (3) (*d*) of the Tenancy Act, and is triable only by a Revenue Court.

The Court of first instance was that of a Munsif who has no powers at all on the Revenue side. I do not think that I should order the decree of that Court to be registered as the decree of a Collector of the first grade, for if such a course is improper in the case of a suit being tried by an Officer whose powers on the Revenue side are too low [Vide *Ram Jas* v. *Ralla*(1)], it would seem to be still more improper in the case of a suit being tried by an Officer who has no powers at all on the Revenue side. I accept this appeal, and set aside all the proceedings and direct the plaint to be returned by this Court to the plaintiff for presentation, if so advised, in a Revenue Court of competent jurisdiction.

I leave the parties to bear their own costs in all Civil Courts, for if defendants had raised the question of jurisdiction in the first Court, it is quite possible that that Court would have returned the plaint.

Appeal accepted.

(1) 1 Ind. Cas. 465; 25 P. R. 1909; 39 P. W. R. 1909; 70 P. L. R. 1909.

RANGASWAMI AIYAR *v.* SUBBARAYA AIYAR.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 735 OF 1913.

October 8, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Tyabji.

RANGASWAMI AIYAR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SUBBARAYA AIYAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code Act (XIV of 1882), s. 335—Order under s. 335, effect of, if not set aside within one year.

An order passed under section 335 of the Code of Civil Procedure, 1882, is conclusive as between the parties and, if not set aside by a suit instituted within one year, it cannot be questioned in any subsequent suit as between the same parties, whether the possession given to the auction-purchaser is actual or symbolical.

Ibrahim Mullick v. *Ram Jadu Rakshit*, 30 C. 710; *Mahadev Sakharam Parkar* v. *Jamu Namji Hatley*, 14 Ind. Cas. 447; 36 B. 373; 14 Bom. L. R. 115, distinguished

Second appeal against the decree of the District Court of Trichinopoly, in Appeal Suit No. 42 of 1912, preferred against that of the Court of the District Munsif of Srirangam, in Original Suit No. 455 of 1910.

FACTS.—The plaintiffs sue to recover possession of their share in the family properties by partition by metes and bounds. The defendant is the purchaser in execution of the share of the father of the plaintiffs. The 1st defendant obtained a decree against the plaintiffs' father. The plaintiffs put in a petition under section 335, Civil Procedure Code. The defendants contended that the house is the self-acquisition of the 1st defendant; but the Court held that it is the joint family property of the plaintiffs and their father and that the 1st defendant is entitled only to the share of the plaintiffs' father. He was accordingly placed in joint possession of the house. No suit was brought by the defendants to set aside the order within a year. The present suit is by the plaintiffs to recover possession of the share of family properties by partition. The District Munsif held that the suit property belonged to the plaintiff and his father and in execution the entire family property passed to the auction-purchaser, and on this ground dismissed the suit. On appeal the District Judge held (1) that the question as to what passed in the execution sale is not concluded by the previous order, as the possession there given is only symbolical and not actual, and (2) that the entire family properties passed to the auction-purchaser. He accordingly dismissed the appeal. The present appeal is against that decree in the case.

Mr. *K. Jogannadha Iyer*, for the Appellant.

Mr. *G. S. Ramachandra Iyer*, for the Respondents.

JUDGMENT.—It does not seem to us material what was the nature of the possession which the plaintiffs obtained under the order, Exhibit C, since we declined to hold that that order was without legal effect. Exhibit C whatever the result of the direction it contained as to delivery to the plaintiffs, also included an adjudication as to their and the 1st defendant's rights in the property. That adjudication was, under section 335 of the Code of Civil Procedure then in force, conclusive between the parties.

The 1st defendant has argued *contra*, on the ground that the finality of this adjudication resulted from his failure to sue to establish the right which he claimed to the present possession of the property, and that as he had not been evicted, he had no cause of action on which to sue. We do not accept this. The plaintiffs had been given such joint possession as the Civil Procedure Code enabled the Court to give them; and the 1st defendant's possession had been affected in its character, though it had not been terminated. We think that the words of the section are wide enough to cover the suit to establish the 1st defendant's right to sole possession, which he should have brought.

In the first case referred to by the lower Appellate Court, *Ibrahim Mullick* v. *Ram Jadu Rakshit* (1), it is not clear how the symbolical or formal delivery which was in question could have had any legal meaning, since none of the circumstances authorising such a delivery are mentioned as in question; and it is not necessary to find any other foundation than this for the decision. In the second, *Mahadev Sakharam Parkar* v. *Jamu Namji Hatley* (2), the nature of the possession obtained was material with reference to Article 138, Schedule II, of the Limitation Act, not in the connection now in question.

In these circumstances we dissent from

(1) 30 C. 710.

(2) 14 Ind. Cas. 447; 36 B. 373; 14 Bom. L. R. 115.

the decision of the lower Courts on issue 8 and hold that the 1st defendant is precluded from disputing the title of the 1st, 2nd and 4th plaintiffs who were parties to Miscellaneous Petition No. 31 of 1907. The third plaintiff was not a party to that order and it has not been shown how he can have the benefit of it.

No argument has been addressed to us with reference to issue 7. The result is that the decision of the lower Courts must be set aside, except as against the 3rd plaintiff, the suit being remanded to the District Munsif's Court, with directions to pass a preliminary decree for partition awarding two shares in the suit property to the 1st defendant and one share each to the 1st, 2nd and 4th plaintiffs. A final decree must then be passed in due course of law. We do not deal at this stage with issues 3, 4 and 5 which will appropriately be considered in connection with the final decree or any appeal against it. The 1st defendant will pay the costs of the 1st, 2nd and 4th plaintiffs here and in the lower Appellate Court. The 3rd plaintiff will pay his own costs throughout. The District Munsif will provide for other costs in his final decree.

Appeal allowed; Suit remanded.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1271 OF 1912.

February 18, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

BHUBAN MOHAN BANERJEE—PLAINTIFF—APPELLANT

versus

EDAN SARDAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), s. 17—Document creating immediate interest in grantee, whether compulsorily registrable—Payment of rent—Proof of tenancy—Rent suit at request of defendant, when not collusive.

A document specifying the boundaries of a certain plot of land, fixing the rent and the terms of the tenancy and stating that a lease is granted to the grantee who undertakes to execute a *kabuliat* within a specified period, is in substance a lease purporting to create an immediate interest in the grantee in the land demised and is, therefore, compulsorily registrable.

It is open to a party to establish a tenancy by proof of the payment of rent to the landlord.

If there is a real contract of tenancy and rent is really due, a rent suit cannot be said to be collusive, though instituted by the landlord at the instance or request of the defendant.

Appeal against the decree of the Sub-Judge, Jessore, dated the 18th February 1912, reversing that of the Munsif, Second Court, Narail, dated 31st January 1911.

Babu *Jadunath Kanjilal*, for the Appellant.

Babus *Surendra Chandra Sen* and *Jnanendra Nath Sarkar*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff in a suit for declaration of title to immoveable property and for recovery of possession thereof. The plaintiff and the defendants claim title from the same source and each of them relies upon an *amalnama*. The question in controversy is whether the *amalnama*, dated the 27th December 1904 and produced by the plaintiff, is admissible in evidence. No question arises as to the *amalnama* produced by the defendants, because the Subordinate Judge has found that the genuineness of that *amalnama* has not been established. The *amalnama* of the plaintiff describes the land as situated within certain specified boundaries and fixes the rent and the terms of tenancy. It further states that a lease is granted to the grantee and that the grantee undertakes to execute a *kabuliat* within a period of one month. This document is in substance a lease and as such was compulsorily registrable. Reliance has been placed on behalf of the plaintiff to support the contrary view upon the cases of *Syed Sufdar Reza* v. *Amzad Ali* (1) and *Dwarka Nath* v. *Ledu Sikdar* (2), which were considered in *Sheik Elahi Bakhsh* v. *Sheik Hukum Bakhsh* (3). It was laid down in the case last mentioned that where a document is in substance an agreement to lease or a lease, that is, where it is something more than a mere authority to the grantee to take possession of the land, it is compulsorily registrable under the provisions of the Indian Registration Act. On behalf of the plaintiff reliance has also been placed upon the decision of the Judicial Committee in the case of *Pertab Chunder Ghose* v.

(1) 7 C. 703, 4 Shome L. R. 240; 10 C. L. R. 121 (F. B.).

(2) 33 C. 502.

(3) 20 Ind. Cas. 907; 19 C. L. J. 464; 18 C. W. N. 38.

Mahendra Nath Purkait (4), and it has been argued that the document before us falls within section 17, clause (*h*), of the Indian Registration Act and is, therefore, not compulsorily registrable. There is no force in this contention. No doubt the document recites that the grantee has undertaken to execute a *kabuliat* in favour of the landlord. But it does not state that no interest would vest in the grantee till the execution of another document by the grantor in supersession of the informal document executed at the time. In the document in the case before the Judicial Committee the tenants conjointly promised that they would sign and have registered *kabuliats* in respects of rents at the rates mentioned for the old lands which they had and for the excess land, if any, found on measurement. Sir Richard Couch stated that the evidence of the plaintiff himself showed that the document was not intended to be the final agreement, and held that it fell within the description of clause (*h*) of section 17, that is, was a document merely creating a right to obtain another document which will, when executed, create or declare any such right. Here, the document purports to create an immediate interest in the grantee in the land demised and, therefore, is in essence a lease which is compulsorily registrable. The *amalnama* has consequently been rightly held by the Subordinate Judge to be inadmissible in evidence.

The next question which requires consideration is whether the Subordinate Judge has properly considered the question of the existence of a tenancy right in the plaintiff, irrespective of the *amalnama*. As was pointed out by their Lordships of the Judicial Committee in the case of *Sonet Koer* v. *Himmut Bahadoor* (5), recognition of interest by receipt of rent would constitute some kind of tenancy requiring to be determined by notice or otherwise. It was consequently open to the plaintiff to establish a tenancy right by proof of payment of rent to the landlord. This the plaintiff sought to do by production of two rent receipts and a rent-decree obtained by the landlord against him. The defendants impeached the genuineness of the receipts, but the Subordinate Judge has not come to any finding upon the question raised. The receipts were also challenged on the ground that the payments for which they were granted are not mentioned in the plaint in the subsequent rent suit and are consequently fictitious. This contention the Subordinate Judge has overruled, without a specific finding that credit was allowed by the landlord in respect of the payments indicated by the rent-receipts. In so far, therefore, as the rent-receipts are concerned, there is no finding by the Subordinate Judge whether they are genuine and if genuine, whether the payments alleged were actually made. As regards the rent-decree the Subordinate Judge has rather loosely described it as collusive. The real question in controversy is, whether the decree was fictitious in the sense that a suit for rent was brought although there was no pre-existing contract of tenancy on which rent was due. If there was a real contract of tenancy and if rent was really due, the rent suit would not be collusive though instituted by the landlord at the instance or request of the defendant. This part of the case consequently requires careful examination. The Subordinate Judge further appears to have based his judgment upon circumstances of suspicion. If fraud is alleged by the defendants, particulars of the fraud must be set forth and the charge substantially proved as laid. The Subordinate Judge must re-examine the fundamental question in the case, namely, whether there was a real contract of tenancy with the plaintiff. If there was a real contract of tenancy, he must also ascertain the truth of the allegation of the plaintiff that rents were paid in respect thereof as indicated by the receipts. Besides, if there was rent due when the rent suit was brought, the decree cannot be discarded as collusive because instituted at the request of the defendants. We further observe that the Subordinate Judge has not properly considered the rent-receipts produced by the defendants. He has found that the *amalnama* of the defendants has not been proved to be genuine; but whether genuine or not, it must be discarded on the same ground as the *amalnama* produced by the plaintiff. But in so far as the receipts obtained by the defendants are concerned, their genuineness and reality must be examined. If the

(4) 17 C. 291; 16 I. A. 233.

(5) 1 C. 391 at p 399, 25 W. R. 239, 3 I. A. 92; 3 Sar. P. C J 606; 3 Suth. P. C. J. 257.

plaintiff establishes a real tenancy, the case for the defendants must be investigated; and the defendants will succeed if they prove that they had a prior tenancy or that the claim of the plaintiff is barred by limitation. The judgment of the Subordinate Judge is essentially defective and cannot be upheld.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and the case remanded to him in order that the points indicated in this judgment may be re-tried upon the evidence on the record. The costs of this appeal will abide the result.

Appeal allowed; Case remanded.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 141 OF 1912.

June 17, 1914.

Present:—Mr. Justice Rattigan and Mr. Justice Shadi Lal.

AMAR SINGH—PLAINTIFF—APPELLANT

versus

KISHEN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption—Rival pre-emptors—Collusion with vendee to be strictly proved before pre-emption suit dismissed

Before the suit of a pre-emptor is dismissed on the ground that he is acting in collusion with the vendee and in the latter's interest, it will have to be shown by the strictest evidence that his object is really to secure the property for the vendee. His motive to annoy and defeat his rival pre-emptors is not sufficient.

Second appeal from the decree of the Divisional Judge of the Ferozepur Division, dated the 23rd of November 1911.

Mr. *Ganpat Rai*, for the Respondents.

JUDGMENT.—The dispute with which this appeal is concerned is one between rival pre-emptors and arose as follows :—

On the 16th of March 1910 Dana Singh sold the land in dispute to Kishen Singh, vendee, for an alleged consideration of Rs. 5,000. On the last day of limitation Harnam Singh and Sundar Singh, who are proprietors in the village and in the *patti*, brought a suit for pre-emption, claiming that the price had not been fixed in good faith and offering to pay Rs. 2,000 or market value. On the same day and immediately after the institution of the first suit, Amar Singh, brother of the vendor, also instituted a suit for pre-emption offering to pay the full price of Rs. 5,000. The rival pre-emptors were impleaded as co-defendants against each other in the suits, both of which were tried together with the consent of the parties.

It is not denied that Amar Singh's right of pre-emption is superior to that of his rivals, but his claim has been dismissed by the District Judge and by the Divisional Judge on appeal, on the ground that he is acting in collusion with the vendee and in the latter's interest. The grounds upon which this opinion is based are—

(1) that Amar Singh has expressed his readiness to pay the full amount of Rs. 5,000 in respect of land which, according to his own statement made in another suit in 1906, cannot be worth more than about Rs. 750;

(2) that Amar Singh is deep in debt and will find difficulty in raising the money for purchasing the property; and

(3) that he filed the suit in a hurry and with the obvious intention of defeating the rival pre-emptors.

The learned Divisional Judge has referred to certain rulings of this Court, but, despite the principles therein laid down, holds that this is a very exceptional case and that consequently those principles do not apply.

In our opinion, the grounds upon which the Courts have held that suit to be collusive are devoid of any real force and do not prove that the pre-emptor is seeking the benefit not of himself but of the vendee. It is quite possible that his motive is to annoy and defeat his rivals and, in any event, it would have to be shown by the strictest evidence that his object was really to secure the land for the vendee. In our opinion, having regard to the rulings of this Court [see *Brij Nath* v. *Jita* (1), *Ramsukh Das* v. *Fazal-ud-Din* (2), *Jiwan Singh* v. *Sher Singh* (3), *Manohar*

(1) 139 P. R. 1894.
(2) 19 P. R. 1898.
(3) 10 P. R. 1902; 172 P. L. R. 1901.

Lal v. *Pars Ram* (4), *Ahsan Ullah* v. *Jowahir Lal* 5), *Mahmud Bakhsh* v. *Hassan Bakhsh* (6) and *Sheo* v. *Jawahir Singh* (7)], the claim of Amar Singh should have been decreed and we accordingly accept his appeal.

He will be granted a decree for pre-emption conditional on his paying into Court a sum of Rs. 5,000 within 90 days from the date of this decree. In the event of his failing to do so, his suit shall stand dismissed and plaintiffs, Harnam Singh and Sundar Singh, will be granted a decree for pre-emption conditional on payment into Court of Rs. 2,500 within 30 days after the expiry of the said period of 90 days. In default, their suit also to stand dismissed. We direct that the costs of all parties shall be borne by themselves throughout this litigation.

Appeal accepted.

(4) 67 P. R. 1907; 61 P. L. R. 1907, 38 P. W. R. 1907.
(5) 87 P. R 1896
(6) 11 Ind Cas 708, 7 P. R 1912; 230 P. L. R. 1911, 155 P W R 1911
(7) 13 Ind. Cas 602, 58 P.R. 1912, 240 P.W.R. 1912.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 40 OF 1912-13 OF BARA BANKI DISTRICT.

April 15, 1914.

Present.—Sir Duncan Colvin Baillie, S. M.

Babu RAM DAS—DEFENDANT—APPELLANT

versus

Haji MUHAMMAD ABDUL HAQ—PLAINTIFF—RESPONDENT.

Grove losing its character as such and brought under cultivation, resumption of—Ordinary tenant land—Trees still standing on land previously grove, right of grove-holder as to.

A grove-holder becomes an ordinary tenant in respect of the grove-land losing its character as such and brought under cultivation, but retains his right in the trees that still remain standing thereon.

Appeal from the decree of the Officiating Commissioner, Fyzabad, dated 18th June 1913, upholding the order of the Deputy Commissioner, Bara Banki, dated 20th January 1913, upholding that of the Assistant Commissioner, Bara Banki, dated 12th November 1912.

Babu *Behari Lal*, for the Appellant.

Mr. *Muhammad Wasim*, for the Respondent.

JUDGMENT.—First as to the grove. The Assistant Collector saw the number himself and satisfied himself that it did not retain the character of a grove and was under cultivation. In these circumstances, it cannot be held that appellant has any right to hold rent-free in perpetuity or to have rent assessed as under-proprietor. He retains his rights in the trees, but the land becomes ordinary tenant land on which he has to pay rent as a tenant.

There remains the question of the *muafi*, not grove. Appellant appears to have held at the first Regular Settlement a number of other numbers as *muafi* which are not now in his possession. It cannot, therefore, be presumed that the *sanad* he produces refers to the present *muafi* or that the *muafi* itself is an old one.

The appeal is dismissed with costs on appellant.

Appeal dismissed.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 890 OF 1913.

November 10, 1914.

Present:—Mr. Justice Scott-Smith.

LIVINGSTONE—DEFENDANT—PETITIONER

versus

FEROZ DIN—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), s. 43—Joint promisors—Promisee's discretion to sue some or all—Civil Procedure Code (Act V of 1908), O. I, r. 10.

Section 43 of the Contract Act takes away the right of a joint debtor to be sued jointly.

Where two persons jointly lease a house, in the absence of any agreement to the contrary, they are jointly and severally liable to pay the rent, and it is open to the landlord to sue one or both of them.

If the landlord sues one of them only, under Order I, rule 10, Civil Procedure Code, the Court has the power to order that the other should be made a co-defendant, but it is not bound to do so, and in case there is no clue to his whereabouts, it would not be proper for the Court to insist that he should be made a party

Petition for revision of the decree of the Judge, Small Cause Court, Lahore, dated the 5th July 1913.

Mr. *Morton*, for the Petitioner.

Mr. *Raghunath Sahai*, for the Respondent.

JUDGMENT.—The petitioner, Mr. Livingstone, and a certain Mr. Dick jointly leased

a bungalow in Lahore from Feroz Din, plaintiff-respondent, for one year from 1st October 1912 at a rental of Rs. 80 a month, *plus* Rs. 8 a month for the *mali's* pay. The suit out of which the present application for revision arises was brought by the plaintiff against Mr. Livingstone alone for Rs. 88 on account of the rent for the month of May 1913. It was stated in the plaint that the other tenant had left Lahore and there was no clue to his whereabouts. The defence was that the landlord was not entitled to bring the suit against one of the two joint tenants and to realise the whole rent from him. The Court below, on the authority of section 43 of the Indian Contract Act, disallowed defendant's objections and decreed the claim.

Mr. Morton, on behalf of the petitioner, refers to the ruling reported in volume XII of the Calcutta Law Journal at page 642 [*Kashi Kinkar Sen* v. *Satyendra Nath Bhudro* (1)]. In that case an earlier ruling of the Calcutta High Court printed at page 591 of the same volume [*Sir Rameswar Singh* v. *Jaideb Jha* (2)] was referred to, in which it was held that it was competent to a plaintiff-landlord to maintain his suit against any number of several joint tenants. In the ruling cited by Mr. Morton the Judges were of opinion that the rule was stated in too comprehensive terms in the earlier ruling and they went on to state, "we may add that even if it could be laid down that ordinarily a landlord may make one of several joint tenants responsible for the whole rent, the doctrine would be inapplicable to the present case for two special reasons." The learned Judges then went on to state the special reasons which existed in that case. They did not lay down that a landlord must always sue all his joint tenants in one suit.

Section 43 of the Indian Contract Act is as follows:—

"When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one or more' of such joint promisors to perform the whole of the promise." It was laid down in *Muhammad Askari* v. *Radhe Ram Singh* (3), that the effect of this section was to exclude the right of a joint contractor to be sued along with his co-contractors, and that the rule laid down in the cases of *King* v. *Hoare* (4) and *Kendall* v. *Hamilton* (5) is no longer applicable to cases arising in India. Similarly in *Dick* v. *Dhunjee Jaitha* (6) it was held that section 43 of the Contract Act takes away the right of a joint debtor to be sued jointly. But the learned Judge went on to point out that it was open to the defendant to apply to the Court for joinder of a person who ought to have been included in the action as a co-defendant and that the Code of Civil Procedure gives the Court absolute discretion to add or to refuse to add a party. In *Jag Lal* v. *Shib Lal* (7) it was held that in a suit upon a contract made by a partner on behalf of the partnership the promisee can compel all or any one of such partners to perform the whole of the promise, and that non-joinder of a co-promisor is no ground of defence to such a suit.

In the present suit it is clear that Mr. Livingstone and Mr. Dick jointly leased the house from the plaintiff and, in the absence of any agreement to the contrary, I must hold, in accordance with the authorities, that they are jointly and severally liable to pay the rent and that it was open to the plaintiff to sue one or both of them. No doubt under Order I, rule 10, of the Civil Procedure Code, the Court had the power to order that the other tenant, Mr. Dick, should be made a co-defendant, but the Court was not bound to do this and, as there is no clue to Mr. Dick's whereabouts, it would not have been proper for it to insist that he should be made a party.

The application for revision is, therefore, rejected. No costs are allowed, no certificate having been filed.

Revision rejected.

(1) 7 Ind. Cas. 840; 12 C. L. J. 642.
(2) 6 Ind. Cas. 387; 12 C. L. J. 591.
(3) 22 A. 307; A. W. N. (1900) 73.
(4) 13 M. & W. 494; 14 L. J. Ex. 29; 8 Jur. 1127; 2 Dowl. & L. 382; 67 R. R. 694.
(5) 4 A. C. 504, 48 L. J. Q. B. 705, 41 L. T. 418; 28 W. R. 97.
(6) 25 B. 378; at p. 386; 3 Bom. L. R. 284.
(7) 37 P. R. 1902, 25 P. L. R. 1902.

RAHIMUNISSA BIBI v. MANIK JAN.

CALCUTTA HIGH COURT.
ORIGINAL CIVIL SUIT No. 887 OF 1911.
February 12, 1914.
Present:—Mr. Justice Chaudhuri.
Musammat RAHIMUNISSA BIBI—
PLAINTIFF
versus
Sheikh MANIK JAN AND OTHERS—
DEFENDANTS.

Waqf—*Muhammadan dedicating properties for expenses of mosque and maintenance of family, how far valid—Musalmans Waqf Validating Act* (*VI of* 1913), *retrospective effect of.*

Where a Muhammadan made a *waqf* of his properties for the expenses of a mosque and for the maintenance of his children:

Held, that the *waqf* so far as it related to the expenses of the mosque was valid, but not for the maintenance of the children, as it was not properly endowed for religious purposes.

The Mussalmans Waqf Validating Act, 1913, has not a retrospective effect.

Mr. *A. Basul* (with him *Dr. A. M. Suhrowardy*), for the Plaintiff.

Messrs. *S. K. Chakravarti*, *D. N. Basu* and *B. C. Ghose*, for the Defendants.

JUDGMENT.—This is a suit to have a *towliatnama* or *waqfnama*, dated the 12th *Aswin* 1297, executed by one Abdul Khansama declared invalid, and for partition of the properties therein mentioned according to the Muhammadan Law, should it be held to be invalid either wholly or in part. The partition is to be of such part as may be declared not legally affected by that instrument. So far as the appearing defendants are concerned, no question has been raised as regards the correctness of the facts stated in the plaint, either with regard to the pedigree set out therein or the dates of death and the subsequent devolution of the shares of the parties named; but inasmuch as defendants Nos. 5 and 6 have not appeared and some others have not put in their written statements, I give leave to the plaintiff to prove the facts stated in the plaint, so far as the pedigree and devolution of shares are concerned by filing an affidavit. Such affidavit is to be filed before the decree is drawn up.

It appears that Abdul Khansama executed a *waqfnama* on the 17th October 1880. So far as that *waqfnama* is concerned, I do not think there can be any doubt that it was a proper endowment. It is stated by some of the parties that there is a suit pending in the Alipore Court relating to this document. But the plaintiff asserts that that suit has been recently withdrawn—a fact which is not admitted by the defendant Sukur Jan. But whether that be so or not, I am not called upon to construe that document. Having regard to its tenor alone, it does not seem to be an illusory dedication. With the subsequent dealings with the property by the creator, whether they were treated by him as subject to a valid *waqf* or not, I am not concerned. I am not dealing with those contentions in this suit. Nothing in connection therewith has been brought before me in this suit. As regards the second deed, the question is how far it is a good dedication. It seems to me to be an illusory dedication, excepting in respect of the charitable trusts specifically mentioned therein. It begins by saying that "provision for the livelihood and support of one's children and the destitute is also reckoned amongst religious deeds under the Muhammadan Law," and that he, therefore, makes a charitable *waqfnama* "for children and the poor in the name of God." He constitutes himself the first *mutwalli* by this deed, and lays down certain rules which are to govern the management of the so-called dedicated properties. Rule (1) states "that out of the income of the properties, in the first place, Government revenue and taxes shall be paid and repairs to the mosque and other buildings shall be effected, when necessary." The "other buildings" do not refer to the mosque, but to other buildings belonging to the estate. Rule (2) runs thus: "out of the surplus remaining after deducting the charges of collection, the expenses of and in connection with the mosque at Narkeldanga founded under the first deed shall be paid in accordance with the list given in schedule 'kha,'" rule (3): "that out of the amounts of profits from the *waqf* properties which will remain after deducting the expenses, etc., in paragraphs 1 and 2, members of his family shall get monthly allowances as stated in schedule 'ga.'" Rule (4) goes on to say that "out of the surplus, certain sums are to be paid by the *mutwalli* for specially important matters relating to the dedicated property and on occasions of joy and grief of the *mutwallis* and others." Rule (5) says that in the event of his or their children being totally extinct, the amount of maintenance will vest in the poor. Then there is a provision that in the event of the monthly allowance lapsing, the *mutwali* for the time being is to distribute

t according to the provisions of the Muhammadan Law. Then elaborate rules are laid down for the appointment of *mutwallis*. He recites the earlier endowment and says that it is to be treated as part of the present *waqf*. Then in paragraph 28 he says that his heirs (naming them) are to get their respective shares according to the Muhammadan Law in the property in his "*khas*" possession, and the surplus is to be similarly divided amongst them, after deducting all costs from the amount of the income of the *waqf* properties. I think that the dedication for *waqf* purposes of property yielding an income of Rs. 316 is good. This amount should be set apart, namely, Rs. 300 mentioned in schedule "*kha*" and a sum of Rs. 8 for the salary of a *sircar* for making collections and Rs. 8 for the salary of the person who is to be the manager amongst the *mutwallis*. Properties sufficient to yield the above income and also for the upkeep of the mosque at Narkeldanga are to be set apart, and also such amount as may be necessary for the payment of the Government revenue and taxes. By upkeep I mean repairs, etc., because all other expenses are provided for in schedule "*kha*." With regard to the rest of the property, I consider there has been no proper dedication. It was intended, and the only intention appears to be, to tie up the property for the benefit of his children and heirs and as such, cannot be considered to have been properly endowed for religious purposes. The properties mentioned in the first *waqfnama*, I am told, are quite sufficient for the expenses of the mosque; and since that document has been made part of the present document and since all those properties are included in the document under construction, I have made the order aforesaid. The parties are declared entitled to the shares mentioned by learned Counsel. An affidavit is to be put in, showing that the shares have been correctly calculated. As there is no contest in respect of the shares and it is only a matter of arithmetical calculation, I allow such an affidavit to be put in. Since the institution of this suit, the Mussalman Waqf Validating Act of 1913 has been passed. It was passed in March 1913, and it seems to me to have prospective effect from that date. I do not think it has any retrospective effect. It does not seem to have been intended that it should have retrospective effect. The managing *mutwalli*, namely, the first defendant, will get credit for all payments made by him to the co-sharers. The mesne profits are only to be calculated for the last six years. In setting apart the property to meet the above valid charges, the Commissioner of partition is to take into account the properties purchased by Sukur Jan in execution of decrees obtained by her in other Courts and also the sale certificates she holds, that is to say, that, unless absolutely necessary, those properties are not to be set apart for the above purposes. There will be a decree for partition as regards the rest of the property according to the shares declared. Liberty to the parties to name the Commissioner of partition hereafter. Costs up to date are to be paid out of the estate of Abdul Khansama. Costs of partition will be according to the shares of the parties respectively. Costs of the taking of the accounts above mentioned will be dealt with after the report. Liberty generally to the parties to apply. All the costs are to be taxed on scale No. II as of a contested action. Copies of the affidavit relating to the working out of the shares and pedigree are to be given to the parties appearing for the purpose of verification. It is to be filed as soon as practicable.

Order accordingly.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 891 OF 1913.

June 23, 1914.

Present:—Mr. Justice Chamier.

BHAROSA AND OTHERS—DEFENDANTS—APPELLANTS

versus

SIKHDAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXII, r. 7—Minor—Mutation proceeding—Compromise by mother on behalf of minor sons—Suit by minor for setting aside compromise—Leave of Court not obtained—Registration Act (XVI of 1908), s. 17—Documents evidencing family settlement—Petition of compromise declaring interests of parties in property exceeding Rs. 100 in value—Compromise not for minor's benefit validity of.

In the course of mutation proceedings, a petition was filed setting out the terms of a compromise

arrived at between the parties. The petition was signed on behalf of the minor plaintiffs by their mother and mutation was made in accordance with the terms of the petition. On a suit by the minors to set aside the compromise and for possession of their proper share in the property:

Held, (1) that as Order XXXII, rule 7, of the Civil Procedure Code does not apply to proceedings under section 35 of the Land Revenue Act, the compromise could not be set aside merely on the ground that the Revenue Court did not give the plaintiffs' mother and guardian leave to enter into it on their behalf.

(2) that written instruments are not exempt from registration merely because they evidence or carry out a family settlement; nor does the mere fact that a document is thrown into the form of a petition or is presented to a Court along with a petition exempt its registration, if it is otherwise compulsorily registrable.

(3) that a petition of compromise presented to a Court which declares the respective interests of the parties in property exceeding Rs. 100 in value must be registered before it can be used as evidence of title, unless it is acted upon judicially by the Court.

(4) that the mere fact that the compromise was not made for the benefit of the minors was enough ground for setting it aside.

Second appeal from the decision of the Additional Subordinate Judge of Cawnpore, dated 10th April 1913.

FACTS.—The parties are step-brothers. The plaintiffs sued for possession of certain property, on the allegation that the compromise entered into between the defendants (their step-brothers) and the plaintiffs' mother in a mutation case was not binding on the plaintiffs. The defence was that the plaintiffs were bound by the compromise. The Courts below decided in favour of the plaintiffs.

Dr. *Surendra Nath Sen*, for the Defendants-Appellants:—The compromise, being simply an acknowledgment of the rights of the parties, must be taken to be a settlement of doubtful family disputes. It did not consequently require registration. *Pearey Lal* v. *Kokla Kunwar* (1) and *Kokla* v. *Pearey Lal* (2).

Moreover, Order XXXII, rule 7, Civil Procedure Code, does not apply to an application made in a mutation case. Even if it is assumed that it does, it will have to be presumed under the circumstances of this case that the compromise was arrived at with the implied permission and authority of the Court. It is clear that the parties at first came to an oral agreement and then put in an application stating that the matter had been settled between the parties. I rely on the following rulings.

Aman Singh v. *Narain Singh* (3); *Kaulesra* v. *Jorai Kasaundhan* (4); *Sadar-ud-din Ahmad* v. *Chajju* (5); *Khunni Lal* v. *Gobind Krishna Narain* (6); *Madan Lal* v. *Chuttan Singh* (7); *Ram Nirunjun Singh* v. *Prayag Singh* (8); *Rameshwar Prosad Singh* v. *Lachmi Prosad Singh* (9); *Jasimuddin Biswas* v. *Bhuban Jelini* (10); *Gurdeo Singh* v. *Chandrikah Singh* (11); *Birbhadra Nath* v. *Kulpataru Panda* (12); *Midnapore Zemindari Co., Ltd.* v. *Gobinda Mahto* (13); *Vithaldas* v. *Dattaram* (14); *Krishna Tanhaji* v. *Aba Shetti Patil* (15); *Lingappa Ningappa* v. *Sangawa* (16); *Ramdas Chabildas* v. *Chabildas Lalloobhoy* (17); *Prannal Anni* v. *Lakshmi Anni* (18); *Doraiswamy Pillai* v. *Thungasami Pillai* (19); *Rajinder Narain Rai* v. *Bijai Govind Singh* (20); *Amir Chand* v. *Narsingh Narayan Singh* (21).

Mr. *G. W. Dillon*, for the Respondents:—Here there is no question of any oral agreement. The compromise has been reduced to writing and under section 17 (*b*) of the Registration Act, it ought to have been registered.

I rely on *Sadar-ud-din Ahmad* v. *Chajju* (5), *Bhagwan Sahai* v. *Harchain* (22), *Rustam Ali Khan* v. *Musammat Gaura* (23).

(1) 18 Ind. Cas. 766; 11 A. L. J. 157.
(2) 21 Ind. Cas. 29; 11 A. L. J. 765; 35 A. 2.
(3) 20 A. 98; A. W. N. (1897) 205.
(4) 28 A. 233; A. W. N. (1905) 205; 2 A. L. J. 663.
(5) 1 Ind. Cas. 558; 31 A. 13; 5 A. L. J. 717; A. W. N. (1908) 264.
(6) 10 Ind. Cas. 477; 33 A. 356; 15 C. W. N. 545 (P. C.) 8 A. L. J. 552; 13 Bom. L. R. 427; 18 C. L. J. 575, 10 M. L. T. 25; 21 M. L. J. 645; (1911) 2 M.W.N. 432; 38 I. A. 87.
(7) 15 Ind. Cas. 297; 10 A. L. J. 101.
(8) 10 C. L. R. 66; 8 C. 138.
(9) 7 C. W. N. 688; 31 C. 111.
(10) 34 C. 456.
(11) 1 Ind. Cas. 913; 36 C. 193, 5 C. L. J. 611, 9 M. L. J. 147.
(12) 1 C. L. J. 388.
(13) 8 C. L. J. 31.
(14) 3 Bom. L. R. 887; 26 B. 298.
(15) 4 Ind. Cas. 833; 34 B. 189; 11 Bom. L. R. 1336.
(16) 6 Ind. Cas. 523; 12 Bom. L. R. 370.
(17) 7 Ind. Cas. 134; 12 Bom. L. R. 621.
(18) 22 M. 508; 26 I. A. 101; 3 C. W. N. 485; 9 M. L. J. 147.
(19) 14 M. L. J. 159; 27 M. 377.
(20) 2 M. I.A. 181; 1 Moo. P. C. 117; 1 Sar. P. C. J. 175; 18 E. R. 269; 12 E. R. 757.
(21) 11 C. C. 319.
(22) 10 Ind. Cas. 843; 33 A. 475; 8 A. L. J. 369.
(23) 12 Ind. Cas. 109; 33 A. 725; 8 A. L. J. 918.

BHAROSA v. SIKHDAR.

In order to avoid registration, it must be shown that the compromise was incorporated in a decree. *Biraj Mohini Dossee* v. *Kedar Nath Karmakar* (24).

The compromise does involve a relinquishment of right in property worth more than Rs. 100.

Further, it is a question whether in a joint Hindu family the mother can represent her sons when the eldest son is the *karta* of the family.

Dr. *S. N. Sen*, in reply:—The plaintiffs have not suggested anywhere that their mother did not represent them.

The compromise is either an ordinary petition or a document settling family rights. In either case, it does not require registration.

JUDGMENT.—The plaintiffs are the sons of Mangli Kurmi by his wife Rukya, who is the fourth defendant. Defendants Nos. 1, 2 and 3 are his sons by another wife. Mangli died in September 1911. In the course of the mutation proceedings consequent upon his death a petition was filed on January 4th, 1912, setting out that the parties had agreed that the names of defendants Nos. 1, 2 and 3 should be entered in respect of Mangli's *zemindari* property and that the names of the plaintiffs should be entered in respect of 3 *bighas malikana*, the plots being specified. The petition was signed on behalf of the plaintiffs by their mother, the fourth defendant. The plaintiffs were then and still are, minors. Mutation of names was made in accordance with the petition as regards the *zemindari*. There is nothing to show what was done about the 3 *bighas*.

In June 1912 the plaintiffs brought the present suit to set aside the compromise and for possession of their shares in the *zemindari*. The Munsif gave them a decree for 2/5ths of the property and his decree was confirmed on appeal by the Subordinate Judge who held that the petition of compromise was not admissible in evidence not having been registered, that the sanction of the Revenue Court was necessary to the validity of the compromise but was not obtained and that the plaintiffs' mother had no power to enter into the compromise on their behalf as it was not for their benefit.

Order XXXII, rule 7, does not apply to proceedings under section 35 of the Land Revenue Act, therefore, the compromise cannot be set aside merely on the ground that the Revenue Court did not give the plaintiffs' mother and guardian leave to enter into it on their behalf.

The learned Vakil for the defendants-appellants contended, in the first place, that documents evidencing a family settlement do not require registration, at all events where, as in the present case, the compromise does not purport to transfer property from one party to another but is based on the assumption that there was some kind of antecedent title in the parties and the compromise acknowledges and defines what that title is, and reference was made to *Khunni Lal* v. *Gobind Krishna Narain* (6) and *Piarey Lal* v. *Kokla Kunwar* (1) and on appeal *Kokla* v. *Peary Lal* (2). The former case (6) deals with the effect of a compromise on titles set up by disputants, but it does not lay down that all compromises are based on the assumption that a party has some antecedent title to the property allotted to him. Some compromises certainly rest on no such assumption. It often happens that property is conveyed by one party to another in consideration of the abandonment of a claim by the other. I am not satisfied that the compromise in the present case was based on any such assumption and the decision of the Privy Council is certainly no authority for the proposition that documents giving effect to a family settlement are exempt from the Registration Law. In the case decided by this Court a petition not unlike the one now in question had been filed in some mutation proceedings. Griffin, J., decided that it did not require registration, because neither of the parties thereto purported to convey any property and the petition simply contained a statement that they agreed that each should be recorded in respect of one-half of the property. The appellate judgment is as follows; "In our opinion it must be presumed from the whole proceedings, commencing with the petition for mutation, the order of the Revenue Authorities recording the names in accordance with the petition and the subsequent sales upon the strength of this record that the parties entered into a family arrangement,

(24) 12 C. W. N. 854; 35 C. 1010; 8 C. L. J. 90.

On these grounds we think that the decree of the learned Judge of this Court ought to stand." Nothing was said about the question of registration. I am disposed to think that the real ground of the decision was that as sales had taken place on the strength of the record made with the consent of the plaintiffs, it was too late for the plaintiffs to go back on what had been done. Otherwise it is difficult to account for the fact that the Court did not refer to the case of *Sadar-ud-din Ahmad* v. *Ghajju* (5), in which both learned Judges had taken part, or to the case of *Rustam Ali Khan* v. *Musammat Gaura* (23) which was precisely in point.

Written instruments are certainly not exempt from registration merely because they evidence or carry out a family settlement, see *Pranal Anni* v. *Lakshmi Anni* (18), and I know of no authority for the proposition that a document which would otherwise require registration need not be registered if it is thrown into the form of a petition or is presented to a Court along with a petition. In *Bindeshri Naik* v. *Ganga Saran* (25) their Lordships of the Privy Council said that section 17 of the Registration Act did not apply to proper judicial proceedings, whether consisting of pleadings filed by the parties or of orders made by the Court. But that observation has never been understood to mean that the Registration Act does not apply at all to any document presented to a Court. In the Madras case (18) cited above a *razinamah* had been presented to a Civil Court with a petition that a decree might be passed in accordance with it. The Privy Council held that in so far as it was submitted to and was acted upon judicially by the Court, it was a step of judicial procedure not requiring registration and the order pronounced in terms of it constituted *res judicata*, binding upon the parties who gave their consent to it. The *razinamah* set out the terms of an "agreement of union relating to other lands which had not been filed, but as the decree of the Court did not refer to those lands their Lordships held that as regards them, the parties must be relegated to the agreement of union which not being registered was inoperative." There has been a difference of opinion between this Court and the Calcutta High Court as to the precise meaning of this ruling of the Privy Council as regards a point which does not arise here [see *Raghubans Mani Singh* v. *Mahabir Singh* (26) and *Gurdeo Singh* v. *Chandrikah Singh* (11)], but both Courts have decided that a petition of compromise presented to a Court which declares the respective interests of the parties in property exceeding Rs. 100 in value, must be registered before it can be used as evidence of title, unless it is acted upon judicially by the Court [See *Kashi Kunbi* v. *Sumer Kunbi* (27) and *Rustam Ali Khan* v. *Musammat Gaura* (23)].

In the present case the petition of compromise was acted upon by the Revenue Court, at all events as regards the *zemindari* interests of Mangli, but no decision of a Revenue Court in a mutation proceeding can render a question of title *res judicata*. The Privy Council were referring to the decree of a Civil Court when they said that the order pronounced upon the *razinamah* constituted *res judicata* and, in my opinion, Knox and Piggott, JJ., were right in deciding in *Rustam Ali Khan* v. *Musammat Gaura* (23) that an order of a Revenue Court upon a petition of compromise in mutation proceedings could have no such effect.

There remains another point which was strongly pressed by Dr. Surendranath Sen. He contended that the law did not require a compromise of the kind now in question to be in writing, and that the proper view to take of the case was that the parties settled the terms of the compromise before they signed the petition and that the petition was not intended to carry out the compromise but only to inform the Court of it. He also relied upon the judgment of Banerji, J., and myself in *Abu Saffan* v. *Aminullah* (28). In that case it was alleged that two ladies had renounced their shares in the property of a deceased person in 1903. All that we held was that an unregistered petition of 1904 might be used as evidence of the relinquishment said to have taken place in 1903.

(25) 90 A. 171; 25 I. A. 9; 2 C. W. N. 129.

When the terms of a compromise are

(26) 2 A. L. J. 564; 28 A. 78; A. W. N. (1905) 195.
(27) 5 Ind. Cas. 234; 32 A. 206, 7 A. L. J. 206.
(28) S. A. No. 565 of 1913 (unreported).

found to be set out in a document, it cannot be lightly assumed that the compromise was complete before the document was signed. In most cases the signing of the document by both parties is intended to indicate that *pourparlers* have come to an end and the parties are at last at one. The importance of having written evidence of the terms of a compromise is well-understood, *litera scripta manet*; *verbum ut inane perit*. It was never suggested in the Courts below that the completion of the compromise preceded the signing of the petition, and it would be a mere invitation to the parties to give false evidence to allow such a case to be set up now. The petition was, I have no doubt, intended to prove the terms of the compromise and I doubt whether oral evidence of them would be admissible with reference to section 91 of the Evidence Act.

Lastly, it has been found that the compromise was not for the benefit of the plaintiffs. That finding, if sound, is alone sufficient to dispose of the plaintiffs' case.

I dismiss the appeal with costs, fees on the higher scale.

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 661 OF 1913.

July 20, 1914.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Beaman.

APPAJI BHARMAPPA UMRANI—DEFENDANT—APPELLANT

versus

THALEGAUDA SATYAPPA UMRANI—PLAINTIFF—RESPONDENT.

Limitation—Exclusion of time spent in obtaining conciliator's certificate—Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 48—Mode of computation.

The plaintiff's possessory suit in the *mamlatdar's* Court having been dismissed on the 28th September, 1906, he applied on the 24th September 1909 for a conciliator's certificate which was issued to him on the 24th August 1910. He then filed the present suit to recover possession of the land:

Held, that in computing the period of limitation the time to be excluded according to section 48 of the Dekkhan Agriculturits' Relief Act, 1879, must be reckoned by days, and that even excluding the days between the day of the application and the day of the grant of the certificate, the plaintiff's suit was barred by time.

Second appeal from the decision of the Assistant Judge at Belgaum, in Appeal No. 134 of 1912, confirming that of the Subordinate Judge at Athni, in Civil Suit No. 326 of 1910.

Mr. *M. N. Bhat*, for the Appellant.

Mr. *G. K. Parekh*, for the Respondent.

JUDGMENT.—We are of opinion that this suit is barred by limitation. The *mamlatdar's* order was passed in favour of the defendant for possession on the 28th of September 1906, and from the date of that order the plaintiff had three years to sue. He did not, however, sue within three years, but just before that period expired applied to the conciliator for a certificate under Chapter VI of the Dekkhan Agriculturists' Relief Act. His application was made on the 24th of September 1909, and the conciliator's certificate was issued on the 24th of August 1910. Section 48 of the Dekkhan Agriculturists' Relief Act says:—"In computing the period of limitation prescribed for any such suit or application the time intervening between the application made by the plaintiff under section, 39 and the grant of the certificate under section 46 shall be excluded." We have recently held, and it is also conceded in argument, that the time to be excluded must be reckoned by days, and the days between the day of the application and the day of the grant of a certificate are, therefore, to be excluded under section 48. If those days are excluded, the plaintiff is out of time by three days. The suit is, therefore, barred, without reference to the question whether he can file the suit on a Monday if the time expired on a Sunday. We, therefore, allow the appeal and dismiss the suit with costs throughout upon the plaintiff.

Appeal allowed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 16 OF 1913-14 OF HARDOI DISTRICT.

March 28, 1914.

Present:—Mr. Tweedy, J. M.

RAMESHAR DAT AND OTHERS—PLAINTIFFS —APPELLANTS

versus

Thakur SHYAMA KUMAR SINGH—DEFENDANT—RESPONDENT.

Landlord and tenant, relationship of—Rent assessed —Collection of rent, failure in, effect of.

If rent is once assessed on land, failure to collect it does not destroy the relationship of landlord and tenant which has once been established.

Appeal from the decree of the Officiating Commissioner, Lucknow, dated 27th September 1913, reversing that of the Assistant Collector, Hardoi, dated 9th May 1913.

FACTS.—In 1880 the defendant's father issued a notice of ejectment against the plaintiffs' father, which was contested on the ground that the land mentioned therein was the *muafi* of the latter, and was ultimately cancelled by the Revenue Court. Subsequent to the cancellation of the notice the former sued the latter for recovery of possession in the Civil Court, which decreed the claim on the 15th of July 1881 holding that the land was not a *muafi*; but this decree was never executed, and the plaintiffs' father continued to be in possession of the land. In 1912 the defendant issued a notice of ejectment on the plaintiffs, who filed a suit to contest that notice on the ground that the land was their *muafi*. The defendant pleaded that the land was not a *muafi*, for after the passing of the Civil Court decree the plaintiffs' father had agreed to pay an annual rent of Rs. 7 and did in fact so pay every year. The Court of first instance, finding that no agreement to pay rent had been arrived at and that no rent had actually been recovered, held that the land had been held as *muafi* since 1881 and that the defendant's only remedy was to proceed against the plaintiffs under the Resumption Chapter of the Oudh Rent Act, and cancelled the notice of ejectment. When the case came up in appeal before the Commissioner, he found that the agreement to pay rent had been entered into although the rent was never recovered in accordance with that agreement, but that this fact could not convert an ordinary tenancy into a *muafi*, and thus upheld the notice. The matter was further brought in appeal before the Board, and it was contended that the relation between the parties did not remain as that of landlord and tenant but became as that of grantor and grantee.

Babu *Bisheshwar Nath Srivastava*, Chaudhri *Ram Bharose Lal* and Babu *Manni Lal*, for the Appellants.

Pandits *Gokaran Nath Misra* and *Bansi Dhar Misra*, for the Respondent.

JUDGMENT.—I agree with the view taken by the Commissioner. The Civil Court decree of 1881 was admittedly not executed, but it was not appealed and it was a final decision that as the law stood in 1881 the land was not '*muafi*'. It appears that the rent of Rs. 7 was attested at Settlement, and under these circumstances the fact that it may never have been actually collected does not affect the issue.

If rent is once assessed on land failure to collect does not destroy the relationship of landlord and tenant which has once been established.

I dismiss the appeal with costs.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL MISCELLANEOUS APPEAL No. 17 OF 1912.

December 14, 1912.

Present:—Mr. Crouch, A. J. C., and Mr. Hayward, A. J. C.

IN THE MATTER OF THE INSOLVENCY OF JIWANJI PIRBHOY.

MESSRS. JAMES FINLAY & Co., LTD.—APPELLANTS

versus

MESSRS. DAVID SASSOON & Co.—RESPONDENTS.

Contract Act (IX of 1872), ss 39, 75—Rescission of contract—Compensation for loss caused thereby—Measure of damages—Notice of insolvency, effect of.

A bare notice of insolvency does not necessarily and in all cases amount to a declaration of intention not to fulfil obligations. It is a question of fact in each case.

Where a purchaser of goods failed to take delivery of goods under a due contract and the vendors, on receiving notice of the insolvency of the purchaser, served him with a notice that they put an end to all the forward contracts and received neither a reply to the notice nor any offer to pay for or take delivery of the goods;

JAMES FINLAY &CO., LTD. *v.* DAVID SASSOON & CO.

Held, that the vendors had validly rescinded the contracts and were entitled to exact compensation for the loss occasioned thereby.

Per *Crouch, A. J. C.*—The great underlying principle by which the Courts are guided in awarding damages is *restitutio in integrum* and the exact cost of effecting a complete *restitutio in integrum* is the difference between the original contract rate and that at which the vendor can sell to a fresh purchaser goods of the same quantity and quality and of the same shipment.

Per *Hayward, A. J. C.*—The election to take advantage of the repudiation of a contract goes only to the question of breach, and not to the question of damages, which must be estimated by the difference between the contract price and the market price at the day or days appointed for performance, and not at the time of breach

Appeal against the decision of Pratt, J. C., reported in 19 Ind. Cas. 653; 6 S. L. R. 187.

The Hon'ble Mr. *Harchandrai Vishindas*, for the Appellants.

Mr. *Tekchand Udhavdas*, R. B., for the Respondents.

Mr. *Rupchand Bilaram*, for the Insolvent.

JUDGMENT.

CROUCH, A. J. C.—This is an appeal under section 46 of the Provincial Insolvency Act, III of 1907, against the order of the Judicial Commissioner, dated the 27th June 1912, dealing *inter alia* with two appeals numbered respectively 2 and 5. Appeal No. 2 was against an order of the Official Receiver holding that Messrs. James Finlay & Co. were justified in rescinding their contracts in January; Appeal No. 5 was against an order of the Official Receiver allowing damages to Messrs. James Finlay & Co. The learned Judicial Commissioner dismissed the Appeal No. 2, and in Appeal No. 5 modified the order of the Official Receiver by directing that damages should be ascertained according to the rates ruling at the dates of actual arrival of the goods.

This appeal is filed by Messrs. Finlay & Co., no other party has filed an appeal or put in objections. The only ground of appeal taken is that the learned Judicial Commissioner erred in assessing damages according to the rates ruling at dates of arrival instead of according to those ruling at date of rescission. But Mr. Tekchand has, under Order XLI, rule 22, been allowed to support the order on the ground that there was no valid rescission of the contracts in January.

The facts of the case are very simple. Jiwanji Pirbhoy had made several forward contracts for the purchase of sugar with Messrs. James Finlay & Co., the dates of shipment being at various times between January and December 1911. Towards the end of December 1910 there was a heavy fall in the market price of sugar and Jiwanji Pirbhoy, who had bought very largely, was unable to meet his liabilities and suspended payment. On the 9th January 1911 Messrs. Forbes, Forbes, Campbell & Co. filed a petition in insolvency; and in that petition it was alleged that Jiwanji had failed to take delivery of due contracts, that he had suspended payment and given notice of his intention to appoint trustees for creditors. These allegations were admittedly true. Interim Receivers were appointted on the 19th January. Messrs. Harchandrai & Co., on behalf of Messrs. Finlay & Co., wrote to the Receivers stating that, owing to Jiwanji Pirbhoy's insolvency and consequent inability to carry out the outsanding sugar contracts of different shipments with their clients, their clients put an end to all the said forward contracts and claimed damages, being the differences between the contract rates and market rates then ruling of those shipments, in order to avoid the risk of further reduction in the market and of additional damages. No reply was ever received to this letter. No offer to pay for the sugar or to take delivery was ever made by the Receivers or by the insolvent. Large quantities of sugar arrived in January, February and March under forward contracts of the insolvent, but delivery was taken in no case. On the 21st May Jiwanji Pirbhoy was adjudicated insolvent. Early in June the market rate of sugar began to recover and rose steadily during July and August. At dates of arrival the rates were practically on a level with the contract rate.

The Official Receiver admitted the claim of Messrs. Finlay & Co., calculated according to the rates ruling on the 19th January when they put an end to the contracts.

We agree with the Official Receiver and with the learned Judicial Commissioner that the letter of 19th January effectually put an end to the contracts. If any purchaser under a forward contract gives notice to his vendor that he will be unable to take delivery at due date or that

he has no intention of doing so, the vendor can put an end to the contract under section 39, Indian Contract Act. A bare notice of insolvency does not necessarily and in all cases amount to a declaration of intention not to fulfil obligations; it is a question of fact in each case. But where, as in this case, the market has fallen and a vendor under forward contracts receives notice of insolvency and no accompanying or subsequent intimation that delivery will be taken at due date, and there are no circumstances indicating that he is likely to take delivery, and such vendor serves the insolvent with a written notice that he puts an end to the contracts and that notice is accepted without any protest, I consider that the vendor has rightfully rescinded the contract and is entitled to compensation.

On rescission Messrs. Finlay & Co. were entitled to compensation for any loss they had sustained. The great underlying principle by which the Courts are guided in awarding damages is *restitutio in integrum*. The law endeavours, so far as money can do it, to place the injured person in the same position he occupied before the occurrence of the wrongful act which consitutes the cause of action. (Halsbury's Laws of England, Volume X, section 559).

The law in India is stated in sections 73 and 75 of the Contract Act. Plaintiff is entitled to receive compensation for the loss or damage which naturally arose in the usual course of things from the breach or which the parties knew, when they made the contract, to be likely to result from it. And in estimating the loss, the Court must take into account the means which existed for remedying the inconvenience caused by the breach.

Let us apply these clear provisions of law to the present case. It is admitted, and it is a fact of which this Court has judicial knowledge, that sugar is bought and sold daily in Karachi in very large quantities under forward contracts, that the market rate for any particular shipment can always be ascertained, and that sugar of any particular shipment can always be readily sold at or about such market rate.

On rescission, therefore, of a forward contract for the sale and purchase of sugar in Karachi, the vendor can at once remedy the inconvenience arising from his purchaser's default by making a fresh contract and the exact loss arising from the breach, the exact cost of effecting a complete *restitutio in integrum*, placing him in the same position as before repudiation, is the difference between the original contract rate and the rate at which he can sell to a fresh purchaser goods of the same quantity and quality and of the same shipment.

Let us approach the question from another direction. It is a well-established rule that where a purchaser of goods fails to take delivery, no re-sale is necessary to give the vendor a right to exact damages, if the goods have an ascertainable market value. At due date the vendor has a right to receive the contract price. If, however, instead of paying it the purchaser makes default and leaves the goods in his hands, the vendor simply assesses the goods at the then market value, credits him with the amount and claims the difference between this amount and the contract price. The goods are in effect taken over in part discharge of the liability to pay the contract price.

But if the contract be for future delivery and the purchaser intimate at an early date his intention not to take delivery and the vendor rescind, the contract is thereby annulled, there is no longer any obligation to give or take delivery and at due date there can be no breach. It is not disputed that in such case the vendor has an immediate right of action. Let us imagine that he institutes his suit on the day of rescission. If the interest in the goods which the defaulting purchaser has transferred to the vendor by the rescission is saleable at an ascertainable market rate, he must credit the defendant with its value at such rate, and however certain it may be that at due date the rate will be lower, he cannot assess damages at such lower rate, for the Court is bound by section 73 of the Contract Act to take into account what means he has of remedying the inconvenience. Here again, we have a simple sum in arithmetic. Before rescission, the purchaser was under liability to pay the contract price at due date. On rescission he comes under an immediate obligation to settle up accounts,

and he can claim credit for the value of what he has handed back. He has no right to ask the vendor to delay settling the account in the hope of a rise in the market, for the goods are no longer his, all risk respecting them is now on the vendor, and it is obvious that he cannot both free himself from all liability in the event of a further fall in the rate and at the same time retain the benefit of a rise.

If, on rescission, the goods were absolutely unsaleable until due date and no fresh forward contract could be effected, the vendor would then have no alternative but to wait until due date before he could ascertain the exact amount of his loss. It would be practically impossible to settle up accounts until it was known to what credit the defaulting purchaser was entitled. The vendor would still have his immediate right of action and could, if he chose, at once go into Court, but no direct evidence in proof of his actual loss would be available until after due date, and if the trial took place earlier the assessment would be reduced to conjecture.

It appears, then, that if we apply to the facts of this case the law as contained in the Contract Act, Messrs. Finlay & Co. are entitled to damages as assessed as at date of rescission, as allowed by the Official Receiver. It appears also that in deciding the question whether damages should be assessed as at date of rescission or as at due date, the determining element is the possibility of immediately effecting a fresh forward contract at ascertainable rates, for the nature and extent of the inconvenience which arises from the repudiation and the means of remedying it depends on this possibility.

The learned Judicial Commissioner has, however, ruled that Messrs. Finlay & Co. are entitled only to damages as assessed at due dates, subject to abatement if they could have covered their loss by other prudent contracts. If damages be so assessed, Messrs. Finlay & Co. get nothing at all, notwithstanding that they had some hundreds of tons of sugar thrown on to their hands at a time when the market was in a state of extreme depression. It has been admitted by the learned Pleaders for the respondents, that the rule laid down works partially to the debtor and renders the position of the creditor one of great uncertainty. It may be conjectured, therefore, that there is some error either in the statement of the rule or in its application to the facts of this case. We must endeavour to ascertain its origin and thus fix the limits of its appropriate application.

In applying the law as to compensation for breach or rescission of contract to particular kinds of action, rules derived from judicial decisions have been formulated for determining what in each case is the damage which will be regarded as flowing naturally from the act complained of. These rules are described as "the measure of damages." They are, however, more properly rules for the computation of the loss commonly arising in such action. In many cases this measure affords a means of exact, or approximately exact, computation of the amount to be recovered. (Halsbury's Laws of England, Volume X, sections 571 and 606.) But where the rule has been derived from judicial decisions based on facts which differ in essential details from those under consideration, such rule cannot be safely applied without modification. In the case of rescission of contracts the measure of damages is ordinarily stated in the text-books to be "such damages as would have arisen from the non-performance of the contract at the appointed time." The cases which are invariably cited in support of this rule, the cases from which the rule has been derived, are *Hochster* v. *De la Tour* (1), *Frost* v. *Knight* (2), *Brown* v. *Muller* (3) and *Roper* v. *Johnson*. (4). The most recent of these cases was decided more than 39 years ago, and it is wholly improbable that any Judge or Counsel concerned in any one of them had ever contemplated the possibility of forward contracts being effected under the facile conditions which now obtain in the Karachi sugar market. The first case merely established the right of immediate action at law on rescission. In *Frost* v. *Knight* (2) defendant had promised to marry plaintiff

(1) (1853) 22 L. J. Q. B. 455; 2 El. & Bl. 678; 17 Jur. 972; 1 W. R. 469; 118 Eng. Rep. 922, 22 L.T. (o. s.) 171; 95 R. R. 747.

(2) (1872) 41 L. J. Ex. 78; 7 Ex. 111; 26 L. T. 77; 20 W. R. 471.

(3) (1872) 41 L. J. Ex. 214; 7 Ex. 319, 27 L. T. 272; 21 W. R. 18.

(4) (1873) 42 L. J. C. P. 65; 8 C. P. 167; 28 L. T. 296; 21 W. R. 384.

as soon as his father died. During his father's life-time he absolutely refused to marry plaintiff. It was held that the lady could at once institute a suit and claim such damages as would have arisen from the non-performance of the contract at the appointed time, subject to abatement in respect of any circumstances which may have afforded means of mitigating the loss. It was stated that a jury would, of course, take into account whatever plaintiff had the means of doing, and as a prudent person ought in reason to have done, whereby the loss would have been diminished.

In *Brown* v. *Muller* (3) defendant failed to deliver a quantity of iron at due dates. There was no rescission, and the only question before the Court was whether plaintiff could assess damages at a date, subsequent to all due dates, when he actually bought against the contracts. It was held that he was entitled only to damages as on due dates. In *Roper* v. *Johnson* (4) defendant had agreed to deliver 3,000 tons of coal during May, June, July and August. On the 11th June defendant definitely refused to deliver any coals, and an action for breach was instituted on 3rd July. Between May and July the price rose enormously. Herschell, Q. C., for defendant contended that the true and only mode of estimating the loss was by ascertaining the difference between the contract price and the price at which plaintiff might have obtained a new contract on the day of admitted breach. But there was no evidence that such new contract could have been made and all that was urged on behalf of defendant was that "forward contracts were by no means rare". It was held that in the absence of evidence that plaintiffs could have obtained a new contract on such terms as to mitigate their loss, the true measure of damages was the sum of the differences between the contract price and the market price at the several dates of delivery.

We find then, on examination, that the rule which has been applied to the facts of this case has been derived from decisions in which the essential element of this case—that a fresh forward contract could have been easily effected on rescission—was entirely outside the consideration of the Courts. Though the four cases above referred to are generally cited as establishing the rule, it was really formulated by Cockburn, C. J., in *Frost* v. *Knight* (2) and it is not difficult to understand that a rule laid down in 1872 as a guide for the computation of damages for breach of promise to marry may lead to error when applied to the rescission of a forward contract for the sale and purchase of sugar under modern commercial conditions.

We are now, I respectfully and with all deference suggest, in a position to understand how the application of the rule has resulted in what may be fairly termed legal paradoxes. Though Messrs. Finlay & Co. are entitled under the Contract Act to compensation, none is awarded to them under the rule; though the fundamental principle of all Contract Law is that it shall work reciprocally, the debtor can under the rule insist on having the damages assessed as at due dates if the rate then be favourable to him, without being under any corresponding obligation to do so if the rate be unfavourable. This puzzling result has been arrived at by the application of an inappropriate rule for the computation of the loss suffered.

I would amend the order of the lower Court by ordering that Messrs. Finlay's claim be admitted to proof as assessed by the Official Receiver.

HAYWARD, A. J. C.—These appeals raise two questions, whether appellants validly rescinded their forward contracts for sales of sugar on the purchaser's insolvency and whether appellants in that case were entitled to damages calculated on the difference between the rates of those forward contracts and the market rates at the dates of rescission for similar forward contracts, or to damages calculated on the difference between the rates of those forward contracts and the actual market rates at the dates for performance of those contracts.

With regard to the 1st question, I concur with my learned brother that the appellants have correctly been treated by the learned Judicial Commissioner as having in all the circumstances validly rescinded their forward contracts; with regard to the 2nd question, I find myself unfortunately unable to concur with my learned brother that the appellants were entitled to damages calculated on the difference between the rates of those for-

ward contracts and the market rates at dates of rescission of similar forward contracts. It appears to me, on the contrary, that the appellants have correctly been held by the learned Judicial Commissioner to have been entitled to damages calculated on the difference between the rates of those forward contracts and the actual market rates at the dates for performance of those contracts.

The appellants have strenuously contended that they were placed in a very awkward position by their purchaser's insolvency on a falling market and that they were practically forced, as prudent merchants in order to save further loss to all parties, to rescind and re-sell their sugar at the market rates available on the dates of rescission for similar forward contracts. The appellants, Messrs. Forbes, Forbes, Campbell & Co., had even sought at the original hearing to produce evidence to prove a trade custom whereby rescission implied agreement to accept as the measure of damages the market rates available on the date of rescission for a similar forward contract. They have developed that plea here into a trade custom, whereby rescission assented to by the parties must be treated as a re-sale between the parties at the market rates available on the date of rescission for similar forward contracts. They cannot, in my opinion, be permitted at this stage to raise this developed plea and adduce evidence of such a trade custom. Moreover, in these particular cases it would not serve their purpose, as the insolvent's representative, the Receiver, distinctly repudiated as the measure of damages the market rates available on the dates of rescission for similar forward contracts. If parties should assent to such a re-sale, no doubt they would be bound by such re-sale and such assent might, no doubt, be shown to be common. But it would be quite another matter to show that parties would be bound by such re-sales even when expressly repudiating as the measure of damages the market rates available on the dates of rescission for similar forward contracts. That alone would cover these particular cases and would be far in excess of even this developed plea of trade custom.

Now the appellants must, of course, be admitted to have been placed in very awkward position and they are entitled to all sympathy for having been so unfortunate as to have selected for their sugar an insolvent purchaser. But that cannot be permitted to modify the established rules for assessment of damages and distribution of loss among the victims, however innocent, of a fallen market. Their insistence on an unavailing trade custom was in itself an indication of the weakness of their legal position which on demand they were unable to fortify by a single authority, English or Indian. The rules of law would in fact have apppeared to me to be perfectly well established and not to have admitted of doubt, had it not been for the contrary view of my learned brother. The right to rescind was established by the case of *Hochster* v. *Dela Tour* (1) and has been embodied in section 39 of the Indian Contract Act. The right to damages on rescission was laid down in *Frost* v. *Knight* (2) in these words: "such damages as would have arisen from the non-performance of the contract at the appointed time." That is merely an application of the ordinary rule in case of breach of contract laid down in *Brown* v. *Muller* (3). The same rule was also expressly stated in *Roper* v. *Johnson* (4) in these words: "Although the plaintiff may treat the refusal of the defendant to accept or to deliver the goods before the day for performance as a breach, it by no means follows that the damages are to be the difference between the contract price and the market price on the day of the breach. It appears to me.....that the election to take advantage of the repudiation of the contract goes only to the question of breach, and not to the question of damages; and that when you come to estimate the damages, it must be by the difference between the contract price and the market price at the day or days appointed for performance, and not at the time of breach." These are the decisions underlying the rules as to damages laid down in section 73, Illustrations (*a*) and (*o*), and section 75 of the Indian Contract Act and followed in the case of *Cooverjee* v. *Rajendra Nath* (5). For these reasons it appears to me that the damages have correctly been assessed by the learned Judicial Com-

(5) 2 Ind. Cas. 831; 36 C. 617.

missioner on the difference between the contract rates and the actual market rates at the dates for performance of those contracts. It only remains to add that these general rules do not appear to be affected by anything contained in the Provincial Insolvency Act. There can lastly, in my opinion, be no question but that the evidence for determining those actual rates should not be limited to the uncertain forecast, which in these cases proved entirely erroneous, made by merchants at the dates of rescission of what would probably be the actual rates, but should include the best evidence available of those actual rates at the time of trial, in accordance with the fundamental principles of evidence that the best evidence only shall be accepted by the Court.

The decisions of the learned Judicial Commissioner should, therefore, in my opinion, be affirmed and these appeals dismissed without order as to costs, as the main question was not contested by the nominal respondents in this Court.

BY THE COURT.—As we differ in opinion as to the decision in these appeals, the orders of the lower Court are affirmed under section 9B, clause 2, of the Sind Courts Act, all parties paying their own costs of these appeals, subject to any application that the parties may make under the proviso to that section to the Judicial Commissioner.

Lower Court's orders affirmed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 7 OF 1913-14 OF MEERUT DISTRICT.

March 17, 1914.

Present:—Sir Duncan Colvin Baillie, S. M., and Mr. Tweedy, J. M.

MAREY—DEFENDANT—APPELLANT

versus

Sardar UMRAO SINGH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Kabuliat *never acted on, effect of—Land, rights and liabilities as regards, when not affected by* kabuliat *in respect of it.*

A *kabuliat* never given effect to does not affect the rights and liabilities otherwise existing with regard to the land mentioned in it.

Appeal from the decree of the Commissioner, Meerut, dated 1st September 1913, reversing that of the Assistant Collector, Meerut, dated 28th March 1913.

Mr. *Mohammad Haidar Hussain*, for the Appellant.

Babu *Mangal Rai*, for the Respondents.

JUDGMENT.

BAILLIE, S. M. (*March 3rd*, 1914).—Appellant in this case, according to the evidence, held the land in question for a period of 13 years. It is claimed by the respondents that he has not got occupancy rights, because he was from 1309 to 1315 holding under a *kabuliat* for seven years executed by his brother, Hargyan. The names of both brothers before the execution of the *kabuliat* were entered in the papers.

The first question for decision is whether the present appellant is bound by the *kabuliat* executed by his brother. A similar question was decided by Messrs. Tweedy and Reynolds in a judgment of which there is a copy on the file. The finding was that where it is not shown that the tenure had its origin in the *kabuliat*, it could not be considered that the brother of the person who executed the *kabuliat* was bound by it.

In the present case, moreover, there are facts not noticed by the Commissioner which very greatly support the claim of the appellant. The area now in suit is 38 *bighas* 12 *biswas* rented at Rs. 197. The *kabuliat* was for an area of 63 *bighas* 1 *biswa* at a rent of Rs. 410. There has not been produced in Court any vestige of evidence to show that the two brothers ever held the 63 *bighas* entered in the *kabuliat* or paid the rent mentioned in it.

It is in these circumstances clearly impossible to assume that the appellant ever held under the *kabuliat* in question, or that the *kabuliat* was in fact given effect to.

I would allow this appeal, cancel the order of the Commissioner and restore that of the Court of first instance, with costs on respondents throughout.

TWEEDY, J. M.—I cannot find the copy alluded to of a judgment by Mr. Reynolds and myself and I cannot agree with the opinion which it is said to contain, that when the tenure has not its origin in the *kabuliat* the brother of the person who executed is not bound by it.

It seems to me to be sound law and common sense that when one member of a family takes a written lease from the *zemindar* in which he alone is entered as a tenant and is alone responsible for the rent, one of two things must happen. The other members of the family are not tenants at all during the period of the lease or they are governed by its terms. There is no third course possible. As a seven years' registered lease is excluded from the 12 years necessary to acquire a right of occupancy, this lease, if acted on, is fatal not only to any claim which Hargyan might make but to his brother's claim also.

But it is argued that the *kabuliat* was never acted on and I agree that there is ample evidence of this in the difference of area and the difference of rent. Under these circumstances it must be presumed that the tenancy of Marey, which undoubtedly existed in 1308, continued right on.

I agree to the proposed order.

Appeal allowed.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 116 OF 1911.

October 20, 1914.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Spencer.

E. N. VENKOBA ROW—PLAINTIFF—APPELLANT

versus

THUNIA NATARAJA CHETTIAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Adoption, validity of—Question involved in suit to recover immoveable property not raised—Res judicata—Limitation Act (IX of 1871), Sch. II, Art. 129.

Where in a suit instituted against a widow to recover possession of immoveable property, a ground of defence as to the invalidity of an adoption was open to her but was not raised, she must be held to have raised it and the question as to adoption deemed to be *res judicata* in any subsequent suit between the reversioners to her husband's estate and the alienees.

Adavi Suryaprakasa Rao v *Nidamarty Gangaraju*, 4 Ind. Cas. 386; 7 M. L. T. 236; 33 M. 228; (1910) M. W. N. 251, referred to.

Under the Limitation Act of 1871 it was imperative that a suit for the recovery of immoveable property which involved the displacement of an adoption should be filed within 12 years from the date of the adoption or at the option of the plaintiff, from the death of the adoptive father.

Where, therefore, a suit to set aside an adoption open to a widow is not brought within the period of limitation, a reversioner or any other member interested to dispute the validity of the adoption cannot file a suit after the period of limitation is over, as the right of suit cannot be revived.

Jagadamba Chowdhrani v. *Dakhina Mohan Roy Chaudhri*, 13 C. 308; 13 I. A. 84; 10 Ind. Jur 307; 4 Sar. P. C. J. 715; *Mohesh Narain Munshi* v. *Taruck Nath Moitra*, 20 C. 487; 20 I. A. 30; *Ratnamasori* v. *Atilandammal*, 26 M. 291; 13 M. L. J. 27; *Srinath Gangopadhya* v. *Mahesh Chandra Roy*, 4 B. L. R. (F. B.) 3, 12 W. R. (F. B.) 14, *Appasami Odayar* v. *Subramanya Odayar*, 12 M. 26 (P. C.); 15 I. A. 167; 5 Sar P. C. J. 255; 12 Ind. Jur 370, referred.

Appeal against the decree of the Subordinate Judge's Court of Mayavaram at Kumbakonam, in Original Suit No. 3 of 1910.

Mr. *T. R. Venkatarama Sastri*, for the Appellant.

Messrs. *T. R. Ramachandra Aiyar*, *T. R. Krishnaswami Aiyar*, *S. Srinivasa Aiyangar* and *G. S. Ramachandra Aiyar*, for the Respondents.

JUDGMENT.

SANKARAN NAIR, J.—This is an appeal from the decree of the Subordinate Judge of Mayavaram, dismissing the plaintiff's suit for the recovery of the properties which belonged to his maternal grandfather, one Gopala Row. Plaintiff's case is that Gopala Row and Srinivasa Row were two undivided brothers; that Srinivasa Row having died leaving behind him a widow named Kapila Bai, Gopala Row became solely entitled to the property and he (Gopala Row) died leaving his widow Kaveri Bai and a daughter Ammani Bai; that Ammani Bai predeceased her mother and that Kaveri Bai died in 1896. The plaintiff claims to be entitled to the properties left by Gopala Row. He says the properties in Schedules A and B attached to the plaint were left by Gopala Row at his death. The properties in Schedule C are said to have been purchased by his widow, Kaveri Bai. Some of the properties are now in the possession of certain alienees and the plaintiff says that these alienations are not binding on him. The Subordinate Judge held that the properties in Schedule B never belonged to Gopala Row, and as to the properties in Schedules A and C the plaintiff's claim is barred. The plaintiff appeals.

We have no hesitation in holding that it has not been proved that the properties in Schedule B ever belonged to Gopala Row or that they were inherited by Kaveri Bai,

The properties are now in the possession of defendants Nos. 21 and 22. Their ancestors, Srinivasa Row and Rama Row, acquired these properties by purchase from Chenga Bai and Appaji Row. In one of their title-deeds, Exhibit XVII, it is recited that Chenga Bai got the property by partition. That must have been a partition between her husband and his brothers. Appaji Row is one of those brothers. These recitals show that the plaintiff's case that Chenga Bai must have got the property for her maintenance by an arrangement with Kaveri Bai is not true. We accordingly confirm the Subordinate Judge's finding and dismiss the appeal so far as the properties in Schedule B are concerned.

We will next consider whether the plaintiff has proved his title to the property in Schedule C. These properties did not belong to Gopala Row at the time of his death. The Subordinate Judge finds, and we see no reason not to accept that finding, that they were purchased by Raghunatha Row, who was adopted by Kapila Bai after Srinivasa Row's death, mainly out of the ancestral funds in his hands. The plaintiff's case is that the adoption of Raghunatha Row by Kapila Bai is invalid, because the property had already vested in Gopala Row and after him in his widow Kaveri Bai, and that Kapila Bai, the widow of Srinivasa Row, was, therefore, not entitled to make any adoption to her husband, Srinivasa Row, according to the decision in *Adivi Suryaprakasa Row* v. *Nidamarty Gangaraju* (1). Assuming that the adoption of Raghunatha Row is invalid in law, the Subordinate Judge holds that that question is now *res judicata* and it is not open to the plaintiff to deny the validity of that adoption. The facts on which that plea has to be decided are briefly these. In 1870 Raghunatha Row entered into an arrangement with Kaveri Bai by which he reserved a moiety, that is, the lands in Schedule C for himself and he gave the other moiety of the lands to Kaveri Bai. After his death his natural son, Lakshmana Row, brought Original Suit No. 48 of 1893 for the recovery of the moiety, that is the lands in Schedule C which Raghunatha Row had reserved for himself and which he had entrusted to Kaveri Bai. In that case the question was raised, whether Raghunatha Row's adoption is true and whether it is invalid. It was found by the Subordinate Judge that the adoption was true in fact; that all the relations including Kaveri Bai treated him all along as a validly adopted son of Srinivasa Row and Kapila Bai; that Raghunatha Row had lost all his rights in his natural family; that he took no share in his natural father's property; and that when his natural father and mother died he took no part in the funeral ceremonies, but performed the *sradhas* only of his adoptive father, and that on his own death the members of his natural family did not perform his funeral ceremonies. He held that the grounds alleged for setting aside the adoption were not good in law and upheld the adoption. He further held that Kaveri Bai appeared to be *also* estopped by her conduct from questioning the validity of such adoption. He accordingly directed the defendants including Kaveri Bai, to surrender possession of the properties to Lakshmana Row. The question is whether the plaintiff is barred by these proceedings from claiming the C Schedule properties. It is contended that there is no bar, because Kaveri Bai was held estopped on account of her conduct from disputing the validity of the adoption, and, therefore, it cannot be said that she represented the estate of Gopala Row, that is to say, the reversioners who might become entitled to the property. It will be observed from the above extract that the estoppel was only an additional ground for the Judge's decision. That she, as the widow in possession of the estate, was competent to represent it there is no doubt. If she had precluded herself from raising the contentions which are now put forward on behalf of the plaintiff, then it might be that the plaintiff's claim would not be barred. But she raised all the contentions which she thought necessary to put forward, and it was open to her to have raised the questions which are now put forward by the plaintiff in order to impeach the validity of the adoption. It is also to be observed that the reasons given for the estoppel were reasons applicable not only to Kaveri Bai but also to all the members of the family who treated Raghunatha Row as a member of their family.

It is next contended that the plaintiff is

(1) 4 Ind. Cas. 386; 33 M. 228; 7 M.L.T. 236; (1910) M. W. N. 251.

in any event entitled to the properties in A Schedule. These properties were in the possession of Kaveri Bai. She alienated them to one Subramanian Chetti in February 1855. Raghunatha Row, the adopted son, brought a suit, Original Suit No. 75 of 1866, for the recovery of the property from the alienee. He received Rs. 5,000 in satisfaction of his claim and allowed the suit to be dismissed. It is partly with the money so received and partly with other money which belonged to the estate that Raghunatha Row, according to the Subordinate Judge, purchased the properties in Schedule C. It is contended before us that as the plaintiff keeps possession of a moiety of the properties in Schedule C, it is not open to him to deny the right of those who paid that money to uphold the alienation of the properties in Schedule A. In answer it is contended by the appellant's Pleader that this point was not raised in the lower Court and though C Schedule property is now found to have been purchased in Raghunatha Row's name, there was no issue raised on the question as to the source of the purchase-money. This, no doubt, is so. I accordingly proceed to consider the ground on which the Subordinate Judge dismissed the plaintiff's claim.

It has been decided by the Judicial Committee of the Privy Council in *Jagadamba Chowdhrani* v. *Dakhina Mohun Roy Chaudhri* (2) and in *Mohesh Narain Munshi* v. *Taruck Nath Moitra* (3), as explained by the Full Bench of this Court in *Ratnamasari* v. *Akilandammal* (4), that under the Limitation Act of 1871 it was imperative that a suit for recovery of immoveable property which involved the displacing of an adoption should be filed within twelve years from the date of adoption, or, at the option of the plaintiff, from the death of the adoptive father. In this case that period expired in 1867 and according to the Act of 1871 the suit should have been filed before 1873. The right of the widow or the plaintiff's mother, Ammani Bai, to set aside the adoption, therefore, became barred in 1873 and taking into consideration the facts found, that Raghunatha Row was treated as a member of the family by all the members thereof, it seems to be clear that after 1873 it was not open to the widow, or reversioners or any other member interested to dispute the validity of the adoption.

It is unnecessary in this view to consider what the result would be if the case was governed by the Limitation Act of 1877 or if Raghunatha Row had not, in fact, been adopted. For the plaintiff to succeed it is necessary for him to displace Raghunatha Row's adoption and the ruling of the Privy Council as explained by the Full Bench in *Ratnamasari* v. *Akilandammal* (4) is, therefore, applicable. I am, therefore, of opinion that the plaintiff's claim to this property also is barred by limitation.

The appeal is dismissed with costs.

SPENCER, J.—On the question of limitation in respect of the A Schedule properities, while agreeing that plaintiff's claim is time-barred, I think that it is unnecessary to consider this case in the light of the Articles of the Limitation Act of 1871, seeing that the right of the plaintiff in this suit and his predecessors-in-title had been already extinguished before that Act came into force in 1873.

Of the two Privy Council decisions referred to by the Subordinate Judge in support of his finding on the 15th issue, *Jagadamba Chowdhrani* v. *Dakhina Mohun Roy Chaudhri* (2) and *Mohesh Narain Munshi* v. *Taruck Nath Moitra* (3), in the *Jagadamba's* case (2) Act IX of 1871 was the Act to be considered, because as stated at page 317 that was the Limitation Act in force in 1873 and 1874 when the suits concerned in that case were commenced; and in the latter it was observed at page 495 that the Limitation Act of 1871 applied to the time when the period of limitation was running.

Here the period of 12 years from the date of adoption which was in 1855, expired in 1867.

The Act in force in 1867 was Act XIV of 1859, which allowed six years from the date of adoption for suits to declare an adoption invalid and 12 years under clause 12 of section 1 from the date of adoption in suits for the recovery of immoveable property which involved the validity of an

(2) 13 C. 308; 13 I. A. 84; 10 Ind. Jur. 307; 4 Sar. P. C. J. 715.
(3) 20 C. 487; 20 I. A. 30.
(4) 26 M. 291; 13 M. L. J. 27.

adoption. Vide *Ratnamasari* v. *Akilandammal* (4); *Srinath Gangopadhya* v. *Mahesh Chandra Roy* (5).

If in 1867 the period of limitation expired, it becomes unnecessary to consider the effect of the later Acts for limitation of suits, as the right of suit could not be revived by them. Vide *Appasami Odayar* v. *Subramanya Odayar* (6).

On all other points and on the general result of this appeal, I agree with my learned brother.

Appeal dismissed.

(5) 4 B. L. R. (F. B.) 3; 12 W. R. (F. B.) 14.
(6) 12 M. 26 at p. 33; 15 I. A. 167; 5 Sar. P. C. J. 255; 12 Ind. Jur. 370.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 130 OF 1913

December 22, 1914.

Present:—Sir Charles Fox, KT., Chief Judge, and Justice Sir Henry Hartnoll.

U WISAYA—APPELLANT

versus

U ZAW TA—RESPONDENT.

Jurisdiction, Ecclesiastical and Civil, in Lower Burma—Civil Procedure Code (Act V of 1908), s. 9— Kathanabaing.

The Civil Courts in Lower Burma have jurisdiction to entertain and try suits of Ecclesiastical nature.

The Government has recognised the authority of *kathanabaing* in Upper Burma, but not in Lower Burma.

Mr. *May Oung*, for the Appellant.

Mr. *Ng Po Han*, for the Respondent.

JUDGMENT.—The suit is one between two Burman Buddhist priests. The appellant sued the respondent to recover possession of certain lands of which he has been in possession for a considerable number of years and for possession of certain religious manuscripts. The lands appear to be lands that have been occupied by members of the Buddhist priesthood for a long period of years, and the points at issue between the parties appear to involve points of Burmese Buddhist Ecclesiastical Law. The suit has been dismissed on the ground that Civil Courts should abstain from deciding points which fall within the sphere of Ecclesiastical jurisdiction. In appeal it is urged that there are no Ecclesiastical Courts in Lower Burma and that the case is triable by a Civil Court. In Upper Burma it has been ruled that the Civil Courts are bound by the decisions of the Buddhist Ecclesiastical Authorities in matters within their competence and that they should also abstain from deciding points which fall within the sphere of ecclesiastical jurisdiction. It has been brought to our notice that Government has recognised the authority of the Taung Win Sayadaw as *kathanabaing* of Upper Burma (Burma Gazette, General Deparment, Notification No. 255 of the 22nd October 1903, page 715); but Government has not recognised the authority of the *kathanabaing* in Lower Burma as appears from the record of the proceedings of the Legislative Council on the 6th April last (Burma Gazette, Part III, pages 72, 73). There are, therefore, no Ecclesiastical Authorities in Lower Burma. Section 9 of the Civil Procedure Code enacts that the Courts shall, subject to the provisions herein contained, have jurisdiction to try all suits of a civil nature excepting suits of which their cognisance is either expressly or impliedly barred. This is a suit of a civil nature. It is a claim to certain lands and manuscripts.

The Civil Courts, in our opinion, clearly have jurisdiction to decide the suit and should do so. The appeal is allowed with costs and the decree of the District Court is reversed. The District Court will proceed to decide the suit on its merits, and the costs in that Court will follow the final result. The appellant will receive a certificate under section 13 of the Court Fees Act authorising him to receive back from the Collector the full amount of fee paid on the memorandum of appeal.

Appeal allowed.

FAZL KHAN v. KARAM BEGAM.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 643 OF 1912.

July 27, 1914.

Present:—Mr. Justice Chevis and Mr. Justice Shadi Lal.

FAZL KHAN—DEFENDANT—APPELLANT

versus

Musammat KARAM BEGAM—PLAINTIFF—RESPONDENT.

Muhammadan Law—Dower fixed at time of marriage—Dispute as to amount fixed—Wife unable to prove amount asserted by her—Decree according to admission of husband—Customary dower, when allowed—Verbal contract of dower—Evidence—Procedure.

Where the wife alleges that her dower was fixed at the time of marriage, but she cannot prove the amount asserted by her, the Court is bound to pass a decree for the sum admitted by the defendant, inasmuch as the wife is entitled to the customary dower only in cases where admittedly no dower was specified at the time of the marriage.

The rules of procedure and evidence laid down by the Muhammadan Law to be followed in deciding disputes as to dower between the husband and the wife which are at variance with the Statute Law on the subject, cannot be followed by Courts in British India.

A verbal contract for a dower of a large amount can be admitted only if proved by most clear and satisfactory evidence.

Shah Nujmooddeen Ahmed v. *Beebee Hosseinee*, 4 W. R. 110, referred to.

First appeal from the decree of the District Judge, Attock, dated the 28th February 1912.

Mr. *Fasal-i-Hussain*, for the Appellant.

Bhagat *Gobind Das*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by *Musammat* Karam Begam, who is respondent in this Court against her husband, Fazl Khan, appellant, for recovery of her prompt dower. The allegations in the plaint are that the plaintiff's dower was fixed at the time of the marriage, that the amount which the defendant agreed to pay was Rs. 10,000 and 100 gold *mohurs*, being of the value of Rs. 25 each, that half of this amount was prompt dower and that the plaintiff is, therefore, entitled to Rs. 6,250. The defendant pleaded, *inter alia*, that the dower was fixed at Rs. 100 and one gold *mohur* of the value of Rs. 18 and that the prompt dower was, therefore, Rs. 59, which the defendant was willing to deposit in Court. The Court of first instance held that the plaintiff had failed to prove that the amount mentioned in the plaint had been fixed as plaintiff's dower and, after inquiry by a Commissioner into the amount of *mehr-ul-misl*, or customary dower, fixed it at Rs. 3,000 and consequently passed a decree for Rs. 1,500 on account of prompt dower.

The defendant has preferred a first appeal from this decree and the point pressed before us is that the District Judge had, on the pleadings, no authority to go into the question of customary dower.

Before dealing with this contention, it is necessary to decide the question raised by Mr. Gobind Das for the respondent in support of the decree of the lower Court that the evidence on the record proves that the amount stated in the plaint was agreed upon at the time of the marriage. After giving our careful consideration to the arguments of the learned Pleader, we have no hesitation in concurring with the District Judge that the plaintiff's allegation has not been established. There is no document in support of it, and the oral evidence is meagre and interested and it is contradicted by the witnesses examined by the Commissioner.

A verbal contract for a dower of a large sum can be admitted only if proved by most clear and satisfactory evidence [*Shah Nujmooddeen Ahmed* v. *Beebee Hosseinee* (1)], and evidence of this character is wholly wanting in the present case. On the material before us, we are unable to come to a finding in favour of the plaintiff, and must accept the view of the District Judge that the amount of dower as stated by the plaintiff has not been proved.

We now come to the real point in the case, *viz.*, on the allegations in the plaint is the Court authorized to determine the amount of *mehr-ul-misl* and pass a decree for the sum so determined? As stated already, the plaintiff clearly alleged in the plaint, and this allegation was repeated in the statement of the plaintiff's agent before the settlement of issues, that the dower had been fixed, and on this point the defendant was at one with the plaintiff. Both the parties were agreed that this was a case of fixed dower and no issue, therefore, arose as to whether there was an express contract between the parties specifying some dower. The dispute

(1) 4 W. R. 110.

was confined to the *amount* said to have been fixed, each party stating its own figure.

Now, Muhammaden Law lays down the rule that, if no dower is specified at the time of the marriage, the wife is entitled to a proper dower, *i.e.*, to an amount to be fixed by the Court after taking evidence as to what has usually been settled on other female members of the wife's father's family. Can we in this case say that no dower was specified? We think not. When it is admitted that the dower was stipulated for but the amount alleged by the plaintiff has not been proved, then it is clearly not a case in which no dower was specified.

The only authority which has a direct bearing upon the point before us is a judgment of the Calcutta High Court reported as *Shah Nujmoodeen Ahmed* v. *Beebee Hosseinee* (1). In that case, the plaintiff failed to prove her allegation that the dower promised by the husband was Rs. 65,000, and the High Court, though being of opinion that the allegation of the defendant that the amount was fixed at Rs. 1,000 was not established, passed a decree for that sum simply because it was admitted by the defendant. As regards the point whether the Court can pass a decree for customary dower, the learned Judges observed that, as the case was put on a distinct contract, the Court was right in trying it on that issue only, and they did not therefore, determine the amount to which the plaintiff might have been entitled with reference to the customary dower. Mr. Gobind Das has not been able to show any reason why that judgment, which in our opinion contains a correct exposition of the law, should not be followed. He has referred us to certain passages in the Hidaya, which lay down rules of procedure and evidence to be followed in deciding disputes as to dower between the husband and the wife. But these rules, which are at variance with the Statute Law on the subject, cannot, it is manifest, be followed by Courts in British India.

The present case is undoubtedly based upon a contract entered into between the husband and the wife, but the term which deals with the amount of dower has not been proved. A finding against the plaintiff as to her allegation about the sum stipulated to be paid does not lead to the conclusion that no contract of dower was entered into or that no sum was fixed. The contract is there, and in the event of the plaintiff not proving the amount asserted by her the Court must, according to the rules of procedure, pass a decree for the sum admitted by the defendant. In this view of the law, it appears to us that the discussion as to customary dower, which could only be allowed if there were no express contract, is beside the point and we, therefore, consider it unnecessary to deal with it.

For the aforesaid reasons, we accept the appeal of the defendant and, in modification of the decree of the District Judge, we pass a decree for Rs. 59, the sum amditted by the defendant. Having regard to all the circumstances of the case, we direct that the parties bear their own costs in all Courts.

Appeal accepted.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 1682 OF 1910.
May 6, 1913.
Present:—Mr. Justice Newbould and Mr. Justice Roy.

DOYAMOYEE CHOWDHURANI AND OTHERS—DEFENDANTS—APPELLANTS
versus
NARENDRA KISHORE ROY AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Land Revenue Sales Act (XI of 1859), s. 37—Taluk in existence from before Permanent Settlement, division of—Portion of such taluk transferred—Protection of such portion.

When a portion of a *taluk* existing from before the Permanent Settlement is transferred and it is subsequently held in proportionate *jama* under a name different from the original *taluk*, but the subsequent transfer and descent thereof can be traced from the original *taluk*, the portion so transferred is also protected under section 37 of Act XI of 1859.

What the effect of the division of a *taluk* is must depend upon the intention of the parties.

Second appeal from a decision of the Sub-Judge of Noakhali, dated 24th May 1910, reversing that of the Munsif, Second Court, at Feni, dated 28th June 1909.

Babus *Dhirendra Lal Kastagir* and *Probodh Kumar Das*, for the Appellants.

Babus *Akhoy Kumar Banerjee*, for the Respondents.

JANGLI MAL *v.* PIONEER FLOUR MILLS.

JUDGMENT.—This appeal arises out of a suit for *khas* possession brought by an auction-purchaser at a revenue sale. It is now admitted that the land which is the subject of the suit formerly appertained to *Taluk* Rahmat Rafi, which was in existence at the time of the Permanent Settlement. From Exhibit B it appears that in the year 1222 B. S. this *taluk* was divided into two. A new *taluk* called Radha Benode was created and the other portion of the *taluk* was still called Rahmt Rafi. The rent of the old *taluk* was proportionately assessed on these two *taluks*. The land in this suit appertains to the portion that was allotted to *Taluk* Radha Benode. The Court of first instance held that this *taluk* existed from the time of the Permanent Settlement and dismissed the plaintiffs' suit for *khas* possession, on the ground that the defendants were protected by the provisions of section 37 of Act XI of 1859. On appeal the learned Subordinate Judge held that the *Taluk* Radha Benode must be held not to have been in existence before the division of the old *taluk* in 1222, and as it was not in existence from the time of the Permanent Settlement the plaintiff was entitled to *khas* possession. The lower Appellate Court, therefore, decreed the suit.

On behalf of the appellants the case of *Nobendra Kishore Roy* v. *Durga Charan Chowdhury* (1) has been cited. The facts of that case closely resemble the facts of the present case. It was there held that when a portion of a *taluk* existing from before the Permanent Settlement was transferred and the said portion was subsequently held in proportionate *jama* under a name different from the original *taluk*, but the subsequent transfer and descent thereof can be traced from the original *taluk*, the portion so transferred is also protected under section 37 of Act XI of 1859. That ruling, in our opinion, is binding on us as regards the decision of the present case.

For the respondents it is contended that the finding of the learned Subordinate Judge is a finding of fact with which we cannot interfere in second appeal. We are unable to accept this contention. As has been pointed out in the case of *Mulluk Chand Das* v *Satish Chandra Das* (2) what the effect of the division of a *taluk* is must depend upon the intention of the parties. Had the learned Subordinate Judge come to a finding that the intention of the parties in 1222 was that the division of the old *taluk* changed the incidents of the tenure we should be bound by such a finding, But as he has come to no finding as to the intention of the parties we are not unable in second appeal to form our own conclusion, and the conclusion we arrive at is that judging from the circumstances of the case there was no intention to alter the condition of the tenure.

We accordingly decree this appeal and reverse the finding and decree of the lower Appellate Court and restore those of the Court of first instance.

The appellants are entitled to their costs in all Courts.

Appeal decreed.

(1) 10 Ind. Cas. 287, 15 C. W. N. 515.

(2) 3 Ind. Cas. 306, 11 C. L. J. 56, 14 C. W. N. 335.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 463 OF 1911

July 30, 1914.

Present:—Sir Alfred Kensington, KT., Chief Judge, and Mr. Justice Chevis.

JANGLI MAL—PLAINTIFF—APPELLANT

versus

PIONEER FLOUR MILLS—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), ss. 3, 6 (e), 130—Breach of contract—Damages—Insolvent estate, transferee from purchaser of, right of, to sue for damages—Transfer of right to sue—Actionable claim.

A transferee from the purchaser of rights in an insolvent estate from the Receiver, cannot enforce a claim for damages on an unfulfilled contract in favour of the insolvent.

A right to sue for damages for breach of contract is not an actionable claim and cannot be transferred.

First appeal from the decree of the District Judge, Lahore, dated the 7th February 1911.

The Hon'ble Mr. *Shadi Lal*, R. B., for the Appellant.

Rai Bahadur Pandit *Shiv Narain* and Lala *Dhanpat Rai*, for the Respondent.

JUDGMENT.—The facts of this case are very simple. In August 1907 the defendant Company of Lahore contracted for delivery of various large consignments of flour to a Delhi merchant, named Shambhu Nath,

There were some deliveries and the contract then fell through. The defendant's explanation, not so far accepted by the plaintiff, is that the contract required delivery at Lahore within fifteen days, and that Shambhu Nath was bound to make all arrangements for freight to Delhi; that he failed to make such arrangements and consequently did not take delivery; and that the defendant ceased, therefore, to be liable for Shambhu Nath's losses, if any, through non-delivery in time.

Shambhu Nath took no action for recovery of damages on breach of contract, and became insolvent in 1909. In August 1910 the Receiver of the insolvent's estate at Delhi sold Shambhu Nath's rights under the contract to one Hardwari Lal for Rs. 1,000, and he re-sold immediately to the present plaintiff for the same sum filing the present speculative suit for damages, about Rs. 12,000, shortly afterwards.

The District Judge has dismissed the suit, finding that it did not lie. He referred to various rulings, but not to the one which is exactly in point, contained in *Abu Mahomed* v. *Satish Chandra Chunder* (1). Counsel for the plaintiff-appellant is unable to dispute the applicability of the ruling now quoted, and has, therefore, confined his argument to an attempt to show that the law has not been there laid down correctly so far as Indian Courts are concerned.

The circumstances of the Calcutta case are precisely similar, in that the plaintiff there, as here, was a transferee from the purchaser of rights in an insolvent estate from the Official Assignee of Bombay through an intermediate purchaser and was seeking to enforce a claim for damages on an unfulfilled contract. The learned Judges discussed the matter with reference to the terms of sections 3, 6 (*e*), and 130 of the Transfer of Property Act, IV of 1882, and though this Act is not in force in the Punjab, we consider that we should follow its provisions in a case like the present not otherwise specifically covered by law.

Put shortly, plaintiff's difficulty is that his suit does not embrace an "actionable claim" to debt as defined in section 3 of the Act, inasmuch as by section 6 (*e*) a mere right to sue cannot be transferred. Section 130 takes the matter no further, as it merely prescribes the procedure by which transfer of an actionable claim shall be effected, without fresh definition of the crucial words "actionable claim." In every case of the kind it has, therefore, to be determined whether the claim is actionable or not. We have no hesitation in saying that, in the absence of other authority, we should follow the learned Judges of Calcutta, and that we must, therefore, hold the present claim to be not actionable, because it is expressly prohibited by section 6 (*e*).

We are not impressed by Counsel's argument by analogy from the provision of the Insolvency Act constituting a Receiver in insolvency an assignee with right to sue. The law there gives statutory permission to the Receiver by section 120 (*d*) of the Insolvency Act, with an express limitation that even he can only sue as assignee with leave of the Court. The analogy, such as it may be, cannot hold good in the case of the present plaintiff.

We observe further that the present case is even stronger than that discussed in the Calcutta ruling, as here there has been delay of over three years before instituting the suit for damages. That, however, touches plaintiff's case on the merits, and the point need not be discussed in view of our finding that he has no right to sue at all.

The plaintiff's appeal is accordingly dismissed with costs to the defendant-respondent.

Appeal dismissed.

(1) 1 Ind. Cas. 827; 36 C. 345; 13 C. W. N. 364.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 40 OF 1913.

November 13, 1914.

Present:—Mr. Justice Kumaraswami Sastri.

M. NATESA MOOPPAN—DEFENDANT—PETITIONER

versus

K. R. RAMACHANDRA IYER—PLAINTIFF—RESPONDENT.

Legal Practitioners Act (XVIII of 1879), s. 28—Promissory note for out-fees disbursed by Pleader, suit on—Note not filed in Court—Dismissal of suit no bar to fresh suit on original cause of action—Note operates as acknowledgment of liability—Interest at stipulated rate not recoverable.

NATESA MOOPPAN *v.* RAMACHANDRA IYER.

A promissory note obtained by a Pleader from a client in respect of out-fees disbursed by him is invalid, if not filed in Court under section 28 of the Legal Practitioners Act, XVIII of 1879, but that does not estop the Pleader from obtaining a decree for the sums actually spent by him

Subba Pillay v. *Ramaswami Aiyer*, 27 M. 512; 14 M. L. J. 274, followed.

Krishnasami v *Kesava*, 14 M 68, *Anantayya* v. *Padmayya*, 16 M 278; 2 M. L J. 247, followed.

A promissory note, even though it cannot be sued upon on account of not having been filed in Court, may still operate as an acknowledgment of liability and the dismissal of a suit on the note does not bar a fresh suit on the original cause of action, but interest at the rate specified in the note cannot be recovered.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the District Munsif of Tanjore, in Small Cause Suit No. 1900 of 1912.

Mr. *V. Rathnasamanadhan*, for the Petitioner.

Mr. *G. S. Ramachandra Aiyar*, for the Respondent.

JUDGMENT.—The defendant is the petitioner. The plaintiff, who is a Vakil practising in Tanjore, sued to recover Rs. 136 with costs and further interest alleged to be due on a promissory note dated 28th July 1909 for Rs. 100 executed by the defendant in his favour. The defendant, while admitting execution, pleaded that there was no consideration for the promissory note, that it was obtained from him by the exercise of undue influence and that the note is void as the plaintiff did not file it in Court as required by section 28 of the Legal Practitioners Act. It was also alleged that the suit was barred under Order II, rule 2, Civil Procedure Code, as the plaintiff had obtained another promissory note in respect of fees due to him and had not included this claim in the suit (Original Suit No. 351 of 1912) filed on that promissory-note. The District Munsif found against the defendant and passed a decree for the amount. There is no evidence to show that the promissory note was either without consideration or was executed owing to the exercise of undue influence. The defendant examined himself and two witnesses. His first witness, who is plaintiff's *gumashta*, states that the plaintiff had paid Rs. 60 which was payable b the defendant to the Commissioner an that the promissory note was executed in respect of that sum and also of other sundry items due to the plaintiff. The defendant, who examined himself as his second witness, says that the plaintiff was paying *batta*, out-fees and all charges in connection with the suit which he (defendant) filed and in which he had engaged the services of the plaintiff. He states that the plaintiff told him that Commission fees had to be paid and that he executed the note at plaintiff's request. Defendant's third witness says nothing about the promissory note. The plaintiff deposes that Exhibit A was executed in consideration of Rs. 60 paid by him as Commissioner's fees, that out-fees to the extent of Rs. 15 or 20 had been spent by him in respect of *batta*, etc., and that the defendant had also borrowed from him Rs. 15 or 20 in cash. There is, therefore, ample evidence to show that the promissory note was executed for consideration, and I agree with the District Munsif in holding that the promissory note was executed by the defendant to secure moneys actually due by him to the plaintiff.

It has been argued by the Counsel for the petitioner that plaintiff has not produced any accounts and that consequently his case ought to be disbelieved. I cannot help remarking that the plaintiff ought to have kept proper accounts and that professional gentlemen who do not keep accounts lay themselves open to a great deal of misconception and suspicion, however honest they may be: but in the present case the defendant admits that the plaintiff was paying out-fees payable by him. His statement that the note was executed by the exercise of undue influence and without consideration is false and, under these circumstances, I do not think that the fact that the plaintiff did not keep proper accounts exonerates the defendant from liability to pay the debt actually due.

The next question is as regards the validity of the promissory note, having regard to section 28 of the Legal Practitioners Act. It has been held in *Subba Pillai* v. *Ramasami Aiyar* (1) that a promissory note obtained by a Pleader in respect of out-fees disbursed by him fell within section 28 of the Legal Practitioners Act, as being an agreement respecting the amount of

(1) 27 M. 512; 14 M. L. J. 274.

payment for charges incurred or disbursements made by the Pleader in respect of the suit in which he had been retained, and that the note was invalid if it was not filed in Court. In the present case it is admitted that the note was not filed in Court and, therefore, the note cannot be sued on. This, however, would not deter the plaintiff from getting a decree in respect of the sums actually spent by him, and in the case above cited a decree was passed for the amount so spent notwithstanding the fact that the promissory note was invalid. In *Krishnasami* v. *Kesava* (2) it was held that the fact that the promissory note which was sued upon was invalid owing to its not having been filed in Court as required by the Legal Practitioners Act, did not prevent the Court from decreeing the sum which was reasonably due for fees. A similar view was taken in *Anantayya* v. *Padmayya* (3).

The District Munsif found on the evidence that the sum of Rs. 100 claimed by the plaintiff was actually due by the defendant, and I do not think he erred in passing a decree for the amount. It is argued that the claim to recover moneys alloged to be due would be barred by limitation, as the suit on the promissory note was filed on the last day allowed by the law of limitation. The plea of limitation was not raised in the lower Court and in the present case it involves a mixed question of law and fact, as the dates when the payments for out-fees were made do not appear. The question will also arise as to when the proceedings in the suit in which plaintiff was engaged as a Vakil terminated.

There is nothing to prevent the promissory note from operating as an acknowledgment of liability, even though it may not be sued upon owing to its not having been filed in Court as required by the Legal Practitioners Act.

I do not see how it can be said that the present suit is barred by rule 2, Order II, of the Civil Procedure Code. The cause of action in this suit is different from the cause of action in the previous suit and the plaintiff was not bound to join both causes of action in one suit.

(2) 14 M. 63.
(3) 16 M. 278; 2 M. L. J. 247.

I am, however, of opinion that the District Munsif erred in allowing interest at the rate stipulated in the promissory note as the note was not enforceable. There was no contract to pay interest apart from the note and plaintiff has not proved notice in writing so as to bring the case within the Interest Act.

I modify the decree of the lower Court by passing a decree for Rs. 100 with interest from date of decree at 6 per cent. and proportionate costs throughout.

Petition partly allowed;
Decree modified.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 473 OF 1912.
June 16, 1914.

Present:—Mr. Kanhaiya Lal, A. J. C.

IMAM UDDIN—PLAINTIFF—APPELLANT
versus
Musammat MUMTAZ UNNISA—DEFENDANT RESPONDENT.

Limitation Act (IX of 1908), s. 6—Privilege, personal and not transferable—Minor, assignee from, position of

The privilege conferred by section 6 of the Limitation Act is personal and not transferable, so that an assignee from a minor, whether during the continuance or after the cessation of his disability, must file the suit within the ordinary period provided for the suit or on the date of the transfer, if the transferor's right subsists till that date

Rudra Kant Sarma Sircar v. *Nobo Kishore Sarma Biswas*, 9 C 663; 12 C L. R 209, *Mahadeo Ram Mesta Sutar* v. *Babi Chinnaji Sutar*, 20 B. 730; 4 Bom. L. R 312; *Batuk Dayal Singh* v. *Basant Ram*, A. W. N. (1901) 12, *Mahdin* v. *Ali Mirza*, 5 O. C 197 at p 208; and *Mahomed Asrad Choudhry* v. *Yakoob Ally*, 15 B. L R. 357, 24 W. R 161, referred to.

Subramanya Pandya Cholka Talavar v *Siva Subramanya Pillai*, 17 M 316 at p 342; 4 M L. J. 152, considered

Appeal from the decree of the District Judge, Hardoi, dated 27th August 1912, reversing that of the Munsif, Sandila, dated 19th December 1912.

Babu *Rudra Dat Singh*, for the Appellant.

Babu *Basdeo Lal*, for the Respondent.

JUDGMENT.—Mansab Ali was the owner of an eight-pies share in Nasir Kadauri. He died in 1891, leaving a widow *Musammat* Rasulan, two sons Babar Ali and Subhani and a daughter *Musammat* Hamidan.

IMAM UDDIN v. MUMTAZ UNNISA.

On his death mutation of names was effected in respect of a five-pies share in favour of Babar Ali and Subhani and of the remaining three-pies share in favour of *Musammat* Rasulan. Babar Ali and Subhani were minors and *Musammat* Rasulan was managing the property on their behalf. *Musammat* Rasulan had a distant cousin Himayat Ali, who, it is said, helped her in the management. At the last Settlement Himayat Ali got the three-pies share standing in the name of *Musammat* Rasulan transferred to his name. Subhani attained majority in September 1908 and sold a five-and-half-pies share in the said property to the plaintiff-appellant on the 6th May 1909. Himayat Ali meanwhile died and was succeeded by his widow, who is the defendant-respondent. The present suit was filed by the assignee of Subhani for possession of the three-pies share standing in the name of Himayat Ali, on the allegation that Himayat Ali fraudulently got his name entered in respect of that share and that the claim was within time from the date when Subhani attained majority. The defence was that Himayat Ali was in possession of the said property by purchase from Mansab Ali.

Both the Courts below found that the alleged purchase was not proved. The Court of first instance held that the possession of Himayat Ali was not adverse to the rightful claimants, because he was acting as a manager for *Musammat* Rasulan, the guardian of the minors. The lower Appellate Court, however, held that the possession of Himayat Ali was adverse both to *Musammat* Rasulan and to the predecessor-in-title of the plaintiff. That finding cannot be challenged in second appeal.

The only question for consideration is whether under the circumstances the plaintiff is entitled to the benefit of section 6 of the Indian Limitation Act in extension of the period of limitation provided for such a suit.

In *Rudra Kant Surma Sircar* v. *Nobo Kishore Surma Biswas* (1), which was followed in *Mahadev Ram Mistia Sutar* v. *Babi Chimnaji Sutar* (2), it was held that an assignee is not entitled to the privilge conferred by section 6 of the Indian Limitation Act on minors. The privilege conferred by the section is personal, except in so far that, when the disability continues up to the death of the person entitled to the privilege, his legal representative may, under clause (3) of that section, institute a suit or make an application within the same period after his death as would otherwise have been allowed from the time so prescribed. That privilege is not, however, transferable, and an assignee must file the suit either within the ordinary period provided for the suit, or on the date of the transfer if the transferor's right subsist till that date. The reason is that persons suffering from disability are exempted from the ordinary rules of limitation, because the law considers them incapable of judging properly when a suit should be filed or otherwise looking after their interests. A person who purchases or otherwise acquires their right to sue, either during the continuance of their disability, in execution of a decree against them, or from their guardians, or after the cessation of their disability, is capable of looking after the rights acquired and enforcing them within the ordinary period of limitation.

The transfer of the right of a person under disability to any property does not, as observed by Mitra, carry with it his rights, if any, to future exemption from the ordinary rule of limitation (Mitra on Limitation, Volume I, page 352). In *Baluk Dayal Singh* v. *Basant Ram* (3), Strachey, C. J., and Banerji, J., held that where a sale was effected by a minor in respect of a cause of action accruing during his minority in favour of a person who was *sui juris*, the latter was not entitled to claim exemption accorded to the minor but was subject to the ordinary rules of limitation. The above rule of law was referred to with approval by Chamier, A. J. C., in *Matadin* v. *Ali Mirza* (4). In *Subramanya Pandya Chokka Talavar* v. *Siva Subramanya Pillai* (5), Ayyar and Best, JJ., doubted the correctness of the decisions in *Rudra Kant Surma Sircar* v. *Nobo Kishore Surma Biswas* (1) and *Mahomed Asrad Chowdhry* v. *Yakoob Ally* (6), and

(1) 9 C. 663; 12 C. L. R. 209.
(2) 26 B. 730; 4 Bom. L. R. 513.
(3) A. W. N. (1901) 12.
(4) 5 O. C. 197 at p. 208.
(5) 17 M. 316 at p. 342; 4 M. L. J. 152.
(6) 15 B. L. R. 357; 24 W. R. 181.

observed that those decisions involved the apparent anomaly that a minor could not transfer his title to property, though at the date of transfer it was a subsisting interest so far as he was concerned. Adverting to this remark, Batty, J., said in *Mahadeo Ram Mesta Sutar* v. *Babi Chimnaji Sutar* (2):—"This last mentioned criticism, however, suggests the reflection that what the provision under discussion operates to discourage is the transfer by minors, not of property or title undisputedly in their possession, but only of choses in action, in respect of which it is quite intelligible the Legislature might be unwilling to provide any exceptional privilege. The difficulty which arises in such cases, as pointed out in *Rudra Kant's* case (1), may well be avoided by purchasers entering into a contract for purchase when the chose in action has been reduced into possession, instead of taking an absolute transfer of property which is not in the minor's possession. It is conceivable that the Legislature may have been unwilling to favour speculative purchases from minors of claims awaiting the result of litigation in cases where, but for the assignor's minority, those claims would have been annihilated or on the verge of annihilation by the efflux of time."

It is unnecessary, however, to go so far, for a title is subsisting on the date of the transfer and a suit is filed to enforce it on that very date; there is nothing which can deprive an assignee of what is a valid title on that date from enforcing it in his favour. Where the benefit of a privilege is claimed by an assignee for the period antecedent to the transfer in his favour, he does not claim it in his own right but only as an incident validating the transfer or as proof of the subsistence of the rights conveyed. To hold otherwise would be to deny to the person suffering from disability the right to transfer subsisting titles on attaining majority or through his guardian; and to extend the privilege beyound the date of the transfer would amount to allowing the alienee to sleep upon his rights with impunity so long as the alienor continues to be under legal disability and for three years thereafter.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 11 OF 1913-14 OF UNAO DISTRICT.

February 2, 1914.

Present:—Sir Duncan Colvin Baillie, S. M., and Mr. Tweedy, J. M.

SULTAN SINGH—DEFENDANT—APPELLANT

versus

Thakur CHANDRAPAL SINGH—PLAINTIFF—RESPONDENT.

Oudh Rent Act XXII of 1886), ss. 107G, 107H —Groves entered as "maorusi" in column "of tenants' groves"—Under-proprietary right, accrual of.

Section 107G or section 107H of the Oudh Rent Act applies to plots entered at the time of the First Regular Settlement as "*maorusi*" in the column of "tenants' groves", if the landlord fails to establish his right to resume them.

Appeal from the decree of the Commissioner, Lucknow, dated 23rd September 1913.

JUDGMENT.

TWEEDY, J. M. (*January 30th*, 1914).—The groves were entered as "*maorusi*" in 1864, and there is evidence that before the holders in 1864 there was one Gaya Din in possession. The groves were in *Patti* Bhup Singh, and I do not think (although the decree of the Civil Court of 1906 may give colour to the claim) that the original holders had proprietary rights in them. They were entered in the column of "tenants' groves", but assuming that proprietary rights do not exist we have the fact that the respondent did not prove his right to resume and that being the case, either section 107G or 107H applies. The Deputy Commissioner has, I think, rightly found that there is evidence that the plots were held rent-free for fifty years and by two successors to the original grantee and, therefore, section 107H will apply.

I would, therefore, decree the appeal with costs and restore the finding of the Deputy Commissioner.

BAILLIE, S. M.—I concur.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION NO. 153 OF 1914.

December 12, 1914.

Present:—Mr. Stuart, A. J. C., and Mr. Kanhaiya Lal, A. J. C.

JHANDESHUR—APPLICANT

versus

BAIJ NATH—OPPOSITE PARTY.

Guardians and Wards Act (VIII of 1890), ss. 11 (a) (iv), 13, 17—Civil Procedure Code (Act V of 1908), s. 115—Guardianship of person and property of minor, application for—Person, interested, not made party—Revision, right to, of person not party to case.

Although a person who is not made a party in an application made under section 10 of the Guardians and Wards Act and to whom notice ought to have been issued under section 11 (a) (i) of the Act as a person interested in the result of the application, cannot, under section 47 (a) of the Act, file an appeal from the order passed on the application, yet he can file a petition for revision of that order under section 115, Civil Procedure Code.

Sections 13 and 17 of the Guardians and Wards Act are wide enough to cover an inquiry into any of the matters which can legitimately form the subject of opposition to the grant of a certificate of guardianship to a particular individual.

Application against the order of the Additional District Judge, Lucknow, dated 28th October 1914.

Mr. *St. G. Jackson*, for the Applicant.

Babus *Bisheshwar Nath* and *Piarey Lal*, for the Opposite Party.

JUDGMENT.—This is an application for revision of an order passed by the Additional District Judge of Lucknow, appointing Baij Nath, the opposite party, a guardian of the person and property of *Musammat* Sahodra, a minor girl aged about thirteen or fourteen years. The application was originally put in as a petition of appeal, but as the applicant was no party to the order appealed from, it was treated by the learned Judicial Commissioner as a petition in revision, by his order dated the 11th November 1914.

The applicant claims to be the husband of *Musammat* Sahodra. It appears that *Musammat* Sahodra is possessed of moveable and immoveable property, valued at Rs. 35,000. Her parents died long ago. On the death of her step-mother, with whom she was living since the death of her parents, disputes arose between the maternal and paternal relations of the minor in regard to her custody and guardianship, culminating in certain criminal proceedings instituted by Baij Nath, the maternal uncle of the minor, against her paternal relations, which will be found reported in *Baij Nath* v. *Emperor* (1).

On the termination of the criminal proceedings, Baij Nath applied to the District Judge of Lucknow for his appointment as a guardian of the person and property of the minor. The girl was at that time in the custody of Jagan Nath, to whom she was made over by the trying Magistrate while the criminal proceedings were pending. Baij Nath did not mention the present applicant, Jhandeshur, among the near relations of the minor in his application under Act VIII of 1890, for his contention is that the minor was never married to him. He, however, gave in the last paragraph of his petition a brief history of the whole case, and stated that the paternal relations of the minor, with a view to usurp the property of the minor, were giving out that they had married her to Jhandeshur. The suggestion on behalf of Jhandeshur seems to be that the girl was married to him by her paternal relations after she left the custody of Baij Nath. The Court below issued no notice of the application to Jagan Nath, who had the custody of the girl, as required by section 11 of Act VIII of 1890, or to Jhandeshur who was described in the petition as claiming to be her husband. Jhandeshur had thus no opportunity of establishing the fact of his alleged marriage. The marital relation being disputed, we are not in a position to adjudge whether Jhandeshur is the proper person to be appointed a guardian of the person or property of the minor in preference to her maternal uncle, Baij Nath. Jhandeshur is himself a minor and is represented in this Court by his next friend, Manna Lal. For the purpose of determining guardianship, the disputed question of marriage requires to be tried in this case.

The learned Counsel for the opposite party contends that no application for revision of an order passed under section 7 of Act VIII of 1890 lies under section 115 of the Code of Civil Procedure, for

(1) 25 Ind. Cas. 840; 1 O. L. J. 416; 15 Cr. L. J. 640.

an appeal lies from that order under section 47, clause (*a*), of the said Act. But sections 13 and 17 are wide enough to cover an inquiry into any of the matters which can legitimately form the subject of opposition to the grant of a certificate of guardianship to a particular individual, and any orders passed in regard to the appointment or refusal to appoint a person as a guardian in the course of such inquiry are either open to an appeal *qua* the persons to whom notices should have been sent or who had a right to offer opposition under section 47 (*a*) of the Act, or are open to revision *qua* such persons as may not be entitled to appeal under section 115 of the Code of Civil Procedure. If the allegations made by the present applicant in regard to his marriage were true, he was certainly a person to whom a notice ought to have been issued under section 11, clause (*a*) (*iv*), of Act VIII of 1890, before a certificate was granted to the opposite party. The powers conferred by section 39 of the Act may not provide an adequate remedy to the applicant to have the matter re-opened by the Court which granted the certificate.

We, therefore, allow the application and, setting aside the order passed by the Court below, direct that the case be reinstated under its original number and disposed of after issuing notice to Jagan Nath and hearing him and the present applicant in the manner provided by law. No order is made as to the costs.

Application accepted.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 2112 TO 2139 OF 1913.

September 30, 1914.

Present :—Mr. Justice Oldfield and Mr. Justice Tyabji.

PUCHAKAYALA JAGANNAIKULU— AND OTHERS—DEFENDANTS—APPELLANTS

versus

THE MANAGER OF NANDIGAM ESTATE —PLAINTIFF—RESPONDENT.

Madras Local Boards Act (V of 1884), s. 73—Mortgagee with possession, whether an intermediate landholder—Tenant's right to pay cess to him.

A mortgagee with possession is as much a landholder as any lessee and is intermediate between the ultimate landlord and his tenants within the meaning of section 73 of the Local Boards Act, and the tenants' right to pay him, recognised in that section, cannot be abrogated by a contract to which they were not parties.

Section 73 in its amended form confers on the tenant a right to pay the cess to the intermediate landholder, irrespective of the question whether the intermediate landholder is bound to reimburse the landlord or not.

Per *Tyabji, J.*—The question whether if the mortgagee became entitled to collect half of the cess in his capacity as intermediate landholder he was at liberty to retain it himself or was bound to pay it or account for it to the mortgagor, is not relevant to the rights and liabilities existing between the landholder and the tenant.

The notion of transfer of property is not an ingredient in the notion of an intermediate landholder whose right to collect the cess from the tenant is not dependent on his paying to his landlord; that might form the subject of an express or implied contract.

Second appeals against the decrees of the District Court of Ganjam, in Appeals Suits Nos. 253 to 255, 258 to 262, 286 to 300 and 429 to 433 of 1912 respectively, preferred against those of the Court of the Special Deputy Collector, Estate Land Suits, Chicacole, in Summary Suits Nos. 228, 230, 231, 225, 227, 229, 232, 240, 215, 217, 219, 222 to 224, 226, 233 to 239, 241, 216, 218, 220, 221 and 242 of 1912.

Mr. *K. Srinivasa Aiyangar* (with him Mr. *M. Purushothama Naidu*), for the Appellants.

Dr. *S. Swaminadhan*, for the Respondent.

JUDGMENT.

OLDFIELD, J.—The appellants are defendants, tenants of an estate of which plaintiff is the Court of Wards Manager. The question is whether defendants are bound to pay plaintiff the portion of the road-cess for which they are responsible under section 73, Local Boards Act (V of 1884 amended by VI of 1900) or can and should pay a mortgagee under Exhibit I. The lower Appellate Court has held that they must pay plaintiff with reference to the terms of both Exhibit I and section 73.

The material portions of section 73 provide that (1) every landholder must pay the local tax (except that leviable as water-tax, which is not in question here) directly to Government, (2) the landholder can recover a specified portion of the tax from "any person, holding lands with or without right of occupancy as an inter-

mediate landholder, or an under-tenure created, continued or recognised by the landholder", (3) the intermediate landholder can recover from the tenants occupying the land half the tax payable by the landholder in respect of that land.

Some attempt was made to argue that the mortgagee under Exhibit I was a transferee of the title to the mortgaged property and, therefore, became the landholder during the term of the mortgage. But this does not appear to have been put forward in the lower Courts. The property is part of a permanently settled *zemindari*, and it is not alleged that it has been separately registered. In Exhibit I moreover, the mortgagor, plaintiff's predecessor, expressly undertook to continue the payment of *peshkush*. In these circumstances attention may be confined to the plea that the mortgagee is an intermediate landholder.

The lower Appellate Court has first held generally that the mortgagee is not an intermediate landholder within the meaning of the Act, but has given no general reason for doing so. To us it is clear that a mortgagee with possession is as much a landholder as any lessee and that he is intermediate between plaintiff and his tenants. Our difficulty is caused by the further reference to an under-tenure. That expression is not defined in the Local Boards Act; nor, so far as we have been shown, is it part of the legal or revenue phraseology of this Presidency. It is argued, on the one hand, that an under-tenure involves the idea of a tenancy, a holding under a landlord for rent or service, and, therefore, cannot include a mortgagee with possession. On the other hand, it may be said that it involves only a holding and is not restricted to holdings of any particular description. And this is in accordance with the only other use of the word in India to which we have been referred, that in sections 3 and 5 Bengal Tenancy Act (VIII of 1885), where a tenure is defined as the interest of a tenure-holder or under-tenure-holder, and a tenure holder as meaning primarily "a person who has acquired from a proprietor a right to hold land for the purpose of collecting rents or establishing tenants on it." This definition is wide enough to cover the mortgagee in the present case, since under Exhibit I he was put in possession to collect rents and profits estimated at an amount which would extinguish the debt within the term fixed. Mortgagees in possession, equally with lessees, are entitled to recover rent by summary process: *Vellayan Chetti* v. *Tiruvakone* (1), and it is a further reason for adopting defendants' construction that in accordance with it the amendment to the Act in 1900 would afford a comprehensive remedy for the mischief against which that amendment would be supposed to have been directed, by protecting tenants against the landholder's separate demands for cesses in mortgaged, as well as leased, estate; for no reason has been suggested for the restriction of the protection afforded to the latter. So far then as argument can be based on the wording of section 73, the conclusion must be that the mortgagee is an intermediate landholder and defendants are entitled to pay him.

The learned District Judge next dealt with Exhibit I, laying stress on the absence of reference to payment of cess and the exclusion of the mortgagee's liability for taxes and holding that "assuming the mortgagee is an intermediate landholder within the meaning of section 73, the right to receive one half of the cess from the tenant is dependant on the liability of the landlord (or presumably the intermediate landholder) to pay it and his having paid the whole cess." But in construing Exhibit I, it is to be remembered that it is dated 1897, before any explicit liability for any part of the cess was placed on the intermediate landholder by Act VI of 1900 and before the tenant's right to pay him was recognised by Statute; and accordingly no clear recognition of that right is to be looked for in the document. One of its terms is no doubt that plaintiff's predecessor shall pay the *peshkush* to Government, and it is not contended that that does not cover the payment of cesses payable with it. But, if the landholder is liable directly to Government for cesses under Exhibit I, that is only what section 73 provides; and his being so cannot affect the right of the tenant to pay the intermediate landholder or the landlord's duty to recover from the latter referred to later in the section. There is

(1) 5 M. 76; 6 Ind. Jur. 349.

further underlying this argument, and that based on Exhibits III, IV and VI to which reference will be made, the fallacy involved in the failure to recognise that section 73 in its amended form confers a right on the tenant. When it has been found that an intermediate landholder, such as the section contemplates, exists, that right cannot be affected by a contract, such as Exhibit I, between plaintiff's predecessor and a third party, the mortgagee; nor, created (as it is) unconditionally, can it depend on any payment having been made by the former to Government or by the latter to the former. It is accordingly immaterial whether plaintiff is entitled to be reimbursed by the mortgagee the sums which (it is not denied) he has paid Government or whether, as defendants contend, he is not entitled to reimbursement under the terms of Exhibit I.

At this point plaintiff's contention, that the change in the law effected by Act VI of 1900 cannot modify the relation between him, his mortgagee and defendants created by Exhibit I in 1897, calls for notice. It is of course the case that the rights of the parties to a contract are to be judged by their intention at its date and "by that law by which they intended or rather may justly be presumed to have bound themselves:" *Lloyd* v. *Guibert* (2). But this principle can affect only the parties. It cannot affect strangers to the contract, such as the defendants, or deprive them of statutory rights.

Plaintiff relies next on the fact that in Original Suit No. 54 of 1905 he was refused a decree against the mortgagee for the amount of the payments he had made to Government for cess for certain *faslis* prior to those now in question. It is not clear how this was relied on in the lower Appellate Court. But it is not alleged that this decision is *res judicata* between plaintiff and the present defendants, who were not parties to it. Here argument is based on the principle stated in *Srinivasa Aiyangar* v. *Arayar Srinivasa Aiyangar* (3) and *Sayam Ramamoorthi Dhora* v. *Secretary of State* (4) that judgments, whether *in rem* or *in personam* establishing a relation between the parties to them, are conclusive against third parties in the absence of fraud on the latter, and that principle must be accepted by this Court, though its validity was doubted in *Peari Mohun Shaha* v. *Durlavi Dossya*(5). There is, however, the fundamental objection to its application to the present case that it extends only to adjudications which would be *res judicata* between the parties to them, and that the judgment in Original Suit No. 54 was not of that description. It has not been printed, but the lower Appellate Court's account of it, on which we must depend, shows that the mortgagee, who succeeded, could not have appealed against the merely incidental finding on the point now in question and that finding dealt, not with defendant's statutory right, but with the existence of an assignment to the mortgagee of the right to collect from them.

The existence of such an assignment, as is evidenced by Exhibits III, IV, VI, is the next matter in issue. The last mentioned document can be dealt with shortly, because the lower Appellate Court found on the evidence that the circumstances in which it was prepared were not established. Exhibits III and IV are prior leases of the property, the unexpired term of the former having been transferred to the mortgagee under Exhibit I. The cess was, no doubt, specified in them as one of the items making up the total payable by the lessee, and it is argued by defendants that this total being the basis on which the amount of rent, Rs. 2,600, to be credited annually against the mortgage-debt is estimated in Exhibit I, the cess must be supposed to be included in that amount and appropriated to the mortgagee, plaintiff being, therefore, bound to pay Government from his own pocket. The lower Appellate Court was, I think, right in holding that this inference was not justified. For the cess is only Rs. 71-1-6 per annum, whilst the total rent under Exhibit III was Rs. 2,391-1-9 and the method by which the amount fixed in Exhibit I, Rs. 2,600, a round figure, was arrived at is beyond conjecture. Plaintiff, on the other hand, relies on the lower Appellate Court's statement that "the non-

(2) 6 B. S. 100; 122 Eng. Rep 1134; 35 L. J. Q. B. 74; L. R. 1 Q. B. 115, 23 L. T. 602; 141 R. R. 252.

(3) 6 Ind. Cas. 229, 33 M. 483; 8 M. L. T. 33; 20 M. L. J. 546; (1910) M. W. N. 479.

(4) 19 Ind. Cas. 656; 36 M. 141; 24 M. L. J. 400.

(5) 20 Ind. Cas. 815, 18 C. W. N. 954; 19 C. L. J. 441.

mention of the right to get the half share of the cess from the tenants in Exhibit I *prima facie* suggests that it was not included in the rights conferred on the mortgagee", as a finding of fact which cannot be contested in second appeal. But the very guarded language used by the learned District Judge regarding what is really the construction of a document precludes my taking this view; and on the merits I cannot find that anything is established in favour of either side.

In these circumstances the foundation of our decision must be our conclusions that the mortgagee is an intermediate landholder within the meaning of section 73 and that the tenants' right to pay him recognised in that section cannot be abrogated by a contract to which they were not parties. The appeal must be allowed, the decision of the lower Appellate Court being set aside and that of the Deputy Collector restored with costs in both Courts.

TYABJI, J.—The plaintiff seeks to recover land cess from the defendants, claiming that he is landholder and the defendants his tenants under section 73 of the Local Boards Act (Madras Act V of 1884). The defence is that the defendants are not bound to pay the cess to the plaintiff, but to the person who has a usufructuary mortgage of the land under Exhibit I dated 3rd November 1897. The material portions of section 73 are as follows:—"Every landholder shall pay to the Collector ..the local tax .(provided that in all cases when a person holds as an intermediate landholder on an under-tenure recognised by a landholder it shall be lawful for the landholder to recover from the intermediate landholder the whole of the tax less one-half of the tax assessable on the amount of...quit rent payable by the intermediate landholder to the landholder) provided (also) that, in the case of lands occupied by tenants, it shall be lawful for the landholder, (or the intermediate landholder, as the case may be) to collect and recover from his tenant one-half of the amount payable by the landholder in respect of the land so occupied." The portions enclosed in ( ) were inserted by Madras Act VI of 1900 and came into force on 1st April 1901, about 3½ years after the execution of the mortgage, Exhibit I.

The scheme of the section is that though the whole of the tax is recoverable by the Collector from the landholder, yet half of the tax has to be borne ultimately by the tenant and the other half either entirely by the landholder or, where there is an intermediate landholder, partly by the landholder and partly by the intermediate landholder. To effect this division between the two latter, it is provided that wherever there is an intermediate landholder, the one-half tax payable by the tenants shall be recovered by the intermediate landholder and not by the landholder.

It is urged, in the first place, that the plaintiff has no *locus standi* because the mortgagee is the landholder: that, as stated in one of the grounds of second appeal, "Exhibit I is in effect an absolute transfer of property for a term." It is admitted, however, that the plaintiff was, prior to the mortgage, the landholder. There does not seem to have been such a complete transfer of the ownership as to pass to the mortgagee all the rights which the mortgagor had in the property. As pointed out by my learned brother (whose judgment I have had the benefit of reading) though the property is part of a permanently settled *zemindari*, it is not alleged to have been separately registered and the land tax is specifically payable by the mortgagor. The deed refers to itself as *khanda gutta* which literally means ("fixed rent"), "*deed with possession*" and also a "*mortgage possession.*" This contention, therefore, cannot succeed. It does not seem to have been put forward in the lower Courts.

Therefore, whether the plaintiff can recover the half cess payable by the tenants depends solely upon whether the mortgagee answers to the description of an intermediate landholder. All the rest of the arguments addressed to us or contained in the judgments of the lower Courts centre round this one question.

The expression "intermediate landholder" appears from section 73 to connote (*a*) the holding of land (*b*) as an intermediate landholder (*c*) on an under-tenure (*d*) created, continued or recognised by a landholder (*e*) payability by him of *kattubadi, jodi, poruppu* (or) quit-rent, (*f*) that

when he exists the tenant is his tenant. The last appears from the second proviso.

The expression "intermediate landholder" indicates *prima facie* a person who is (1) landlord of the tenants, (2) a tenant of the ultimate landholder. His dual capacity is recognised in the direct reference to under-tenure, and the assumption that rent is payable by him on the one hand, and by the fact that the tenants are referred to as his tenants on the other. It is also referred to in *Nellayappa Pillian* v. *Ambalavana Pandara Sannadhi* (6) for another purpose. It is true that if no rent is payable by the intermediate landholder to the landholder, there is no unsurmountable difficulty in working out the provisions of the sections. The intermediate landholder will, in that case, have to pay the whole tax to the landholder or, in other words, bear the whole tax himself.

With reference to the expression "under-tenure" I have been unable to come across its use or recognition in any English or American text books on the Law relating to Landlord and Tenant, or anywhere else except in the Bengal Tenancy Act (Bengal Act VIII of 1885). The definition contained in that Act has been cited by my learned brother; it consists of the equivalent of (*d*), (*a*) and (*f*) above, with reference to which there is no dispute before us: the expression "under-tenure" is evidently not used in section 73 in a sense cognate to "under-tenant", which would mean the holding of a tenant under a tenant, or an under-lease. Still inasmuch as in accordance with the strict terminology of English Law even a free-holder is a tenant holding a tenement on a tenancy, and "under-tenure" may with sufficient accuracy be taken to refer to a holding under that of the landholder.

Five other considerations have been suggested to us, three as having some relevance to the connotation of the term "intermediate landholder" and two as otherwise affecting the rights of the parties.

First, there is a remark of the District Judge on which a good portion of his judgment is based: "Assuming the mortgagee was an intermediate landholder within the meaning of section 73, the right to recover one half of the cess from the tenant is (he says) depended on the liability of the landlord to pay it and on his actually having paid the whole cess." This remark has reference to the nature and incidents of the rights concerned. It seems to me necessary to direct attention to the component parts of the three relationships on which the section is explicitly based, and then to annex rights to the holders of the respective relationships, considered with reference to the two relationships entitling a right to claim half the tax. In the case of the landholder the District Judge's remark may be correct: the first proviso refers to the tax paid by the landholder for payment, of which the section specifically provides. But the remark is obviously inapplicable to the intermediate landholder. His right does not depend on his liability to pay the tax. He does not in any case "actually pay the whole cess;" he pays the whole cess with a deduction calculated on the rent payable by him: and he pays not to the Collector, but to the landholder. The learned District Judge's remark, therefore, coupled as it is with the assumption that the mortgagee is an intermediate landholder, seems to me, with the greatest respect, to be unsupportable. The Act provides for the payment of the tax and its apportionment amongst the three persons by reference to their bearing certain relationships to the land and to each other. The payment of the tax to the Government is not laid down as an element in the definition or connotation of any of those relationships and the existence of the relationships is the only condition precedent to the right to recover half of the cess. The payment has been imposed on him who bears one of the relationships, *viz.*, that of landholder; and the liability on the others is quantified by the amount paid or payble by the landholder. The recovery of half of the cess is not dependant on the landholder's liability to pay it in any sense, except that where no cess is payable the portion received from the tenant is half of nothing.

Secondly, in an earlier portion of his judgment the District Judge has remarked that "there is no transfer of property" (to the present mortgagee) "as in the case of an English mortgage or of a mortgage by conditional sale" and that, therefore, the mortgagee cannot, in the present case, be considered to be an intermediate landlord With great respect I am unable to follow

(6) 27 M. 465 at pp. 469, 470; 14 M.L.J. 81 (F.B.).

this. Assuming that there is no such transfer of property as is referred to, I do not find that as an ingredient in the notion of an intermediate landlord.

Thirdly, it is suggested that if it is shown that as between the mortgagor and mortgagee the former cannot recover anything from the latter, it must be decisive of the question whether the tenants must pay to the one or the other. That, in my opinion, is not the case. It is true that the law assumes that the intermediate landholder (1) recovers half of the tax from the tenants; (2) that he pays something to the landholder; and these two matters are connected with each other and (to the extent stated above) with (3) the landholder's liability to pay the whole tax to the Government. But I apprehend that by the terms of his contract with the intermediate landholder the landholder could either release to the intermediate landholder his right to recover the portion of the tax which the law empowers the landholder to recover, or reserve that right to himself, and the release or the reservation might be either express or it may be implied from the fact that all rights other than those referred to are either expressly released or reserved [*Nikka Mal* v. *Sulaiman Sheikh Gardner* (7)]. If the right to recover half cess from the tenant had been purported to be reserved by the landholder to himself, there might have arisen a question whether the tenants would not even in that case be justified in paying it to the intermediate landholder. I shall refer to the legal aspect of this question under the fourth head to which I have alluded. But here I must state that, in my opinion, the contract of 1897 contained no reservation, express or implied, of the right arising from the amendment of the Act in 1900.

On the other hand, the landholder may, it is not disputed, validly agree to allow the intermediate landholder to retain the portion of the tax recovered from the tenant and apply it towards any sum that may be due to him from the mortgagor, and that is what is alleged here on behalf of the tenants. But though the question whether or not such an agreement, express or implied, relating to the application of the money exists between the mortgagor and mortgagee, may affect their pockets, it does not affect the question whether the tenants have to pay to the mortgagee in the first instance or directly to the mortgagor. The District Judge's omission to notice this made him consider that there was here something like an "assignment of the statutory right to contribution" alleged, whereas the question is whether the mortgagee or the mortgagor is the person to collect the tenants' contribution, and that depends solely upon whether the mortgagee became by the contract an intermediate landholder.

The further question whether if he became entitled to collect half of the cess in his capacity as intermediate landholder he was at liberty to retain it himself or was bound to pay it or account for it to the mortgagor, is not relevant to the rights and liabilities existing between the landholder and the tenant. This is illustrated by *Ram Awatar* v. *Tulsi Prosad Singh* (8).

The fourth consideration to which I referred above is whether the rights of the parties are affected by the fact that section 73 was amended after the contract, Exhibit A, was entered into. In the case last cited the statutory right of recovering the cess from the tenants came into being after the contract; in our case the incidence of a right existing at the time of the contract was (by an amendment of the law after the contract) shifted from the landholder to the intermediate landholder. I think it unnecessary to consider the general question whether this shifting can be prevented by contract, inasmuch as in the present case there is no attempt to do so. But I may point out that the shifting is brought about by the Legislature and has the effect of a contractual act. It may be that the Legislature intended that the parties should not be at liberty to contract themselves out of this shifting as an incident of a contract, the effect of which apart from this particular term would be to make one of the parties to it an "intermediate landholder:" and that the reason for this curtailment of the right to contract (if the right is so curtailed) is, as pointed out by my learned brother, to afford a comprehensive remedy for the mischief of the landlord's separate demands for cesses on

(7) 2 A. 193.

(8) 11 Ind. Cas. 713; 14 C. L. J. 507; 16 C. W. N. 157.

mortgaged lands. See also *Vellayan Chetti* v. *Tiruvakone* (1). It may be that the Legislature left no power to the parties to contract so as to bring about a relationship corresponding in other respects to that of an intermediate landholder without annexing to that relationship the rights under section 73. The question, however, seems to me to be a large one and I express no opinion on it, as it seems to me that it has no bearing on the view I take of the case. My view is that the contract did not expressly or impliedly purport to prevent a shifting of the right, which was brought about by a Legislative amendment of the law made three years after the contract had been entered into.

Finally, some arguments before us were apparently based on the assumption (which I cannot grant) that, because in other cases persons called or calling themselves mortgagees or lessees were or were not held to be intermediate landholders or farmers of revenue and because in the present case we speak of a mortgagor and mortgagee, therefore, this case must be decided as being governed by those other cases. The decisions cited to us seems to me, however, to be helpful, not as direct authorities, but as showing in what way the question should be endeavoured to be solved. In *Vellayan Chetti* v. *Tiruvakone* (1) a Full Bench pointed out that the question must depend upon the terms of the particular contract giving rise to the relationship between the parties, which in that case also was a mortgage. The fact that a deed refers to itself as a mortgage, does not necessarily make it a mortgage: *Nidha Sah* v. *Murli Dar* (9); nor does every mortgagee become or cease to become an intermediate landholder because one mortgagee has been held to be so or not to be so. I proceed to deal with the facts of the case and to examine whether the mortgagee answers to the description of an intermediate landholder.

The mortgage-deed in the present case recites (1) that a sum of Rs. 28,000 was found payable to the mortgagee on a calculation which was, no doubt, satisfactory to the parties. It is then said (2) that the rents of the lands in question including therein (*a*) *kattubadis* of *inams* (*b*), *kists* of *banjir* lands, (*c*) incomes of *banjir* lands, (*d*) fishing tax, (*e*) etc., are fixed at Rs. 2,600; (3) that the mortgagee "is this day put in possession;" (4) that "the mortgagee" shall collect the said lease amount (*i. e.*, the rents above recited) and enjoy the same for 25 years .. bearing the profit and loss thereof; and on the expiry of 25 years put the villages and the document in the mortgagor's possession on the mortgagee recovering the amount due in respect of this bond in full." (5) Covenants follow on the part of the mortgagor (*i*) not to offer to re-pay the mortgage-debt prior to the expiry of 25 years, (*ii*) not to mortgage the villages any further, (*iii*) to furnish accounts and information, (*iv*) to transfer an existing lease (which is in evidence as Exhibit III) to the mortgagee. Then after a passage, which I shall set out below, (*v*) the right to sue *ryots* in his own name is given to the mortgagee, (*vi*) also to quarry; (*vii*) finally the mortgagor agrees to pay the *peishkush* and in default to pay back the mortgage amount with interest. (6) The portion above referred to is as follows:—

"As by this *khanda gutta* deed the villages of Damilada and Lingalopada have been given to you for *khanda gutta* to be enjoyed by you for 25 years for the said sum of Rs. 28,000, you shall not plead then (*i.e.*, at the end of 25 years) that anything more is due to you under the document nor shall we contend that the debt has been discharged earlier."

It seems to me that every part of the connotation of the term "intermediate landholder" has its equivalent in the status given to the mortgagee. There might be some doubt as to payment of rent. But section 105 of the Transfer of Property Act recognises the payment of a premium instead of rent for a lease; and I find it difficult to distinguish from a premium the sum of Rs. 10,000 originally paid by the mortgagee to the mortgagor, which by a calculation that the parties seem to have considered satisfactory was taken to amount to Rs. 28,000. The relationship of a usufructuary mortgagee is always close to that of a lessee, as may be found by reference to the provisions of the Transfer of Property Act regarding them respectively, and to the numerous cases before the Courts in which it has had to be determined whether the relationship that has arisen

(9) 30 I. A. 54 at p. 58; 25 A. 115; 7 C. W. N 289 (P. C.); 5 Bom. L. R. 111.

between the parties must fall under the one description or the other.

I agree with my learned brother that no aid is to be obtained from Exhibits III, IV and VI for the reasons stated by him.

With reference to Original Suit No. 54 of 1905 on the file of the District Court of Ganjam, we have not the judgment before us. Its contents are, however, referred to in the judgment under appeal and the parties before us had to restrict their arguments on what the District Judge says regarding it. From his judgment I gather that in Original Suit No. 54 of 1905 (1) the present plaintiff contended that the mortgagee was on the mortgage liable to pay the cess and had failed to pay it; (2) the mortgagee contended on the other hand that (*a*) the cess was payable by the mortgagor, and (*b*) that the half cess recoverable by the mortgagee from the tenants was to be reckoned as part of the income. The only part of the judgment which became *res judicata* was that the mortgagor was liable to pay the land cess. This is irrelevant to the question before us, whether or not the mortgagee is the intermediate landholder.

I hold, therefore, that the mortgagee in the present case was an intermediate landholder and as such he, and not the mortgagor (the plaintiff), has the right to collect from the tenants the half cess referred to in section 73 of the Local Boards Act. The appeal will succeed with costs in this and the lower Appellate Court. The order of the Special Deputy Collector that each party should pay his own costs in the Court of first instance will stand.

Appeal allowed.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 421 OF 1913.

January 14, 1914.

Present:—Mr. Crouch, A. J. C.

G. W. WILSON AND ANOTHER—PETITIONERS

versus

MESSRS. VOLKART BROTHERS AND ANOTHER—RESPONDENTS.

Arbitration Act (IX of 1899,) s. 2—Application to file an award—Cause of action arising in part—Jurisdiction.

A "cause of action" consists of every fact which is material to be proved to entitle the plaintiff to succeed, every fact which the defendant would have a right to traverse, and it arises "in part" within the jurisdiction of a Court, if any fact material for the plaintiff to prove took place therein.

Where a trader entered into a contract at Multan with the agents of a Karachi firm, and the contract was to be completed in Karachi and the money payable thereon was expressly made payable in Karachi:

Held, that the cause of action arose in part in Karachi and that the Karachi Court had jurisdiction to file an award based on a reference contained in the contract.

Mr. *Rupchand Bilaram*, for Respondents No. 1.

Mr. *Asanmal Bulchand*, for Respondents No. 2.

JUDGMENT.—This is an application to file an award under the Indian Arbitration Act. Messrs. Bhagwandas-Hiranand object that the arbitrators had no jurisdiction, on the ground that the contracts forming the subject of the reference were made at Multan, and all money payable under them was impliedly payable in Multan. Mr. Rupchand, who appears for Messrs. Volkart Brothers, relies on the judgment of this Court in the case of *Forbes, Forbes, Campbell & Co.* v. *Chelaram* (1). That case, however, was decided before the new Civil Procedure Code came into operation, and can be distinguished from the present one by the fact that evidence was given which justified the Court in holding that the money to which the claim related was both expressly and impliedly payable in Karachi.

The question is whether or not, if the subject-matter submitted to arbitration had been the subject of a suit, such suit could have been instituted in Karachi. If the cause of action, wholly or in part, arose in Karachi, then the arbitrators had jurisdiction.

"Cause of action" is not defined in the new Civil Procedure Code, but there can be no doubt that it consists of every fact which is material to be proved to entitle the plaintiff to succeed, every fact which the defendant would have a right to traverse, and that the cause of action arises "in part" within the jurisdiction of this Court if any fact material for the plaintiff to prove, such as the payment of money due

(1) 1 Ind. Cas. 938; 3 S. L. R. 8.

took place therein. See Halsbury's Laws of England, Volume I, pages 6 and 7.

Under the contracts which formed the subject of reference, Messrs. Volkart Brothers of Karachi advanced certain sums of money to Bhagwandas-Hiranand and they undertook to receive in Karachi certain consignments of wool belonging to the said Bhagwandas-Hiranand, to ship them to Europe, and to there arrange for their sale; and Bhagwandas-Hiranand on the other hand agreed to pay a certain commission and to re-pay any difference between the amounts advanced on the consignments and the net proceeds of sale. Messrs. Volkart Brothers agreed, in fact, to act as commission agents for the sale of the wool, and all such services as they had to render had to be performed in Karachi. These services consisted of receiving the wool on arrival in Karachi, arranging for its shipment to Europe, corresponding with friends in Europe with regard to its disposal, issuing all necessary instructions, etc. The memos. which contain the contracts, state in terms that the contracts are to be completed in Karachi, and the covenant to re-pay differences is to pay them to Messrs. Volkart Brothers, Karachi. "Karachi" is printed in very conspicuous capitals and underlined. Under the contract, then, the money payable to the claimants is expressly payable in Karachi, and when we find express terms in a contract, we are not at liberty to consider whether or not there was an implied agreement to do something inconsistent with these express terms.

Mr. Asanmal contends that it had been the practice of Messrs. Volkart Brothers for some fifteen years to always make and receive payments to and from Bhagwandas-Hiranand in Multan, and that his clients treated the guarantee-brokers there as the persons with whom they were contracting. But a party to an agreement is always at liberty to have strict performance, or to permit modified performance, and no such waiver or permisison under one contract can be relied on to excuse strict performance under another. To succeed in his objection Mr. Asanmal would have to prove that the express terms of the contract did not embody the real agreement between the parties, and this he has not attempted to prove; he has not even suggested that it was the case.

Let the award stand filed. Costs of these proceedings to be borne by Bhagwandas-Hiranand.

Award filed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2038 OF 1913.

November 9, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Hannay.

KIZHAKOT PARATHAT MARIZAMMA AND OTHERS—DEFENDANTS NOS. 2, 5 AND 6 —APPELLANTS

versus

NANDANASSERI ILLATH GANAPATHI MUSSAD AND OTHERS—PLAINTIFF NO. 2 AND DEFENDANTS NOS. 1, 3, 4 AND 7 —RESPONDENTS.

Mortgage—Contract brought about by fraud—Concealment of prior mortgage—Rescission of contract—Contract Act (IX of 1872), ss. 19, 65—Obligation of mortgagee to return mortgage money.

A contract of mortgage brought about by concealing fraudulently from the mortgagee the existence of a prior mortgage is voidable at the option of the mortgagee.

Where a mortgagor sues for the cancellation of a mortgage document he must pay over to the mortgagee the amount paid by the latter under the contract of mortgage.

Second appeal against the decree of the District Court of North Malabar, in Appeal Suit No. 49 of 1912, preferred against that of the Court of the District Munsif of Quilandy, in Original Suit No. 807 of 1910.

Mr. *K. P. Govinda Menon*, for the Appellants.

Mr. *K. Govinda Marar*, for the Respondents.

JUDGMENT.—It is found that the plaintiffs (respondents) brought about the contract of mortgage by concealing fraudulently from the defendants (appellants) the existence of a prior mortgage to the extent of Rs. 400 on four of the mortgaged items (besides the mortgage-decree for Rs. 800 directing the sale of their lands, which decree was disclosed in the document). Now when a contract has been brought about by fraud, it is voidable at the option

of the party defrauded (section 19 of the Contract Act). We must take it that when the defendants refused to perform their part of the contract, namely, to pay the Rs. 800 towards the decree passed for sale of those four items, they must be held to have exercised their option to avoid the contract. The plaintiffs also in this suit repudiate the contract and want a cancellation of the mortgage document. Hence, we need not interfere with the decree of the lower Appellate Court which has rescinded the document evidencing the contract of mortgage.

A rescinded contract has, of course, become a void contract. When a contract becomes void, any person who has received any advantage under it from the other party is bound to restore it to the other party. The plaintiffs have received Rs. 450 from the defendants under the deed. They are, therefore, bound to restore it to the defendants. The plaintiffs are not entitled to any damages for breach of contract, as the defendants were (as we have found) justified (on account of the plaintiffs' fraud) in repudiating the contract.

In the result the lower Appellate Court's decree will be modified as follows :

(1) In paragraph (3) of the decree the words and figures "Rs. 450 and interest at 6 per cent. per annum from date of the Munsif's decree" shall be substituted for the words and figures "Rs. 50."

(2) For paragraph 4, the following shall be substituted: "The parties shall bear their respective costs in this and the lower Courts."

Each party will bear his own costs in this Court.

Appeal partly allowed; *Decree modified.*

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 100 OF 1913.

October 21, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Tyabji.

OTTAPURAKKAL THAZATH SUPPI AND OTHERS—PETITIONERS—APPELLANTS

versus

Saiyad ALABI MASHUR KOYANNA KOYA KUNHI KOYA—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXIX, r. 2 (3), O. XLIII, r. 1 (r)—Order refusing to attach property for disobedience of injunction, whether appealable—Appellate Court, power of, to order imprisonment

An order refusing to attach property for disobedience of an injunction order is an order passed under Order XXXIX, rule 2 (3), and is appealable under Order XLIII, rule 1 (*r*), and the Appellate Court has jurisdiction to pass an order of imprisonment in appeal.

Per *Oldfield, J.*—Disobedience of an injunction order is an act independent of the suit and the injunction and calls, therefore, for a separate punishment.

Venkatasami v. *Stridaramma*, 10 M. 179; *Lachmi Narain* alias *Munnuji* v. *Ram Charan Das*, 20 Ind. Cas. 653; 11 A. L. J. 613; 35 A. 425; *Advocate-General of Bombay* v. *Ganji Akhai*, 19 B. 152, distinguished.

Seaward v. *Paterson*, (1897) 1 Ch. D. 545; 66 L. J. Ch. 267; 76 L. T. 215; 45 W. R. 610, *In re A Solicitor*, (1892) W. N. 22, followed.

Per *Tyabji, J.* (dissenting)—Order XLIII, rule 1 (*r*) is not sufficient to give to the Appellate Court the power which is restricted "to the Court granting the injunction," in other words no appeal is intended to be given as regards the exercise of a power which is annexed to a specified Court.

Shaik Jaharuddin v. *Hari Charan Poddar*, 22 Ind. Cas. 499; 18 C. W. N. 470, *Hari Charan Saha* v. *Baran Khan*, 25 Ind. Cas. 903; 41 C. 746, followed.

Appeal under clause 15 of the Letters Patent against the judgment and order passed by the Hon'ble Mr. Justice Miller, in Civil Revison Petition No. 772 of 1912, reported in 22 Ind. Cas. 404, on the file of the High Court, preferred against the order of the District Court of North Malabar, in Civil Miscellaneous Appeal No. 10 of 1912 (Miscellaneous Petition No. 821 of 1911, in Original Suit No. 952 of 1909 on the file of the District Munsif of Badagara).

FACTS appear fully from the judgment of Miller, J., reported in 22 Ind. Cas. 404.

Mr. *J. L. Rosario*, for the Appellants.

Messrs. *A. Sundaram* and *A. Rangasami*, for the Respondents.

JUDGMENT.

OLDFIELD, J.—The District Munsif granted a temporary injunction, and the appellants as they eventually admitted, disobeyed it. Whilst the suit was still pending and the injunction was still in force, the District Munsif was moved to deal with their disobedience; but at the request of the parties he adjourned the petition with the suit, until the latter had been disposed of, when on the 30th September 1911 he dismissed it on the ground that, whether or no disobedience had taken place, the case was not one for punishment. On appeal the District Judge remanded it for re-admission and disposal. The District Munsif then con-

sidered it sufficient to express his grave disapproval and order the appellants to pay the respondent's costs. The District Judge, in the order which this Court was asked to revise, imprisoned the appellants for one month. This Letters Patent Appeal is against the refusal of a Judge of this Court to interfere in revision.

It is argued first that no appeal lay to the District Judge because Order XLIII, rule 1 (*r*), provides for an appeal only against an order under Order XXXIX, rule 2, and the decision of the District Munsif was a refusal to pass such an order. No authority has been adduced for this contention, and it is negatived by *Venkatasami* v. *Stridavamma* (1) and *Lachmi Narain* alias *Munnuji* v. *Ram Charan Das* (2). It, therefore, cannot be accepted.

It is said next that the District Judge had no power to pass an order of imprisonment in appeal, because under section 104 (2), Civil Procedure Code, no order passed by him in appeal is appealable and it is inconceivable, especially in view of section 104 (1), (*h*) that any order directing imprisonment should be final. But all such orders are subject to control by revision; and, even if the competence of Appellate Courts to use their power with discretion were doubtful, no apprehensions would justify a refusal on our part to give effect to the provisions of the Code as they stand.

Another objection to the District Judge's order is that Order XXXIX, rule 2, confers the power to imprison or attach property for breach of an injunction only on the Court granting it, not on the Appellate Court, and that, therefore, the District Munsif alone could take action. In connection with this and other parts of the appellants' arguments it is, no doubt, material that the application of a *quasi*-penal provision is in question and that such a provision must be construed strictly; and, no doubt, the wording of the Order affords support to this objection. *Contra* reliance has been placed on section 107; and, when it has been held that an appeal lies against an order refusing to deal with disobedience, it follows that the power to deal with it by imprisonment or attachment is available to the Appellate Court. The reference to "the Court granting the injunction" was first made in the present Code; and, if its introduction needs explanation, one may be found, not in the advisability of restricting the use of these powers to the Court of first instance, but in the necessity for guidance in cases in which it might be doubtful which Court of first instance should use them, as for instance in suits covered by section 19 or 20, since an injunction issued in such a suit is liable to infringement outside the jurisdiction of the Court which granted it.

The appellants contend next that on the date of the District Judge's order no Court was competent to use the powers conferred by Order XXXIX, rule 2 (3), because those powers could not be used then to secure obedience to the injunction, which had been vacated on the disposal of the suit and could, in no circumstances be used to punish for past disobedience. It must be conceded that unless a punitive, and not merely a coercive, use of the Court's powers is legitimate, the order cannot stand. But it has not been shown that only the latter is contemplated. It may be that the Court should require much clearer and stronger reason when it is asked to punish a past infringement, and not also to prevent one in the future. It does not follow that it can use its powers only for the latter purpose. There is no authority cited for that view; and there is some against it. *Advocate-General of Bombay* v. *Ganji Akhai* (3) was decided on the original side with reference either to general principles or to section 493 of the Code of 1882, in which the enforcing of the injunction is explicitly referred to. Yet in the judgment the Court's right to inflict punishment for a completed act of disobedience as well as to enforce compliance with its order for the future is recognised. *Vide* also *Seaward* v. *Paterson* (4) and *In re A Solicitor* (5). It is argued that the punitive exercise of the Court's powers is excluded by implication, because under Order XXXIX, rule 2 (4), attached property cannot be sold and its

(1) 10 M. 179.
(2) 20 Ind. Cas. 653; 35 A. 425; 11 A. L. J. 613.
(3) 19 B. 152.
(4) (1897) 1 Ch. D. 545; 66 L. J. Ch. 267; 76 L. T. 215; 45 W. R. 610.
(5) (1892) W. N. 22.

contumacious owner cannot be damnified, unless and until disobedience has continued for one year, and this postulates that at the date of the sale the injunction is still in force. But the argument takes no account of the facts that (1) imprisonment can be awarded without reference to disobedience continuing, (2) there is no provision for the termination of the imprisonment or attachment (before one year has elapsed), in case either the disobedience or injunction ceases (3) attachment at least in the case of moveables is itself punitive, whether or no it ends in sale. The order, therefore, cannot be held objectionable on this ground.

Lastly it is urged that the reference in Order XXXIX, rule 2 (3), to the Court's power to order attachment of property "and also" imprisonment entails that the latter power shall be exercised only after the former and that, no attachment having been ordered in the present case, the order for imprisonment is illegal. The interpretation adopted by the learned Judge is a reasonable one, that this wording merely permits the exercise of the two powers in the alternative. This would be consistent with the wording of the former Code and with the fact that in section 94 these powers are specified in the reverse order. Moreover, no reason apart from this wording has been suggested for the assumption that one power must be exercised before the other.

Objections to the order on legal grounds thus fail. On the merits there is no valid reason for dissent from the conclusion of the learned Judge, that the order has not been shown to work injustice of any kind, or from his refusal to interfere in revision. I would dismiss the Letters Patent Appeal with costs.

TYABJI, J.—Order XXXIX, rule 2 (3), provides that "the Court granting an injunction" may order the property of a person guilty of disobeying the injunction to be attached, "and may also order such person to be detained in the civil prison." The question is whether by reason of an appeal lying from orders passed under the said rule the Appellate Court is empowered to pass the order which the Court granting the injunction is thus expressly empowered to pass [See Order XLIII, rule (1) (r)].

Appellate Courts have the same powers as the Courts of original jurisdiction,—Civil Procedure Code, section 107 (2)—and it is argued that consequently the fact that an appeal lies from the order for attachment or imprisonment implies that the Appellate Court has the same powers to order imprisonment as the original Court. But this argument, it seems to me, overlooks the real difficulty. It may be inverted into the contention that inasmuch as the Appellate Court would have the power of imprisonment if an appeal lay and inasmuch as the Legislature has restricted the power of imprisonment expressly to the Court granting an injunction, it follows that no appeal should lie.

The real question seems to be whether (*a*) the fact that an appeal lies or (*b*) the insertion of the restricting words, "the Court granting the injunction," is to be considered as laying down the governing consideration. Not without hesitation I am of opinion that Order XLIII, rule (1) (*r*), is not sufficient to give to the Appellate Court the power which is restricted to the Court granting the injunction, in other words that no appeal was intended to be given as regards the exercise of a power which is annexed to a specified Court.

My reasons for coming to this conclusion are :—

First, the words qualifying "the Court," —"granting the injunction"—are used in marked distinction to the absence of such words elsewhere in Order XXXIX, rule 2. Even in the same sub-rule the word "Court" is later on used in an unqualified manner: release may be directed by "the Court," not "the said Court." It is argued that the qualifying words were intended to prevent the powers being used by a Court to which the jurisdiction was transferred, *Sheik Jaharuddin* v. *Hari Charan Poddar* (6). Granting that that is so, it does not follow that there was no other restriction; perhaps the contrary.

Secondly, I am not unaffected by the terms of section 104 (1) (*h*) and (*i*), which show (1) that an order imposing a fine or directing an arrest is ordinarily appealable, but (*ii*) not an order refusing

(6) 22 Ind. Cas. 499; 18 C. W. N. 470.

to impose a fine or to direct an arrest, (*iii*) that an appeal from an order not falling without clauses (*a*) to (*h*) can only lie if an appeal is "expressly" provided by the body of the Code or "expressly" allowed by the rules : thus implying that if an order not falling within these clauses is to be appealable for some special reason not within the general principles laid down, some express enactment is contemplated; and this somewhat strengthens my disinclination to consider the words "(Court) granting the injunction" as being made nugatory by the general right of appeal, (*iv*) clause (*h*) makes every order imposing a fine or directing arrest appealable: if the Appellate Court has the power to impose a fine or direct arrest, though the Court of first instance refused to do so, then by operation of section 104 (2) the Appellate Court's order will not be subject to appeal : thus the general principles contained in section 104 (1) would be violated, not only as stated in (*iii*) above, but because an order for arrest will then be entitled to stand though it has not the security of two concurrent decisions upholding it, which is what the principle of the section seems to require by implication. No doubt the revisional powers of this Court may be invoked, but they would not ordinarily entitle the question of facts to be revised.

Thirdly, the right to appeal from an order granting an application for revision [Order XLIII, rule (1) (*w*)] has been held to be restricted to the grounds referred to in Order XLVII, rule 7, see *Hari Charan Saha* v. *Baran Khan* (7), Civil Miscellaneous Appeal No. 195 of 1910, though the clause granting the review is unrestricted in its terms. In my opinion in regard to this last matter the two rules in question permitted of being reconciled, but I feel bound by authority to hold otherwise. See *Aiyarappa Mudaliar* v. *Gulam Ghouse* (8). It seems to me that the reasons in the present connection are at least as strong for holding that it was not intended to entitle the Appellate Court to exercise the powers which are granted specially to the Court granting the injunction.

Mr. Rozario urged another ground based on the construction of the words "may also" in Order XXXIX, rule 2 (3). I agree in Mr. Justice Miller's construction of these words, *i.e.*, that it is meant that the Court shall also have the power to commit, and not that the power to commit is not to be used without ordinary attachment.

For the reasons I have given it seems to me, with great deference, that the District Judge had no jurisdiction to order the detention of the appellants. But as my learned brother is of opinion that the order appealed from should stand, the appeal will be dismissed under clause 36 of the Letters Patent of the High Court.

BY THE COURT.—Under clause 36 of the Letters Patent the appeal is dismissed with costs.

Appeal dismissed.

(7) 25 Ind. Cas. 903, 41 C. 746.
(8) 26 Ind. Cas. 831; 2 L. W. 62,

BOMBAY HIGH COURT.
SECOND CIVIL APPEAL No. 641 OF 1913.
July 16, 1914.
Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Beaman.
BAPU—APPELLANT
versus
VITHAL—RESPONDENT.

Decree—Consent decree, how varied.

A decree made by consent can only be varied by consent

JUDGMENT.—In this case the mortgagor has bound himself to pay the amount of the decree within a certain time by certain instalments. It was a consent decree, not a decree framed by the Court in its discretion under the Dekkhan Agriculturists' Relief Act, and we see no reason why the mortgagor should not be held to the terms upon which the decree was passed with his consent. It has been held by Mr. Justice North in *Australasian Automatic Weighing Machine Co.* v. *Walter* (1) that a decree made by consent can only be varied by consent. Here the decree-holder claims

(1) (1891) W. N. 170.

that the decree should be enforced according to its terms. We think he is entitled to an order for its enforcement accordingly. We set aside the decree of the lower Appellate Court and decree that the *darkhast* should be carried out as prayed by the applicant. Costs upon the opponent throughout.

Decree set aside.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2826 OF 1912.

August 11, 1914.

Present:—Mr. Justice Woodroffe and Mr. Justice Coxe.

SADHU CHARAN DATTA—DEFENDANT——APPELLANT

versus

HARA NATH DATTA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Appeal—Final decree passed before filing appeal against preliminary decree—Preliminary decree, whether appealable.

Where before the filing of a second appeal against a preliminary decree a final decree was passed and no appeal was preferred against the final decree.

Held, that no appeal lay against the preliminary decree as it had been confirmed by the final decree.

Khirodamoyi Dasi v *Adhar Chandra Ghose*, 21 Ind. Cas. 516, 18 C. L. J 321, followed.

Ugra Narain Singh v. *Basan Narain Singh*, 19 Ind. Cas. 630; 17 C. W. N 868, 18 C. L J. 209, distinguished.

Appeal against the decree of the Officiating Subordinate Judge, second Court of Dacca, dated the 14th May 1912, affirming that of the Munsif, first Court, at Munsigunge, dated the 19th of May 1911.

Babus *Gonoda Charan Sen* and *Surendra Nath Das*, for the Appellant.

Dr. *Sarat Chandra Basak* and Babu *Bepin Chandra Bose*, for the Respondents.

JUDGMENT.

WOODROFFE, J.—It is quite clear in this case that no appeal lies and the preliminary objection must succeed.

This is an appeal against a preliminary decree for partition. Now, before the filing of the second appeal a final decree was passed and there has been no appeal filed against the final decree. What is the result? The result is that the preliminary decree which was passed has been affirmed by the final decree and the final decree is itself not made the subject of appeal.

The case cited to us, [*Khirodamoyi Dasi* v. *Adhar Chandra Ghose* (1)], is in point and the case of *Ugra Narain Singh* v. *Basan Narain Singh* (2) does not assist the appellant, because it is pointed out there that at the time when the appellant preferred his appeal no final decree had been passed. In this case, however, a final decree has been passed and this is the material difference between the two cases.

The appeal, therefore, must be dismissed with costs.

COXE, J.—I agree.

Appeal dismissed.

(1) 21 Ind. Cas. 516; 18 C. L. J. 321.

(2) 19 Ind. Cas. 630; 17 C. W. N. 868; 18 C. L J. 209.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 479 OF 1913.

February 6, 1914.

Present:—Mr. Crouch, A. J. C.

H. C. WHITEHOUSE AND ANOTHER—PETITIONERS

versus

MESSRS. KAHN KAHN AND COMPANY AND OTHERS—RESPONDENTS.

Arbitration Act (IX of 1899), s 14—Award made ex parte—Sufficient cause for non-appearance—Court, power of, to set aside award.

If a party shows sufficient cause for his non-appearance before an arbitrator, the Court will set aside an award passed *ex parte* against him.

Mr. *Hirdaram Mewaram*, for Petitioners and Respondent No. 1.

Mr. *Kalumal Pahlumal*, for Respondent No. 2.

JUDGMENT.—Messrs. Fatamal Nahjimal object to the award on the ground that the arbitrators were guilty of legal misconduct in refusing a postponement asked for on reasonable grounds and proceeding *ex parte*.

It is clear law that if a reasonable excuse for not attending the appointment can be shown, the Court will set aside an award made by an arbitrator who has proceeded *ex parte*. (Halsbury's Laws of England, Volume I, page 431.)

It has been admitted that the notice of the hearing for the 4th December was not

actually delivered until the 30th November. On receiving it, the objectors formally applied for a postponement, stating that their managing partner was ill and the witnesses were not in Karachi. This application was rejected on the ground that Messrs. Kahn Kahn & Co. did not consent (Exhibit C). On the morning of the 4th December Mr. Kalumal, Pleader for objectors, again wrote to the arbitrators pressing for a postponement, giving as one of the reasons that his client was compelled to be present all day in the Small Cause Court. The postponement was refused; the arbitrators proceeded *ex parte*, and their award was made on the 5th December.

It has been shown that the Firm of Fatamal Nanjimal consists of three adult partners, two of whom were absent from Karachi on the 4th December. On that date, Chandiram, the managing partner in Karachi, was confined to his house by illness; Dr. Moses Solomon who attended him has been called as witness. Vishindas, the man who was really acquainted with the facts of the case, was compelled to attend the Small Cause Court, and the summons shows that it was not issued until the 1st December. It has been proved that he was actually in the Small Cause Court from noon until about 4. He states that his defence was that the potatoes offered were rotten and that they were not in good condition when shipped. The witnesses whom he proposed to call were persons who had seen the goods on arrival; two of them were absent from Karachi on the date of hearing.

The objectors have, in my opinion, made out a case which any Court would regard as good enough for setting aside an *ex parte* decree under Order IX, rule 13, Civil Procedure Code I see no reason why a stricter rule should be enforced in the case of arbitrators. The arbitrators seem to have refused a postponement on several grounds:—*Firstly*, Messrs. Kahn Kahn & Co. objected; *secondly*, one of the arbitrators said he was shortly leaving Karachi; *thirdly*, the date of hearing had been fixed in consultation with Vishindas; and *fourthly*, the arbitrators, after reading the papers, came to the conclusion that the case was so simple and straightforward that nothing would be gained by hearing the other side. None of these reasons is sufficient for refusing a postponement if one of the parties is really unable to be present and so informs the arbitrator. The arbitrators may feel convinced that nothing that the absent party could say would influence their decision; but this is a feeling which a judicial tribunal cannot entertain without forfeiting its claim to be judicial.

Mr. Hirdaram contends that arbitrators have power to proceed *ex parte* for good cause; this is true, but in proceeding *ex parte* for what *prima facie* appears to be good reason, an arbitrator takes the risk of the absent party being able to convince the Court that there was sufficient cause for his non-appearance.

Mr. Hirdaram further urges that objectors have really no case on the merits, and asks the Court to read the contract and correspondence and be convinced of it. But the objectors have not yet submitted their evidence and arguments, and though it may be perfectly true that any defence which they may put forward is excluded by the terms of their contract they must at least be heard.

I set aside the award. I make no orders as to costs.

Award set aside.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 3330 OF 1910.

April 8, 1913.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

Chowdhury KIRTIBASH DAS—APPELLANT

versus

GOPALJEE THAKUR, BY HIS *Shebaits*, BRAHMANAND DAS AND OTHERS—RESPONDENTS.

Mortgage—Benamidar, *whether can sue*—*Presumption*—*Mortgagor, whether can object to such institution.*

A suit instituted by a *benamidar* should be presumed, in the absence of any evidence to the contrary, to have been instituted with the full authority of the beneficial owner, and any decision made in such a suit is as much binding upon the real owner as if the suit had been brought by the real owner himself.

A mortgagor, who received money from the beneficial owner but chose to contract with the *benamidar*, cannot object to the institution of the suit on the mortgage by the *benamidar* nor can his sons when bound by the mortgage-bond raise any such plea.

KIRTIBASH DAS v. GOPALJEE THAKUR.

Appeal against the decree of the Additional Subordinate Judge, Cuttack, dated the 23rd of August 1910, modifying that of the Munsif, Second Court at Puri, dated the 14th of June 1909.

Babu *Sushil Madhab Mullick*, (for Babu *Provash Chandra Mittra*), for the Appellants.

Babu *Suresh Chandra Chuckerbutty*, for the Respondents.

JUDGMENT.—This is an appeal by the first defendant in a suit for declaration of title to immoveable property and for an injunction to restrain the sale thereof in execution of a mortgage-decree. On the 7th October 1896 the first defendant took a mortgage of the property from the other four defendants. He subsequently sued to enforce the security and obtained the usual mortgage-decree on the 25th August 1899, The decree was put into execution in due course, and a proclamation was served on the 13th August 1908 under which the sale was notified to take place on the 15th September 1908. On the 25th August 1908 the plaintiffs, who are the sons of the mortgagor, commenced this suit for declaration that they were not bound by the mortgage or by the decree made on the basis thereof, and also for consequential relief. The Court of first instance held in substance that the plaintiffs were bound by the mortgage transaction and that they were only entitled to redeem as they would have been if they had been made parties to the mortgage suit. Upon appeal the Subordinate Judge has reversed that decision and given the plaintiffs a decree which practically nullifies the mortgage-decree to the extent of their interest in the property. The Subordinate Judge has based his judgment on the ground that the first defendant was not the real mortgagee, that he was only the ostensible mortgagee for the benefit of a real creditor, and that consequently he was not entitled to enforce the security though it stood in his name. In support of this position, he has invoked the authority of the decision in *Mohendra Nath Mookherjee* v. *Kali Prosad Johuri* (1). This view has been now assailed on behalf of the first defendant as erroneous, and it has been contended that as the bond stood in his name it was competent to him to sue to enforce the security. In support of this argument reliance has been placed upon the case of *Sachitananda Mohapatra* v. *Baloram Gorain* (2), which was accepted as good law in *Hara Gobind Saha* v. *Purna Chandra Saha* (3). In our opinion there is no room for controversy that this contention is well-founded.

In the case of *Sachitananda Mohapatra* v. *Baloram Gorain* (2) it was ruled that a suit for foreclosure of a mortgage may be brought by the person named in the mortgage deed as the mortgagee, although he was in fact only the *benamidar* of the beneficial owner, and that such a suit should not be dismissed on the ground that the beneficial owner has not been joined as a party. The learned Judges added that the same point had been brought up for decision to this Court, before and that it had been decided that the contract could be enforced by the parties who had entered into it and that the suit should not fail merely because the beneficial owner was not on the record. The earlier decision to which reference was thus made was apparently the case of *Sree Nath Nag* v. *Chunder Nath Ghose* (4) where, as subsequently pointed out in the case of *Bhoobuneswar Roy Chowdhry* v. *Juggessuree Chowdhrain* (5), it was ruled that in a case of mortgage where *A* advanced money taking a bond in the name of *B*, if a suit was afterwards brought in the name of *B*, the suit should not be defeated on the ground that he was merely the ostensible mortgagee; *A* was the person who sought to enforce the mortgage and as the defendant had received the money from *A* and chosen to contract with *B*, it did not lie in his mouth to object to the institution of the suit in the same form. It is clear, therefore, that if this suit were resisted by the mortgagor alone, it would not be competent to him to dispute that the ostensible mortgagee was entitled to maintain it. We are of opinion that the sons of the mortgagor who are bound by the mortgage-bond equally with the executant do not stand in any better position. The case of *Mohendra Nath Mookherjee* v. *Kali Prosad Johuri* (1), where

(1) 30 C. 265; 7 C. W. N. 229.

(2) 24 C. 644.
(3) 1 Ind. Cas 522; 11 C. L. J. 47.
(4) 17 W. R. 192.
(5) 23 W. R. 413.

it was ruled that a *benamidar* as such is not entitled to maintain a suit for recovery of possession of immoveable property which stands in his name, is plainly distinguishable and does not touch the question now before us. As pointed out by Mr. Justice Mitter in the case of *Gopi Nath Chowbey* v. *Bhugwat Pershad* (6) so long as the *benami* system is recognised, it is to be presumed in the absence of any evidence to the contrary that a suit instituted by a *benamidar* has been instituted with the full authority of the beneficial owner, and any decision made in such a suit is as much binding upon the real owner as if the suit had been brought by the real owner himself. Under these circumstances, we must hold that the ground assigned by the Subordinate Judge for his decision cannot be supported.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and that of the Court of first instance restored with one variation. The Court of first instance allowed the plaintiffs to redeem within three months from the 14th June 1909 and directed that in the mortgage accounts interest was to be calculated only up to the date of the judgment. The time fixed for redemption has long since elapsed and we understand that the plaintiffs have not availed themselves of the opportunity afforded to them. In the circumstances of the present case we think that as the decision of the first Court is to be restored, a fresh date must be fixed for redemption. [*Noor Ali Choudhuri* v. *Koni Meah* (7), *Nam Narain Singh* v. *Lala Raghunath Sahai* (8), *Tara Chand Marwari* v. *Brojo Gopal Mukerji* (9).] We accordingly direct that the records be sent down to the Court of first instance and that accounts be taken of the sum due under the mortgage decree up to the date of the account [*Kedar Lal Marwari* v. *Bishen Pershad* (10), *Gangadas Bhattar* v. *Jogendra Nath Mitter* (11), *Gurdeo Singh* v. *Chandrikah Singh* (12)] and that the plaintiffs be allowed to redeem within 15 days of the date when the sum payable for redemption has been notified to them after determination by the Court of first instance. The defendant-appellant is entitled to his costs both here and in the Court of appeal below. If the plaintiffs do not redeem within the time allowed, the suit will stand dismissed with costs in all the Courts.

Appeal allowed.

(6) 10 C. 697.
(7) 13 C. 13.
(8) 22 C 467.
(9) 18 Ind Cas. 747, 17 C. L. J. 120 at p 122; 17 C. W. N. 457
(10 31 I A 57 (P. C); 31 C. 332, 8 C. W N. 609.
(11) 5 C. L. J 315 at p 323, 11 C. W. N. 403.
(12) 1 Ind. Cas 918; 5 C.L.J. 611 at p. 637; 36 C. 193,

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL MISCELLANEOUS APPEAL No. 15 OF 1914.
April 24, 1914.

Present:—Mr. Hayward, J. C.

JAMES FINLAY & Co.—APPLICANTS
versus
E. RAYMOND—OPPONENT.

Arbitration Act (IX of 1899), s 19 - Insolvent guarantee-broker—Guarantee deposit - Employer's claim for damages adjudicated by Judge in insolvency proceedings —Suit to recover guarantee deposit after setting off damages, whether can be referred to arbitration—Sufficient cause.

A suit by an Official Receiver of the property of an insolvent guarantee-broker against his employer for the balance of the guarantee deposit with interest, after setting off the amount of damages settled by the Judge in the insolvency proceeding as due to the employer, cannot be referred to arbitration under section 19 of the Act, as the main question of damages cannot now be litigated without the leave of the Court under section 16 (2) of the Provincial Insolvency Act.

Mr. *Asanmal Bulchand*, for the Applicants.

Mr. *E. Raymond*, for the Opponent.

JUDGMENT.—The applicant, Jiwanji Pirbhoy, entered into an agreement for sale of certain sugar as guarantee-broker of Messrs. James Finlay & Co. Jiwanji Pirbhoy failed to sell certain consignments of the sugar and became insolvent. Messrs. James Finlay & Co. proved their claim for damages against him in respect of his failure to sell the sugar before the Official Receiver. The amount of the damages was reduced upon the question of rates admissible by the Judge. The Receiver of the estate of the insolvent Jiwanji Pirbhoy has allowed

this amount of damages as a set-off in a suit to recover from Messrs. James Finlay & Co. the balance with interest of 25 thousand rupees, the guarantee deposit. Messrs. James Finlay & Co. want this suit referred to arbitration under the arbitration clause in the agreement with Jiwanji Pirbhoy. It has been objected that there is in the above circumstances "sufficient reason why the matter should not be referred" within the meaning of section 19 of the Arbitration Act.

It seems to me that there is sufficient reason why the matter should not be referred to arbitration. The main question would appear to be the amount of damages which has already been decided in the insolvency proceedings by the Judge. There appears to be no dispute as to the amount of the guarantee deposit. The main question as to the amount of damages depended upon difficult questions of law, as indicated in the judgment published as in *Re Jivanji Pirbhoy* (1). Moreover, that main question could now apparently only be litigated with the leave of the Court in view of the section 16, clause 2, of the Provincial Insolvency Act. This amount of damages is closely connected with the counter-claim to recover the guarantee deposit and would appear to have been rightly set off in the suit for the guarantee deposit under section 30 of the Provincial Insolvency Act. The insolvency proceedings would, therefore, appear sufficient reason why the matter should not be referred to arbitration in the discretion vested in me by section 19 of the Arbitration Act. The conclusion is fortified by the cases relied upon in paragraphs 951 and 959 of the first Volume of Halsbury's Laws of England. The application is, therefore, rejected with costs.

Application rejected.

(1) 19 Ind. Cas 653; 6 S L R 187; on appeal *Messrs. James Finlay & Co Ld.* v. *Messrs David Sassoon & Co.*, 27 Ind. Cas 102, 8 S. L. R. 95.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 530 OF 1909.

July 19, 1914.

Present:—Justice Sir Asutosh Mukerjee, Kt., and Mr. Justice Beachcroft.

KRISHNA CHANDRA MANDAL AND OTHERS—DEFENDANTS NOS. 1, 2 AND 3—APPELLANTS

versus

JOGENDRA NARAIN ROY AND OTHERS—PLAINTIFFS & REMAINING DEFENDANTS—RESPONDENTS.

Minor, guardian ad litem *of, appointment of - Appointment without consent of person appointed, validity of—Mortgage decree, sale under—Reversal of decree—Stranger purchaser, effect on—Party purchaser, liability of*—Cessante ratione legis, cessat etipsa lex, *applicability of—Reversal of sale—Party, who is a necessary—Civil Procedure Code (Act V of* 1908), *O. XXXIV, r. 4—Decree, form of, whether can be modified —Inherent power.*

A Court is not competent to appoint a person without his express consent as a guardian *ad litem* of a minor.

Where, therefore, a guardian *ad litem* is appointed without his express consent, the minor is not properly represented before the Court and is in no way bound by a decree passed against him and a sale held under such a decree does not pass the right, title and interest of the minor in the property sold.

A stranger purchaser of property in execution of a decree is not affected by the subsequent cancellation of the sale on reversal of the decree, as he cannot be expected to go behind the judgment to inquire into irregularities in the suit; it is sufficient for him to know that the Court had jurisdiction and exercised it and that the order, on the faith of which he purchased, was made and did authorize the sale. But this does not apply when the purchaser is himself a party and has notice, or at least opportunity of knowledge, of all the proceedings therein, on the principle of *cessante ratione legis, cessat etipsa lex.*

It is essential for the reversal of a sale that the person whose property has been sold must be a party to the proceeding.

Order XXXIV, rule 4, of the Civil Procedure Code, 1908, contemplates a sale of the mortgaged properties but where a sale of the mortgaged properties be impossible, as where the mortgaged properties have been sold for arrears of revenue or of rent or in execution of some decree, the decree must be suitably modified and a Court is competent, in the exercise of its inherent powers, to give appropriate directions for the disposal of the fund which represents the property.

Appeal against the decree of the District Judge of Birbhum, dated the 3rd September 1909.

Babu *Samatul Chandra Dutt*, for the Defendants-Appellants.

Babus *Lalit Mohini Ghose* and *Karunamoy Ghose*, for the Plaintiffs-Respondents.

KRISHNA CHANDRA v. JOGENDRA NARAIN.

Dr. *Rash Behari Ghose*, Babus *Gunada Charan Sen* and *Surendra Nath Das Gupta*, for the Defendants-Respondents.

JUDGMENT.—This appeal is directed against a decree in a suit to enforce a mortgage security. To appreciate the questions raised herein, it is necessary to examine the relevant facts as they appear on the record.

On the 1st June 1898 Krishna Chandra Mandal (the first defendant) and Dukhbhanjan Mandal (since deceased and now represented by his infant sons, the second and third defendants) executed the mortgage-bond in suit, in favour of Jogendra Narayan Roy and Mohendra Narayan Roy. The principal money secured was Rs. 4,999, which carried interest at 10½ per cent. per annum and was re-payable on the 12th April 1899. On the 12th April 1905 the mortgagees commenced the present suit to enforce their security. They joined fourteen persons as defendants. Of these the first three were one of the original mortgagors and the two infant sons of the other mortgagor. The remaining defendants were persons who, it was alleged, had acquired an interest in the equity of redemption by purchase, settlement, mortgage or otherwise and were consequently necessary parties as entitled to redeem the plaintiffs. On the day that the suit was instituted, the plaintiffs applied for appointment of guardian *ad litem* of the infants defendants, and proposed their mother as a suitable person. Notices were served upon the infants and the proposed guardian. The mother, however, did not enter appearance and signify her willingness to act as guardian of her sons. Yet the Court proceeded, at the instance of the plaintiffs, to appoint her guardian of the infants for the purposes of the suit. There was no appearance on behalf of the infants at any stage of the suit, but some of the other defendants filed written statements. On the 15th December 1905 the Court proceeded to decree the suit *ex parte* as against defendants Nos. 1, 2, 3, 10, 11, 12, 13, on a compromise as against defendants Nos. 5, 6, 7, 9, 14, and apparently on contest as against defendants Nos. 4, 8. On the 25th June 1906 the mortgagees applied for an order absolute, whereupon notices were directed to issue upon the defendants. On the 25th July 1906 the first defendant as also the mother of the second and third defendants applied to the Court to set aside the *ex parte* decree. They alleged that no summons in the suit had ever been served upon them and that there were substantial defences to the claim, and they prayed that the decree might not be made absolute till the matter had been investigated. This application was made by a Pleader on the strength of a *vakalatnama* given by the mother of the infants on the 24th July 1906 authorising him to take necessary steps to oppose the grant of the application for order absolute. On the 25th October 1906 the Court dismissed the application to set aside the decree, and on the 13th November 1906 made the decree absolute. On the 17th January 1907 the petitioners, who had unsuccessfully applied to set aside the decree, preferred an appeal to this Court against the order dismissing their application. On the 8th January 1908 this Court heard the appeal and set aside the *ex parte* decree as against the three petitioners and directed the suit to be re-heard in so far as they were concerned. As regards the infants appellants, this Court held that they were not parties to the suit, as no guardian had ever been appointed for them in accordance with law, and they would consequently not be bound by the decree. This Court was not apprised at the time that during the pendency of the appeal, the decree had been executed and the mortgaged properties sold. In fact, on the 4th February 1907, the lower Court proceeded, at the instance of the mortgagees-decree-holders to sell the properties; many of these were purchased by the decree-holders themselves, some were purchased by the defendants other than the mortgagors, a few were purchased by persons who were neither plaintiffs nor defendants and were entire strangers to the proceedings. The sale was confirmed on the 8th April 1907, and on various dates between April and November 1907 possession was delivered to the purchasers. On the 24th March 1908, that is shortly after the *ex parte* decree had been set aside by this Court, the first three defendants applied to the Court below to set aside the sale. Petition of objection was filed by

two only of the purcharers, one of whom was a party to the suit (defendant No. 12). On the 31st July 1908 the Subordinate Judge dismissed the application, on the ground that third parties were not affected by the cancellation of the decree. The suit, which by order of this Court stood revived against the mortgagors, was then taken up for re-trial, and on the 16th December 1908 they filed their written statement. On the 3rd September 1909 the District Judge, who took up the case for disposal, overruled the defences on the merits and made his decree. This decree directs the mortgagors to pay up the mortgagees within three months and on default entitles the latter to take the sale-proceeds of the mortgaged properties purchased by third parties in satisfaction of their decree. A provision is added that, should this prove insufficient, the mortgagees will have the right to realise the balance by sale of the remaining mortgaged properties. The decree, it will be observed, does not specify what is meant by "third party,"—whether it includes only a person who is not a party to the mortgage suit or includes all persons other than the plaintiffs-mortgagees. The mortgagors defendants have now appealed to this Court, and have contended that the decree as drawn up is not in accordance with rule 4 of Order XXXIV of the Code and that, in the events which have happened, all the mortgaged properties should be directed to be sold afresh.

It is plain that the two infants defendants have not been affected in any way by the sale held on the 4th February 1907, because there was at the time no valid and operative decree in force against them. They were not properly parties to the mortgage suit. It was not competent to the Court to appoint their mother as guardian *ad litem* without her express consent. The Court acted contrary to what was the established rule on the subject. *Dhondiba Lakshuman* v. *Kusa* (1), *Babaji* v. *Maruti* (2), *Isur Chunder* v. *Nobo Kristo* (3), *Narsingh Narain* v. *Jahi Mistry* (4), *Bal Krishan Lal* v. *Topeswar Singh* (5), *Dinabandhu Nandi* v. *Mashuda Khatun* (6). The position, consequently, was that the infants were not properly before the Court, and are in no way bound by the decree of the 15th December 1905. The sale held under these circumstances did not pass the right, title and interest of the infants. *Khairaj Mal* v. *Daim* (7), *Rashidunnessa* v. *Muhammad Ismail Khan* (8), *Kishen Chunder* v. *Ashoorun* (9). It is consequently indisputable that every one of the purchasers at the execution sale held on the 4th February 1907 has failed to acquire the right, title and interest of the infants defendants in the mortgaged properties. Such purchasers may have imagined that the infants were bound by the decree and may have paid the purchase-money on the assumption that they were acquiring the interest of all the mortgagors. But that clearly cannot affect the position of the infants, who are bound neither by the decree nor by the sale consequent thereon. It is thus necessary for the protection of the purchasers themselves that the properties should be re-sold on the footing of a fresh decree binding on the infants in the suit as re-constituted.

Apart from this question, the effect of the cancellation of the decree by this Court on the 8th January 1908, upon the sale held on the 4th February 1907 requires examination. Two positions are clear and incontestable, namely, *first*, that the purchase made by the decree-holders themselves must be treated as cancelled, and *secondly*, that the purchase made by persons who are not parties to the suit must be treated as unaffected. *Nawab Zain-ul-abdin Khan* v. *Mohammad Ashgar Ali Khan* (10), *Jan Ali* v. *Jan Ali* (11), *Chunder Kant* v. *Bissessur* (12), *Mukhoda* v. *Gopal Chunder* (13), *Inderjeet* v. *Pootee Begum* (14), *Shivlal* v.

(1) 6 B. H. C. R. 219.
(2) 11 B. H. C. R. 182.
(3) 7 C. L. R 407.
(4) 13 Ind. Cas. 414; 15 C. L. J. 3.
(5) 14 Ind. Cas. 845; 15 C. L. J 446; 17 C.-W. N. 219.
(6) 17 Ind. Cas. 263; 16 C. L. J. 318.
(7) 32 I. A 23; 32 C. 296; 2 A. L. J. 71; 1 C. L. J. 584, 7 Bom. L. R. 1; 9 C W. N. 201 (P. C.).
(8) 3 Ind. Cas. 864; 36 I. A. 168; 10 C. L. J. 318; 31 A. 572; 6 M L. T. 279; 13 C. W. N. 1182; 6 A. L. J. 822; 11 Bom. L. R. 1225 (P. C.).
(9) (1863) Marshall 647.
(10) 15 I. A. 12; 10 A. 100; 5 Sar. P. C. J. 129.
(11) 1 B. L. R. 56; 10 W. R. (A. C. J.) 154.
(12) 7 W. R. 312.
(13) 26 C. 734.
(14) 19 W. R. 197.

Shambhu Prasad(15), *Janakdhari Lal* v. *Gossain Lal Bhaya* (16), *Dorasami Ayyar* v. *Annasami Ayyar*(17). The question arises, however, as to the position of a purchaser who is not a stranger to the suit but is a defendant therein. Is his position analogous to that of the plaintiff or of an absolute stranger to the proceedings? The answer to this question must depend upon the reasons for the rule that a stranger who purchases in execution of a decree is not affected by the subsequent cancellation or reversal of the decree. Sir Barnes Peacock in *Nawab Zain-ul-abdeen* v. *Muhammad Ashgar Ali* (10) refers to a passage from Bacon's Abridgment, Tit. Error (M. 3), which runs as follows.—"if a man recovers damages and hath execution by *fieri facias* and upon the *fieri facias* the Sheriff sells to a stranger a term for years, and after the judgment is reversed, the party shall be restored only to the money for which the term was sold, and not to the term itself, because the Sheriff had sold it by the command of the writ of *fieri facias*". This statement of the law is supported by a long series of early cases: *Anon.* (18), *Luddington* and *Anner's* case (19), *Beverley's* case (20), *Eyre* v. *Woodfine* (21), *Anon.* (22), *Hoe's* case (23), *Methew Manning's* case (24), *Drury's* case (25), *Goodyere* v. *Ince* (26), *Doe d Emmett* v. *Thorn* (27). An examination of these cases shows that protection is afforded to the purchaser only when he is a stranger to the suit. This is clear when we examine the reasons assigned in support of the rule. Thus in *Bennet* v. *Hamill* (28) Lord Redesdale justified the rule on the principle that the stranger who purchases has a right to presume that the Court has taken the steps necessary to investigate the rights of the parties and has on such investigation properly decreed a sale. To the same effect is the observation of Sugden, L. C., in *Bowen* v. *Evans*(29). The principle was affirmed by the House of Lords in *Bowen* v. *Evans* (30) and *Tommey* v. *White* (31) and by the Supreme Court of the United States in *Gray* v. *Brigniardello* (32), *Beauregard* v. *New Orleans* (33) and *Grignon* v. *Astor* (34). The reason for the rule is uniformly stated to be that the stranger purchaser cannot be expected to go behind the judgment, to enquire into irregularities in the suit, and that it is sufficient for him to know that the Court had jurisdiction and exercised it and that the order on the faith of which he purchased was made and did authorise the sale. To the same effect is the observation of the Judicial Committee in *Rewa Mahton* v. *Ram Kishen Singh* (35) and *Zain-ul-abdin* v. *Ashgar Ali* (10). The reason for the rule obviously disappears when the purchaser is himself a party to the suit and has notice, or at least opportunity of knowledge, of all the proceedings therein. The case is clearly one for the application of the maxim, *cessante ratione legis, cessat ipsa lex* (when the reason of any particular law ceases, so does the law itself.) The question has been raised in the Courts of the United States, and it has been held that a purchaser at a judicial sale, who is a party to the proceeding and in interest, is not a *bona fide* purchaser to the extent that will protect his purchase in case of a reversal of the decree by authority of which it is made: *Buchanan* v. *Clark* (36). The condition of such a purchaser is unlike that of an absolute stranger to the proceedings who becomes a purchaser under the decree, such stranger is protected, but the sale fails on reversal of the decree as to the purchaser who is a party in interest or to the proceedings. There is only one solitary decision, *Gossom* v. *Donaldson* (37), where it was held that the protection afforded to strangers

(15) 29 B. 436; 7 Bom L. R. 585 (F. B.).
(16) 1 Ind Cas. 871; 37 C. 107 at p. 118; 13 C. W. N. 716; 11 C. L J. 254.
(17) 23 M. 306; 10 M. L. J. 307.
(18) Dyer 363a; 73 E. R. 814.
(19) Godb. 27; 78 E. R 17; 2 Leon 92, 74 E. R. 384; 3 Leon 89; 74 E. R. 559.
(20) Goulds. 55; 75 E. R. 991.
(21) Cro. Eliz. 278; 78 E. R. 533.
(22) (1600) Moore 578; 72 E. R. 767.
(23) (1600) 5 Coke 90b, 77 E. R. 191.
(24) (1610) 8 Coke 94b; 77 E. R. 618
(25) (1611) 8 Coke 141b; 77 E. R. 688.
(26) Cro. Jack. 246; 79 E. R. 211.
(27) (1813) 1 M. & S. 425; 14 R.R. 485; 105 E.R. 159.
(28) (1806) 2 Sch. & Lef. 506.
(29) (1844) 1 J. & L. 178; 6 Ir. Eq. 509; 68 R. R. 242.
(30) (1848) 2 H.L.C. 257, 81 R. R. 136, 9 E. R. 1090.
(31) (1850) 3 H L. C. 49; 10 E. R. 19, 88 R. R. 26.
(32) 1 Wallace 627; 68 U. S., 17 Law. Ed. 692.
(33) (1855) 18 Howard 497; 59 U. S., 15 Law. Ed. 469.
(34) (1844) 2 Howard 319, 11 Law. Ed. 288.
(35) 18 I. A. 106; 14 C. 18; 10 Ind. Jur. 428; 4 Sar. P. C. J. 746.
(36) (1853) 10 Grattan (Va.) 164.
(37) (1857) 18 B. Mon. 280; 68 Am. Dec. 723.

should also be extended to parties to the suit, including the plaintiff-decree-holder himself. This case stands alone, and the extreme view taken therein has been adversely criticised by text-writers. [Kleber on Judicial Sales, sections 201, 202 and 291, *Baker* v. *Baker* (38)]. The decision in *MacBride* v. *Longworth* (39) is not contrary to this view, as that case turned upon a Statute which afforded protection to all execution purchasers, whether strangers or parties to the suit; in fact the view taken in *Buchanan* v. *Clark* (36) is identical with that taken in *Hubbel* v. *Breadwell* (40) and *Walpole* v. *Ink* (41) (Rorer on Judicial Sales, sections 132-134). It is obviously essential, however, that for the reversal of the sale the person whose property has been sold must be a party to the proceedings. *Wither* v. *Little* (42), *Little* v. *Superior Court* (43), *Withers* v. *Jacks* (44) (Freeman on Executions, section 347). The rule that a stranger purchaser is not affected by the reversal of the decree is based, as the cases show, on grounds of public policy, though it operates harshly upon the person whose property has been sold and who, it may turn out in the end, was not liable at all to the plaintiff. We are not prepared to extend the scope of the rule and to apply it for the benefit of parties to the suit in whose case the reason for the rule has no application. Consequently all the properties which have been purchased by parties to the suit must be re-sold, if necessary, in execution of the decree now to be made.

We may add that we do not feel pressed by the argument that the decree made by the Subordinate Judge is not in conformity with rule 4 of Order XXXIV of the Code. That rule, no doubt, contemplates a sale of the mortgaged properties, but the decree must be suitably modified in exceptional circumstances where a sale of the mortgaged properties may be impossible. for instance where the mortgaged properties have been sold for arrears of revenue, for arrears of rent or as here, in execution of a decree; in such cases, where the property can no longer be reached, either in whole or in part, the Court is competent. in the exercise of its inherent power, to give appropriate directions for the disposal of the fund which represents the property.

The result is that this appeal is allowed, the decree of the District Judge discharged, and the case remanded to him in order that the necessary accounts may be taken and the final decree drawn up. An account will first be taken of the sum due to the plaintiffs upon the mortgage of the 1st June 1898. An account will then be taken of the sums realised by the plaintiffs from the properties purchased by them on the 4th February 1907, and of which, it is said, they have taken possession. Both these accounts will be taken up to the date of this judgment. The difference between these two sums will be taken and will be reduced by the sum realized by the sale of the mortgaged properties to strangers to the suit. A decree will be made in favour of the plaintiffs for this reduced sum and the sum decreed will carry interest at six per cent. per annum from this date. The judgment-debtors will be allowed to pay up the money within three months from the date when the decree of the Court below is drawn up and signed. If the amount is not so paid, the mortgaged properties other than those sold to strangers on the 4th February 1907, will be sold by the Court for the satisfaction of the decretal amount, after the usual order absolute has been made. Each party will pay his own costs of the suit up to the present stage. The costs of the inquiry in the Court below will be in the discretion of that Court. The District Judge will be at liberty to take the accounts himself or to transfer the case for disposal to the Subordinate Judge.

We do not at this stage consider the question of restitution by the defendants-purchasers to the mortgagors-defendants on account of their possession of the properties they had purchased on the 4th February 1907. Such question may be determined on application to the Court by which the sale was held. *Beni Madho*

(38) (1888) 87 Ky. 46.
(39) (1863) 14 Ohio. St. Rep. 349; 84 Am. Dec. 383.
(40) (1857) 8 Ohio. 120.
(41) (1859) 9 Ohio. 148.
(42) 56 Cali. 870
(43) 74 Cali. 219.
(44) 79 Cali. 297; 12 Am. St. Rep. 148.

Singh v. *Pran Singh* (45), *Raghu Singh* v. *Shew Prasad Rai* (46).

Let the records be sent down at once.

Case remanded.

(35) 14 Ind. Cas. 456; 15 C. L. J. 187.
(46) 17 Ind. Cas. 121; 16 C. L. J. 135.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 319 OF 1913.

October 23, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Tyabji.

TRASI DEVA RAO *alias* ANANTHAYA—CREDITOR—APPELLANT

versus

Pandit PARAMESHRAYA AND ANOTHER—PETITIONERS—RESPONDENTS.

Provincial Insolvency Act (III of 1907), ss. 4, 6—Appeal in insolvency proceedings—What parties entitled to notice—Annual Practice O. LVIII, r. 2—Limitation Act (IX of 1908), s. 14, applicability of.

In an appeal against an order passed in an insolvency matter, only the parties affected by the order are entitled to notice.

In re A Debtor, (1901) 2 K. B. 354; 70 L. J. K. B. 699, 84 L. T. 606, 17 T. L. R. 536, 8 Manson 247, followed.

As the Limitation Act is not applicable to proceedings under the Provincial Insolvency Act the time during which a petition in insolvency was pending in a Court not having jurisdiction cannot be allowed in computing the period for filing a petition under section 6 of the Act.

M. Duraiswamy Aiyangar v. *Meenakshi Sundara Aiyar*, 25 Ind. Cas. 610; 16 M. L. T. 246, followed.

Appeal against the order of the District Court of South Canara, dated 30th September 1913, in Insolvency Petition No. 3 of 1912.

Mr. *B. Sitarama Row*, for the Appellant.

Mr. *H. Balakrishna Row*, for the Respondents.

JUDGMENT.—A preliminary objection has been taken by the respondent that the hearing cannot proceed, because no notice of the appeal has been given to the creditors other than himself. Section 46 of the Provincial Insolvency Act specifies the class of persons entitled to appeal. But no provision specifies those entitled to be made, or whom the appellant is obliged to make respondents; and we can obtain no indirect guidance on the point by inference from other parts of the Act. For it is not possible to hold that all other creditors of the insolvent, whether named or not named in the petition and whether they have appeared at the adjudication proceedings or not, are necessarily parties to whom general or special notice of the appeal should issue. We decide to follow the English procedure stated in English Order LVIII, rule 2, *vide* also *In re A Debtor* (1) and to hold that only parties directly affected by the appeal are entitled to notice. It has not been shown that any special circumstances exist in consequence of which other creditors than those already on the record can be supposed to be so affected. We, therefore, disallow the preliminary objection.

On the merits the learned District Judge was wrong in holding, as we understand him to have done, that the date of presentation of the petition was the date on which it was erroneously filed in the Subordinate Court, before it was filed in the District Court. He could do so only with reference to section 14 of the Limitation Act; and it has been decided by this Court in *M. Duraisami Aiyangar* v. *Meenakshi Sundara Aiyar* (2) that the Limitation Act is not applicable to proceedings under this Act. As the petition can be treated as having been presented on the date of its presentation in the District Court, it has not been presented in conformity with section 6 of the Provincial Insolvency Act within three months of the act of insolvency alleged in it. It is, therefore, liable to dismissal. The appeal is accordingly allowed, the petition being dismissed with costs as between the appellant and the first respondent in both Courts. The second respondent, the insolvent, will bear his own costs throughout.

Appeal allowed.

(1) (1901) 2 K. B. 354; 70 L. J. K. B. 699; 84 L. T. 606; 17 T. L. R. 536, 8 Manson 247.
(2) 25 Ind. Cas. 610; 16 M. L. T. 246; (1914) M. W. N. 831.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 1 OF 1914.

May 30, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Tudball.

MUHAMMAD IBRAHIM AND OTHERS—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 476—Court—Successor in office.

The expression "Court" in section 476 of the Criminal Procedure Code includes the successor in office.

Shaikh Bahadur v. *Shaikh Eradatullah Mullick*, 6 Ind. Cas. 801; 37 C. 642; 14 C.W.N 799; 12 C.L.J. 45; 11 Cr. L. J. 407: *Nawal Singh* v. *Emperor*, 14 Ind. Cas. 766; 34 A. 393, 9 A. L. J. 481; 13 Cr. L. J. 302, referred to.

Civil revision from an order of the Subordinate Judge of Agra.

Messrs. *B. E. O'Conor*, *Shiam Krishna Dar* and *Benode Behari*, for the Applicants.

Messrs. *A. E. Ryves* and *Lalit Mohan Banerji*, for the Opposite Party.

JUDGMENT.—This application arises out of an order made by the Subordinate Judge of Agra, directing a prosecution under the provisions of section 476 of the Code of Criminal Procedure. The prosecution was directed in connection with evidence given in a civil trial. Under the rulings of this Court, such an order cannot be entertained in revision save under the provisions of section 115 of the Civil Procedure Code. It is suggested that as the final order directing the prosecution was not made by the same Subordinate Judge who originally heard the case, there was no jurisdiction to make the order. In our opinion this contention is without force. We may mention that the first step in connection with the prosecution was taken by the very same Subordinate Judge who decided the civil case. But on the general question we may refer to *Shaikh Bahadur* v. *Shaikh Eradatullah Mullick* (1), where it was held that the expression "Court" in section 476 includes the successor in office. See also *Nawal Singh* v. *Emperor* (2). We, of course, express no opinion whatever on the merits. The application fails and is dismissed with costs.

Application dismissed.

(1) 6 Ind. Cas. 801; 37 C. 642; 14 C. W. N. 799; 12 C. L. J. 45; 11 Cr. L. J. 407.

(2) 14 Ind Cas. 766; 34 A. 393; 9 A. L. J. 481; 13 Cr. L. J. 302.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 102 OF 1914.

June 23, 1914.

Present:—Sir George Shaw, KT., J. C.

NGA SAW KE AND OTHERS—APPLICANTS

versus

EMPEROR—PROSECUTOR.

Criminal Procedure Code (Act V of 1898), ss. 155, 190 (1) (b)—Non-cognizable case reported by Police—Procedure—Police report.

When a Magistrate receives a Police report in a non-cognizable case and has reason for doubting its correctness, he can order an investigation under section 155, Criminal Procedure Code, but he cannot examine the Police Officer who submitted the report as if he was a complainant.

A Police report in a non-cognizable case is a Police report within the meaning of section 190 (1) *(b)*, Criminal Procedure Code.

Emperor v. *Nga Thaung*, U. B. R. (1904-06) I, Cr. Pro. 25; 1 Cr. L. J. 1047.

Revision against the finding and sentence of the Township Magistrate, Natmauk, in Criminal Summary Case No. 22 of 1904.

Mr. *H. M. Lutter*, for the Applicants.

Mr. *E. G. Aiyangar*, for the Crown.

ORDER.—This case is similar to the one dealt with in Criminal Revision No. 101 of 1914, and three of the accused were convicted in that case, *viz.*, Saw Ke, the house-owner, Nga Hme and Nga Te. Here, too, the Magistrate passed sentences of imprisonment without the option of a fine. Saw Ke was sentenced to three months' rigorous imprisonment under section 12 (*a*) for keeping a common gaming house on the 9th February 1914. Nga Hme, Ye Gyan and Nyi Bu were sentenced each to two months' rigorous imprisonment under section 11 for gambling on the same occasion at Saw Ke's house, they having been previously convicted. Nga Te was sentenced to one month's rigorous imprisonment under section 11 for gambling at the same time and place. Nga Hme's previous conviction, as noted in my order in Criminal Revision No. 101, was one under section 11, dated the 19th January 1903, when he was fined Rs. 15. Ye Gyan's convictions were one under sections 11 and 12 (*sic*) on the 5th January 1900, when he was fined Rs. 15, and the second under section 10 on the 2nd May 1903, when he was fined again Rs. 15. Nyi Bu was convicted under section 10 on the 3rd August 1904 and fined Rs. 50 and again under sections 11 and 12(*sic*) on the 22nd July 1913, when he was fined Rs. 10,

BHAGUBHAI DWARKADAS *v.* EMPEROR.

The gambling in the present case was similar to that in Criminal Revision No. 101: the stakes were Re. 1. Here the Magistrate said: "It appears that accused Saw Ke has been carrying on different kinds of gambling for some time past in the neighbouring villages of Natmauk." But there is nothing to show that there was any evidence to that effect.

The sentence on Saw Ke is reduced to a fine of Rs. 100 with 21 days' rigorous imprisonment in default. The sentence on Nyi Bu is reduced to a fine of Rs. 50 with ten days' rigorous imprisonment in default. The sentences on Ye Gyan, Nga Hme and Nga Te are reduced in each case to a fine of Rs. 30 with seven days' rigorous imprisonments in default.

The Magistrate who first dealt with this case entertained it on a Police report by a Head Constable. He proceeded to examine the Head Constable on oath as if he was a complainant, and then ordered a Police investigation. As explained 10 years ago in *Emperor* v. *Nga Thaung* (1), a Police report in a non-cognizable case is a Police report within the meaning of section 190 (1) (*b*), Criminal Procedure Code, and there is no authority in the Criminal Procedure Code for examining a Police Officer submitting a Police report under section 190 (1) (*b*) as if he was a complainant.

It was, however, open to the Magistrate to order an investigation under section 155, and this appears to be the proper course for a Magistrate to take when he receives a Police report in a non-cognizable case and has reason for doubting its correctness.

(1) U.B.R (1904-06) I, Cr Pro. 25, 1 Cr. L J. 1047

BOMBAY HIGH COURT.

CRIMINAL REVISION APPLICATION NO. 269 OF 1914

August 17, 1914.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

BHAGUBHAI DWARKADAS AND OTHERS —APPLICANTS

versus

EMPEROR—PROSECUTOR.

Criminal Procedure Code (Act V of 1898), s. 144 (3)—Order directed to public at large—Operation not confined to particular place—Jurisdiction.

An order of a District Magistrate, purporting to have been passed under section 144 of the Criminal Procedure Code, is made without jurisdiction if its operation is not confined to a particular individual or to the public generally when frequenting or visiting a particular place.

Criminal application for revision from an order passed by the District Magistrate of Surat.

Mr. *Setalvad* (with him Mr. *Ratanlal Ranchhoddas*), for the Applicants.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

SHAH, J.—The District Magistrate of Surat, purporting to act under section 144 of the Criminal Procedure Code, has made an order directing "all persons to abstain from removing or causing to be removed, or promoting, aiding, or abetting, directly or indirectly, in any way the removal of any dogs, either in carts, or otherwise, and from preventing or trying to prevent or obstruct, directly or indirectly, the poisoning of such dogs in any way and from taking possession of or confining such dogs." It is mentioned in the order that "it applies to Surat city and all places within five miles of Surat city." Under section 144, however, the District Magistrate has power only to direct an order to a particular individual or to the public generally when frequenting or visiting a particular place. It is quite clear that this order complies with neither of these requirements. It is, therefore, made without jurisdiction. It is needless to consider the other objections urged on behalf of the applicants. On this ground alone I set aside the order.

HEATON, J.—I agree. I hold that the District Magistrate has no power whatever to issue a prohibitory order to the public, unless that power is specifically conferred by some provision of the law. He claims or appears to claim that the power to issue this particular prohibitory order to the public of Surat is conferred by section 144. But to me it is quite plain that it is not. Clause (3) of that section cannot conceivably cover the case, and the power to direct any person to abstain from a particular thing is not a power to direct the public generally from abstaining.

Order set aside.

EMPEROR *v.* NARAYAN GANPAYA HAVNIK.

BOMBAY HIGH COURT.
CRIMINAL REFERENCE No. 47 OF 1914.
August 10, 1914.
Present:—Mr. Justice Heaton and
Mr. Justice Shah.
EMPEROR—PROSECUTOR
versus
NARAYAN GANPAYA HAVNIK—
ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 195 (1) (c)—Bombay Land Revenue Code (Act V of 1879), ss. 189, 197—Mutation—Mamlatdar holding inquiry, whether Revenue Court—Record of Rights—Production of forged Will—Sanction to prosecute.

A *mamlatdar* holding an inquiry under Chapter XII of the Bombay Land Revenue Code is a Revenue Court within the meaning of section 195, sub-section (1), clause (*c*), of the Criminal Procedure Code, and sanction is necessary in order to prosecute a person for an offence in respect of a document produced before the *mamlatdar* in the course of the inquiry.

Criminal Reference made by the Sessions Judge of Kanara.

Mr. *T. R. Desai*, for the Accused.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

HEATON, J.—The Sessions Judge of Kanara has referred to us a case which has been committed to him, on the ground that the commitment was illegal and ought to be quashed.

What had happened is this. After the death of a certain person, another person put forward a Will which, he said, had been made by the deceased, and in virtue of this Will he claimed a change in the entries in the Record of Rights. This claim became a disputed claim which, under rules made by the Government, had to be inquired into by the *mamlatdar*. The *mamlatdar* made his inquiry: he saw the Will produced before him. He came to the conclusion that there was grave suspicion attaching to the Will and he declined to recognize it as a basis for any change in the Record of Rights. Eventually the case was taken up by a Sub-Divisional Magistrate under clause (*c*) of section 190 of the Criminal Procedure Code and was inquired into by him as a Magistrate and finally was committed to the Court of Session. As I mention his proceedings, I would like to say this: that they have been conducted in the most painstaking and thorough way and the mistake which has occurred is one which, at any rate, casts no reflection whatever on the manner in which he conducts magisterial work. The mistake is this. If the *mamlatdar* in making his inquiry was a "Court" within the meaning of that word as used in clause (*c*) of section 195, then a sanction or complaint was required as provided by section 195 before this case could proceed. We have come to the conclusion that the *mamlatdar* in making this inquiry was a "Court." I should describe him as a "Revenue Court," but it matters very little whether you describe him in that way or as a "Civil Court." The judicial result is precisely the same in a matter of this kind. I say that he was a "Court" for these reasons: he had power to summon witnesses, to take evidence, although it may be not to administer an oath, to consider the evidence and to make a final order which might be, as in this case, an order of great importance and would be final, unless changed by his superior on revision or appeal, until there had been a decision of a Civil Court which conflicted with it. It seems to me that there are all the ingredients required for a Court in these matters that I have stated. Therefore, I think that a sanction was necessary in this case. But I think it is more than a merely technical defect that there is not a sanction, and for this reason. Supposing that a person aggrieved had applied to the *mamlatdar* for sanction and supposing the *mamlatdar* had, as he properly ought to do, called on these accused persons to show cause why sanction should not be given, and supposing then that they said, "sanction should not be given because we are about to apply for Probate of this Will:" if that were their reply, then I say it would be a monstrous thing for a Court forthwith to give the sanction. It might say, "I will allow you a month or two months" or whatever period might be reasonable within which to apply for Probate "and if within that time you have not applied, then I shall grant a sanction." That view of the case shows, I think, very clearly that in a matter of this kind where there has been no inquiry into the genuineness of the Will by a Court of Probate or by a Civil Court, the conducting of a prosecution without a sanction amounts to very much more than a mere technical defect.

We think that the proper order for us to make in this case is to quash the order of

commitment and the whole of the proceedings before the Magistrate. And if it is determined that this prosecution should take place, it must take place with that foundation and beginning which the law requires.

SHAH, J.—I am of the same opinion. The inquiry made by the *mamlatdar* in this case was one which he was legally empowered to make under the rules relating to the Record of Rights. In conducting the inquiry he could exercise the powers referred to in Chapter XII—particularly in sections 189 and 197—of the Land Revenue Code. He summoned the party interested and recorded evidence before making his order relating to the disputed entry in the Record of Rights. Section 196 of the Land Revenue Code has no application to this inquiry, as it is neither formal nor summary under the Act. It may be, therefore, that the *mamlatdar* cannot be deemed a Civil Court for the purposes of the inquiry. But I feel clear that the *mamlatdar* holding an inquiry as provided in Chapter XII of the Land Revenue Code is a Revenue Court within the meaning of section 195, sub-section (1), clause (*c*). As the offence in question is in respect of a document produced before the *mamlatdar* in the inquiry made by him, and as there is no sanction or complaint of the *mamlatdar* or of any other Revenue Court to which he is subordinate, it is clear that the Magistrate had no jurisdiction to take cognizance of the offence.

Order set aside.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION NO. 55 OF 1914.

July 13, 1914.

Present:—Mr. Fawcett, J. C., and Mr. Crouch, A. J. C.

MUHAMMAD IBRAHIM *alias* MUHAMMAD HAYAT AND ANOTHER—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 112—Order requiring sureties to be clear in its terms—Arbitrary standard—Reluctancy to stand surety—Person, when satisfactory surety—Surety, rejection of.

The object of the provisions of Chapter VIII of the Criminal Procedure Code is not to consign bad characters to jail, but to prevent them from committing offences to allay public apprehension.

An order under section 112 must be such that if a suspect have a *bona fide* intention to be of good behaviour, it will not be impossible for him to find sureties.

It is unfair to a suspect to call on him to produce sureties of a certain class and then to reject the persons offered because they do not conform to an arbitrary standard not set up in the order. If the sureties offered come fairly within the terms of the order, they can only be rejected because they are personally unfit

Mere reluctance to be surety constitutes no valid objection unless the Magistrate is satisfied that the surety is, under what amounts to undue influence, undertaking a risk which as a reasonable and prudent man he would not take if a free agent.

A man is a satisfactory surety if he is in a position to ascertain how the accused is behaving and if he is also of such character and standing that he would not hesitate to apply for cancellation of his bond if he saw risk of forfeiture

A surety should not be rejected merely because a Police Inspector informs the Magistrate that he is of bad character, when such rejection involves the committal of the accused to prison.

Application for revision of the order of the Sub-Divisional Magistrate, Mehar.

Mr. *T. G. Elphinston*, for the Applicants.

Mr. *E. Raymond*, Public Prosecutor, for the Crown.

JUDGMENT.

CROUCH, A. J. C.—This is an application under section 439, Criminal Procedure Code, asking the Court to review orders passed by the Sub-Divisional Magistrate, Mehar, under sections 112 and 123, against Abul, son of Mahomed Hakim and Mahomed Ibrahim, son of Mahomed Hayat.

By his two several orders under section 112, Criminal Procedure Code, dated the 20th December 1913, the Sub-Divisional Magistrate required the two accused to show cause why they should not be ordered to execute a bond to be of good behaviour for the term of two years in the sum of Rs. 1,000, with three sureties jointly and severally bound for the like amount and the same period. The said sureties were to be men not inferior in standing to the two accused and of respectable character, living in their neighbourhood.

Mahomed Ibrahim produced five men, Karimdad, Khan Mahomed, Jhamanmal, Mahomed Sharif and Lakhu.

Mahomed Ibrahim possesses 198 acres of

pucca land and 153 acres of *khas mohab*, *i. e.* of precarious tenure. He has a brother who is said to be owner of a half share, but the brother's name is not entered in the register. The Sub-Divisional Magistrate in his order under section 123 commences by ruling that, as Mahomed Ibrahim had 353 acres of land, it would be fair to ask him to produce, as a surety of equal standing, a *zemindar* owning 300 acres of land. Accordingly two of the sureties, Lakhu and Mahomed Sharif, were at once ruled out. It is asserted that Lakhu has considerable moveable property and is a richer man than Mahomed Ibrahim. Mahomed Sharif possesses 230 acres and is also said to be richer than Mahomed Ibrahim. Karimdad and Jhamanmal were rejected because the Inspector of Police objected to them as being of bad character.

Abul has 100 acres of land, of which 96 are held on precarious tenure. The Sub-Divisional Magistrate, therefore, ruled that each surety must possess 100 acres, though it is asserted that Abul is actual owner of only one half of the land registered in his name. Of the six men offered only one had 100 acres. Four were also objected to on the ground that they were Lakhyars—said to be a tribe of unruly tendencies—and five on the ground that they lived in the accused's village of Nao Goth, which bears a bad reputation. Only one of the sureties was objected to on the ground that he himself bore a bad character.

Mr. Elphinston who appears for the applicants objects to the orders, on the grounds that the character and class of sureties are not clearly defined, that the amount of the bonds is excessive, and that the sureties have been unreasonably rejected.

The object of the provisions of Chapter VIII is not to consign bad characters to jail, but to prevent them from committing offences and to allay public apprehension. The theory underlying these provisions is that, if a bad character can get a couple or more respectable people who know him to accept his assurance that he will be of good behaviour for a defined term and to back their opinion by risking a substantial sum of money, the probability is that he really intends to reform, and it will be safe to leave him at large. But a prudent man will not ordinarily guarantee the good behaviour of a bad character unless he is in a position to exercise direct control over him, or unless he has opportunity of watching, or of obtaining information with regard to, his behaviour from time to time, so that in the event of the suspect resuming his bad habits timely notice may be given to the Police or he, the surety, may apply to be discharged.

Powers are given to the Magistrate to determine the amount of the bond to be executed, the number, character and class of sureties required, and also to reject any particular surety as being unfit. But these powers must, of course, be reasonably exercised, and the order under section 112 must be such that, if a suspect have a *bona fide* intention to be of good behaviour, it will not be impossible for him to find sureties.

The order under section 112 should also be clear in its provisions. It is obviously unfair to a suspect to call on him to produce sureties of a certain class and then to reject the persons offered, because they do not conform to an arbitrary standard not set up in the order. In the present case, the suspects were ordered to produce sureties "not inferior in standing to themselves." The dictionary definition of "standing" is "condition in society; relative position; reputation; rank." It is not, in our opinion, unreasonable to stipulate that the surety shall be of at least equal standing to the accused, but we consider it unreasonable for the Magistrate to reject sureties as of inferior standing merely because they are not *zemindars* with at least 300 acres of land registered in their names. If the Magistrate considered it necessary to limit the sureties to such a class, he should have so stated in his order under section 112.

Having regard to the fact that the suspects have been able to produce sureties for Rs. 1,000, we are not prepared to say that the amount was, in this particular case, excessive, but it is to be noted that when three sureties sign a bond in the form given in Schedule V to the Criminal Procedure Code, they are jointly and severally liable to pay the amount of the bond, but all three of them cannot be called on to pay the whole amount; the sum named can only be recovered once.

It is obviously unfair to an accused person to order him to produce sureties living in his neighbourhood and then to reject the men offered because they are his neighbours. If the sureties offered come fairly within the terms of the order under section 112, they can only be rejected because they are personally unfit. The Magistrate has in this case objected to sureties wholesale because they live in the same village as Abul, though against four of them there was no personal objection. Nor is it reasonable to reject a surety merely because he is of the same caste as accused, unless the order under section 112 has imposed such a limitation.

It has been laid down by this Court in *Emperor* v. *Haji Usman* (1) that the proceedings under section 122 are judicial proceedings within section 1, Evidence Act; a surety, therefore, should not be rejected merely because a Police Inspector informs the Magistrate that he is of bad character, when such rejection involves the committal of the accused to prison. Though it is not contemplated, and it is not, in my opinion, necessary, that all proceedings under section 122 should be of a formal judicial character, yet where the issue, whether or not the accused shall be committed to prison, is narrowed down to the question, whether a particular person is in the opinion of the Magistrate a fit person to be surety, the Magistrate cannot properly base his order on an adverse opinion formed on statements which no judicial tribunal could accept as evidence.

In other cases which are before us to-day, the same Magistrate has rejected sureties because they offered themselves unwillingly or out of pity for the accused's children, or because they were not of standing sufficient to restrain the accused from stealing. Now, it may be taken that no person in Sind willingly becomes surety for a *badmash*; by so doing he not only risks a substantial sum of money but exposes himself to the displeasure of the Police; some degree of importunity is probably always necessary before a man consents to offer himself. Mere reluctance to be surety constitutes no valid objection unless the Magistrate is satisfied that the surety is, under what amounts to undue influence, undertaking a risk which as a reasonable and prudent man he would not take if a free agent, that is to say, he is offering himself as a surety notwithstanding that he has no confidence in the accused's promise to reform, or in his own powers of effectually preventing misbehaviour. Nor is it of itself a disqualification that a person cannot exercise active physical control over accused. It is, no doubt, an advantage in a surety to be in a position to send for the accused from time to time, to question and to warn him, or to put physical restraint on him; but a man may be a satisfactory surety if he is in a position to ascertain how the accused is behaving, and if he is also of such character and standing that he would not hesitate to apply for cancellation of his bond if he saw risk of forfeiture

We reverse the order under section 123, except so far as it relates to the acceptance of Khan Mahomed as surety for Mahomed Ibrahim, and direct the Magistrate to reconsider the question of accepting the sureties offered, with due regard to the above remarks, and to pass fresh orders under section 123.

The accused must enter into their personal recognizances in Rs. 2,000 each to appear before the Sub-Divisional Magistrate until disposal of the case.

FAWCETT, J. C.—I concur with the order proposed by my learned colleague and the general observations made by him as to the principles on which the powers under sections 112, 122 and 123 of the Criminal Procedure Code should be exercised. Though a Magistrate has, under section 122, a wide power to reject proposed sureties as unfit and his discretion in the matter should not be lightly interfered with, yet it is certainly not intended by the Legislature that this power should be used merely to prevent a *badmash* giving security and ensure his being committed to prison. In the present case, as is clearly pointed out by my learned colleague, the rejection of many of the sureties infringes the provision in section 118 that no person shall be ordered to give security of a nature different from that specified in the order under section 112, or is based on an obviously unfair reason.

(1) 7 Ind. Cas. 592; 4 S. L. R. 18; 11 Cr. L. J. 407.

As regards the Magistrate's reliance on the statements of the Police Inspector as to some of the sureties being of bad character, I must confess that I share the doubt expressed by Coxe, J., in *Kalu Mirsa* v. *Emperor* (2) whether section 122 really contemplates an inquiry in the form of a judicial proceeding at all. I am bound, however, by decisions of this Court to the contrary, and in any case I think it desirable that a Police Inspector, who makes statements of this kind, should do so on oath. Otherwise, the Magistrate's procedure does not seem open to objection, as he allowed the sureties concerned to answer the Inspector. It would, however, have been better if he had checked the Inspector's statement in regard to Jhamanmal in the manner in which he says it could easily be done.

I concur with my learned colleague that the order, under section 112, that the sureties should be "of a standing not inferior to the applicants", is not unreasonable or so vague as to be unenforceable, as conten ed by applicant's Counsel. But the learned Magistrate has clearly gone beyond a reasonable and proper interpretation of this condition.

Order reversed.

(2) 5 Ind. Cas. 20; 37 C. 91; 11 Cr. L. J. 23; 14 C. W. N. 49.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 715 OF 1914.

September 17, 1914.

Present:—Mr. Justice Piggott.

SURJAN SINGH AND OTHERS—APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

Procedure—Confession by some of accused—Failure of Judge to record their conviction—Conviction along with others—Irregularity, effect of

If some of the accused in a Sessions trial plead guilty to the charge, their conviction should be recorded then and there, but if the Sessions Judge convicts them after he has taken evidence against the other accused and does not take into account their confession in passing sentence upon the others, he commits only a curable irregularity.

Criminal appeal from an order of the First Additional Sessions Judge of Aligarh.

Mr. *Lalit Mohan Banerji*, for the Crown.

JUDGMENT.—Surjan Singh, Jhandu Singh, Thakuri Singh, Lakhpat Singh, Kallu and Babu Singh appeal against their conviction of an offence of dacoity under section 395 of the Indian Penal Code and the sentences passed upon them. In their petitions of appeal they all assert that the Police have got up a false case against them, and one or two of them allege enmity against the village headman or village watchman. As a matter of fact Jhandu Singh and Kallu pleaded guilty in the Court of Sessions and have been formally convicted on their own plea of guilty. The learned Sessions Judge has committed an irregularity of procedure, in that he went on with the trial and did not record the conviction of Jhandu Singh and Kallu until after he had taken the whole of the evidence and was passing judgment in respect of all the accused persons together. He had a discretion either to accept or not to accept the plea of guilty entered by Jhandu Singh and Kallu. If he desired to hear the whole of the evidence in the case, in order to satisfy himself that these men as well as the other accused persons were really guilty, or in order to enable him to form a satisfactory opinion as to the gravity of the offence committed and the nature of the sentences required, he was perfectly entitled to refuse to act upon the plea of guilty and to proceed with the trial as against all the accused persons. If, however, his intention, was to accept the plea of guilty entered by Jhandu Singh and Kallu, he should have convicted them at once, and whether or not he deferred sentence until after he had heard the evidence, he should have proceeded with the trial as against the remaining four accused persons only. If the learned Sessions Judge had taken into account the confessions made by Jhandu Singh and Kallu as against the remaining appellants, I should have felt it necessary to order a new trial so far as those four appellants are concerned; but I see that the Sessions Judge, although his procedure was somewhat irregular, has been careful not to refer to the confessions of Jhandu Singh and Kallu as implicating any of their co-accused. I have examined the evidence against each of the appellants, which has been carefully summed up by the learned Sessions Judge, and I have no doubt that he was right in convicting all of them. I dismiss their appeal.

Appeal dismissed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 459 OF 1914.
CRIMINAL REVISION PETITION No. 386 OF 1914.
November 12, 1914.

Present:—Mr. Justice Ayling.

CHENGA REDDI—PETITIONER

versus

RAMASAMY GOUNDEN AND ANOTHER—COUNTER-PETITIONERS NOS. 1 AND 2—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), ss. 145, 517—Property attached under s. 145—Cancelment of order—Disposal of property—Proper order—Practice.

Where, after attaching certain properties under section 145 of the Code of Criminal Procedure, the order was on inquiry cancelled on the ground that there was no immediate danger of a breach of the peace:

Held, that in such a case the Magistrate has no jurisdiction to direct that the attached properties should be delivered to one of the parties, as that would be in effect deciding the question at issue between the parties, and that he should keep them or their sale-proceeds, if perishable, in deposit until one of the parties establishes its right in a Civil Court.

Quære:—Whether section 517 of the Code of Criminal Procedure applies to such cases?

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Sub-Divisional Magistrate of Vellore, in Criminal Miscellaneous Petition No. 10 of 1914.

Mr. *C. V. Ananthakrishna Aiyar*, for the Petitioner.

The *Public Prosecutor*, for the Government.

ORDER.—In this case the Magistrate, after taking action under section 145 (1) of the Criminal Procedure Code, attached the property in dispute (certain trees) and had the produce collected and kept in custody of the Village Officers. Subsequently he came to the conclusion that there was no danger of a breach of the peace, and cancelled his preliminary order and released the attachment. The question of disposal of the collected produce then had to be decided; and the Magistrate directed that it should be delivered over to one of the contesting parties, the land *pattadars*, on the ground that the accessories relating to land must be presumed to follow the principal.

This is, in effect, a decision of the question at issue between the parties, after the Magistrate had cancelled his proceedings and declined to inquire into the said question.

The Public Prosecutor argues that the Magistrate is entitled to pass such an order under section 517 of the Criminal Procedure Code. Even if this be so, it is an order subject to revision by this Court. The only proper course for the Magistrate to take under the circumstances recited above was to retain the produce in the custody of the Village Officers until one party or the other obtained an order of a Civil Court in its favour. Of course, if the property were perishable or difficult to keep in safe custody, it might be sold and the sale-proceeds kept in deposit pending the same event.

The order of the Magistrate is hereby cancelled.

Order set aside.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REPORT No. 60 OF 1914.
July 13, 1914.

Present:—Mr. Fawcett, J. C., and Mr. Crouch, A. J. C.

EMPEROR—PROSECUTOR

versus

KHUBOMAL—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 476—Order to prosecute—Charge to be clearly specified—Power of Magistrate to order prosecution under s. 182, Indian Penal Code.

An order under section 476, Criminal Procedure Code, should specify clearly the exact charges against the accused.

The mere fact that no sanction is necessary for a prosecution under section 182, Indian Penal Code, does not deprive a Court of jurisdiction to order that prosecution under section 476, Criminal Procedure Code.

Report against the order of the Sub-Divisional Magistrate, Tando.

Mr. *E. Raymond*, Public Prosecutor, for the Crown.

JUDGMENT.

FAWCETT, J. C.—The learned Sessions Judge asks us to set aside the Sub-Divisional Magistrate's order under section 476, Criminal Procedure Code, on the following

grounds. The first is that the false information in respect of which the prosecution of Khubomal has been ordered falls under section 182, Indian Penal Code, and not under section 211, Indian Penal Code, the section under which he has been sent for trial. Assuming that this view is correct, still we do not think that there is any sufficient ground for our interference in revision. Section 476 empowers a Court to act under that section in respect of "any offence referred to in section 195 and **** and brought under its notice in the course of a judicial proceeding." Section 182, Indian Penal Code, is referred to in section 195 and the alleged offence (whether it falls under section 182 or section 211, Indian Penal Code) was brought to the Magistrate's notice in a regular trial before him. The mere fact, therefore, that no sanction of the Court is required for Khubomal's prosecution under section 182, Indian Penal Code, does not deprive the Magistrate of jurisdiction to order that prosecution under section 476.

We also think that the question, whether the case falls under section 211 or section 182, Indian Penal Code, (if the information given by Khubomal is proved to be false) is one which is best left to the trying Magistrate, who can under section 238, Criminal Procedure Code, convict under section 182, Indian Penal Code, though the accused may be only charged under section 211, Indian Penal Code, for as ruled in *Bhikterum* v. *Heera Kolita* (1) and *Emperor* v. *Sarada Prosad Chatterjee* (2) an offence under section 211 includes an offence under section 182. It is also better to proceed in the first instance under section 211, Indian Penal Code, because if it were eventually held that the case really fell under that section, a conviction under section 182, Indian Penal Code, might be upset merely on the ground that section 211, Indian Penal Code, and not section 182, was the appropriate section under which to frame a charge, *cf. Agaya Tatoba Munde* v. *Emperor* (3). As stated in *Rayan Kutti* v. *Emperor* (4), the main test whether a person makes a 'charge' within the meaning of section 211, Indian Penal Code, is, "does the person who makes the statement, which is alleged to constitute the 'charge,' do so with the intention and object of setting the criminal law in motion against the person against whom the statement is directed." This question of intention is one which in a case like this can only be properly determined after hearing evidence; and even if the Sub-Divisional Magistrate has expressed the view that the aim of Khubomal was *merely* to have Shah Beg removed (though we do not think the Magistrate really means this), still that opinion is not conclusive.

The second ground, on which our interference is recommended, is that the prosecution under section 193, Indian Penal Code, in respect of Khubomal's statements on oath, which are reproduced in the Magistrate's first order of 10th January 1914, is not likely to be successful. But we do not think the mere fact that the Sub-Divisional Magistrate called upon Shah Beg to enter on his defence in the other case is sufficient ground for this view; and if the charge of extortion against Shah Beg is proved to be false, the statement in question will almost inevitably also be false. As pointed out by the Sessions Judge, Khubomal cannot be charged under section 193, Indian Penal Code, in respect of any statement *contained in the petition*, and the Magistrate presumably did not intend to prosecute him merely because his statements on oath were discrepant with a statement in the petition.

We, therefore, see no sufficient ground to interfere and direct that the record be returned to the Court concerned. We would, however, point out to the Sub-Divisional Magistrate that his order under section 476 should have specified more clearly the exact charges against the accused, and not have left his meaning so much in doubt.

CROUCH, A. J. C.—I concur in the proposed order. Though I am not prepared to state as a general rule of universal application that an offence under section 211 includes an offence under section 182, there are

(1) 5 C. 184.
(2) 32 C. 180 ; 2 Cr. L. J. 171
(3) 20 Ind. Cas. 747; 14 Cr. L. J. 491, 15 Bom. L. R. 574.
(4) 26 M. 640, 1 Weir 190.

undoubtedly cases, of which the present one is an instance, in which when a charge has been framed under section 211, the accused may be convicted of an offence under section 182 by application of section 238, Criminal Procedure Code.

BOMBAY HIGH COURT.

CRIMINAL REVISION APPLICATION NO. 329 OF 1914.

September 25, 1914.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

In re MANKU BALA PATIL—APPLICANT.

Criminal Procedure Code (Act V of 1898), s. 476—District Registrar, whether Court—Jurisdiction.

A District Registrar, as provided in section 195 of the Criminal Procedure Code is not a "Court" and has, therefore, no jurisdiction to make an order under section 476 of the Code.

Obiter dictum:—What is declared not to be a "Court" for the purpose of section 195 is also not a Court for the purpose of section 476.

Criminal application for revision from an order passed by the District Registrar of East Khandesh.

Mr. *P. B. Shingne*, for the Applicant.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.—We desire to point out to the District Registrar in this case that he has no jurisdiction to make an order under section 476, because, as provided in section 195 of the Criminal Procedure Code, the District Registrar is not a "Court" and section 476 is so intimately connected with section 195 and is designed to serve a purpose so similar to that served by section 195 that we cannot doubt that what is declared not to be a "Court" for the purpose of section 195 is also not a Court for the purpose of section 476. We do not, however, interfere with the order for this reason that precisely the same practical result would be brought about by the presentation of a complaint of the offence to a Magistrate who has jurisdiction to inquire into it; or by the District Registrar as a Magistrate proceeding under sub-section (1), clause (*c*), of section 190 of the Criminal Procedure Code.

Application rejected.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION NO. 1040 OF 1914.

August 17, 1914.

Present:—Mr. Justice Scott-Smith.

JHANDU RAM—ACCUSED—PETITIONER

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 110—Bad livelihood—General repute, evidence of, nature of.

Where security under section 110, Criminal Procedure Code, 1898, is taken from a person on the evidence of general repute only, that repute should be proved to be universal and there should be no doubt about it.

Therefore, where the only evidence against an accused is that of general repute and it is not universal, it is not safe to bind him over on such meagre and doubtful evidence.

Masti Khan v. *Queen-Empress* 2 P. R. 1897, Cr., followed.

Petition, under setion 439 of the Criminal Procedure Code, for revision of the order of the District Magistrate, Muzaffargarh, dated the 7th April 1914, affirming that of the Honorary Magistrate, First Class, Alipur, dated the 28th of February 1914, ordering the petitioner to furnish security and personal recognizance in the sum of Rs. 300 each to be of good behaviour for the period of one year or in default to undergo one year's rigorous imprisonment.

Mr. *N. C. Mehra*, for the Petitioner.

JUDGMENT.—This is an application for revision of the order of Malak Ghauns Bakhsh, Honorary Magistrate, Alipur, calling upon the petitioner to furnish security for one year to be of good behaviour under section 110, Criminal Procedure Code. The order of the Magistrate was confirmed on appeal by the District Magistrate.

The petitioner, Jhanda Ram, is a goldsmith who, along with his brother, pays Rs. 20 income-tax. He lives in the town of Alipur and has a shop there. He has never been convicted of any offence, nor has he ever been tried in the Criminal Courts. Furthermore, no stolen property has ever been found in his house, and only on one occasion was his house searched in connection with a theft. It was so searched in connection with the theft of Lala Tirath Ram, Treasurer of Alipur, but the fact loses significance in the presence of evidence of Lala Tirath Ram himself, who says that he told the Police that he did not suspect Jhanda

In re SANGAPPA GADIGEPPA.

Ram and has testified to his good character. It does not appear that the petitioner was suspectd in any other case of theft, and the evidence against him is that of general repute only; and out of the prosecution witnesses, Asa Nand and Pallu Khan *Zaildar* were forced to admit in cross-examination that they knew nothing definite against him. On the other side, Lala Tirath Ram and others, including two income-tax paying shopkeepers, have given evidence that the petitioner is a man of good character. In *Masti Khan* v. *Queen-Empress* (1) it was held that "when security is taken from a man under section 110, Criminal Procedure Code, on evidence of general repute only, that repute should be proved to be universal and there should be no doubt about it." Now, in the present case the only evidence against the petitioner is that of general repute and it is by no means universal, and, in my opinion, it is not safe to bind him over on such meagre and doubtful evidence. The revision is allowed and the order of the Magistrate calling upon him to execute a bond is set aside and he is discharged.

Revision allowed.

(1) 2 P. R. 1897 Cr.

BOMBAY HIGH COURT.

CRIMINAL REVISION APPLICATION No. 228 OF 1914.

September 30, 1914.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

In re SANGAPPA GADIGEPPA—APPLICANT.

Criminal Procedure Code (Act V of 1898), s. 195—Sanction, whether granted without application—Defect of procedure or form in granting sanction, effect of.

A Court can give a sanction under section 195 of the Criminal Procedure Code even if no application is made to the Court for it.

Per *Shah, J.*—Any defect of procedure or form in granting a sanction cannot convert the sanction into a complaint.

Criminal application for revision from an order passed by the Sessions Judge of Khandesh.

Messrs. *G. S. Rao* and *N. V. Gokhale*, for the Applicant.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

HEATON, J.—This is one of five cases in which the Collector gave what he considers a sanction in each case for the prosecution of certain persons for giving false evidence. The persons against whom these assumed sanctions were given appealed to the District Judge, and he held that in accordance with the terms of clause 7 of section 195 of the Criminal Procedure Code the appeal did lie to his Court. That view has not been contested here. The District Judge, however, also held that the writing given and signed by the Collector was not a sanction but was a complaint, and that he had no power to interfere. Against these five orders, the applicants have come to us in revision.

Except in one point I am unable to understand why these documents are not to be regarded as sanctions. In terms they are most definitely sanctions. They fulfil, so far as I can see, every single requirement of section 195. But apparently, it has been held elsewhere that a sanction presupposes an application. That appears to me to be departing outside the terms of section 195, and in this Court we have not acted on the assumption that a Court cannot give a sanction under section 195 of the Criminal Procedure Code if there does not happen to be an applicant. I think, therefore, that as a matter of law the District Judge is wrong, that these are sanctions, and that the District Judge must deal with these appeals according to law on the assumption that they are sanctions.

But I should like to add this. Having come to the conclusion that sanctions ought to be given, I think that the Collector acted precisely as he ought to act. We have often in this Court deprecated the giving of sanctions to private persons, because we know that in certain cases they are not used as they ought to be used, but are used for the most improper purpose and in a way which brings the administration of justice into contempt. We have often advocated that sanctions, when they are given, should be given to some responsible Government servant, and perhaps of all, the most appropriate is the one which, in

this case, was chosen by the Collector; and that is the Government Pleader.

The appeals must be sent back to the District Judge to be disposed of by him according to law.

SHAH, J.—I agree. I desire to add that in these cases the Collector sanctioned the prosecution of the petitioners and that sanctions were drawn up as contemplated by section 195, Criminal Procedure Code. I am unable to hold that the writing which purports to be a sanction under section 195 is defective in form. In my opinion the sanction is subject to no such infirmity as is mentioned in the order of the District Judge. In any event, it is quite clear that the document which purports to be a sanction is not a complaint within the meaning of section 195, Criminal Procedure Code. Assuming that the sanctions granted were open to any of the objections referred to by the District Judge, it would be no ground for holding that it is not a sanction. Any defect of procedure or form in granting a sanction cannot convert the sanction into a complaint.

PUNJAB CHIEF COURT.
FULL BENCH.

December 23, 1912.

Present:—Mr. Justice Robertson, Mr. Justice Kensington, Mr. Justice Rattigan and Mr. Justice Shah Din.

In the matter of MR. M., FIRST GRADE PLEADER OF THE CHIEF COURT, PUNJAB, LAHORE.

Legal Practitioners Act (XVIII of 1879), s. 13 cl. (f), —Pleader retaining in his service suspected tout —Making false statement—Professional misconduct.

A Pleader, who after having given a very clear promise to the Bar Council to dismiss *N*, whose name had been entered in the list of suspected touts and to whom notice had been issued to show cause why he should not be proclaimed as a tout, retained *N* in his service and made a distinctly false promise in order to escape the further action of the Council and broke that promise, and subsequently when an inquiry was made from him, deliberately made a false statement, false to his knowledge, regarding the employment and notice, etc., of the dismissal of *N*, is guilty of professional misconduct under section 13, clause *(f)*, of Act XVIII of 1879 and is liable to be either dismissed or suspended for a certain period.

Trial of a First Grade Pleader of the Chief Court under section 13, clause *(f)*, of the Legal Practitioners Act, XVIII of 1879.

Mr. *Broadway*, for the Crown.

Mr. *Obedullah*, for the Pleader.

FACTS.—In accordance with the following order of the Chief Judge an inquiry was held into the conduct of Mr. *M*—Pleader, by a Full Bench of four Judges:—

"I order an inquiry into the professional conduct of Mr. *M*—, a Pleader of this Court, upon the charges contained in the statement hereto annexed and I direct that the inquiry be held by a Bench consisting of three Judges of this Court on Friday the 25th of October, 1912."—*Sd.* A. Reid, Chief Judge.

By a subsequent order of the Chief Judge the Bench consisted of four Judges, Robertson, Kensington, Rattigan and Shah Din, Judges.

Notice was duly issued to Mr. *M*—to show cause why he should not be suspended or dismissed under section 13 of the Legal Practitioners Act, 1879, in respect of the following charges:—

"That you—

(*a*) knowing that, on the 7th December 1910, your application, to have one Nabi Bakhsh enrolled as your legal clerk, had been refused;

(*b*) having been informed, on the 9th May 1911, by the Bar Council that the said Nabi Bakhsh was a tout, and that a notice had been issued to him by the Registrar of the Chief Court to show cause why his name should not be placed on the list of touts;

(*c*) having represented on the same date to the Bar Council that the said Nabi Bakhsh was employed by you merely as a private or menial servant and had nothing to do with your legal work;

(*d*) having been informed by the Bar Council on the same date that your explanation was not considered satisfactory and that it was extremely undesirable that you should retain in your service, under any plea whatever, a man who was not a household servant and was professionally a lawyer's clerk and whose employment had been negatived; and

In the matter of MR. M., FIRST GRADE PLEADER.

(*c*) having promised on condition that the matter was abandoned to forthwith dismiss the said Nabi Bakhsh and not to employ him in any capacity,

continued thereafter and *till July* 1911, to employ the said Nabi Bakhsh in the capacity of your legal clerk;

"(*ii*) that under the circumstances enumerated above you continued to retain the said Nabi Bakhsh in your service;

"(*iii*) that you made the following false statement in a letter, dated the 1st May 1912, to the Registrar, Chief Court:—

'The only thing I knew against him (Nabi Bakhsh) was a trivial conviction under section 504, Indian Penal Code, and a quarrelsome temper which gained him a host of enemies.'

"(*iv*) that you also falsely represented and suggested in the said letter that the said Nabi Bakhsh was not employed by you as your legal clerk."

At the inquiry Mr. Broadway, who appeared for the President of the Bar Council, was entrusted by the Court under rule XXI of the Rules and Orders of the Chief Court, Volume III, page 69, with the conduct of the case against the Pleader, and Mr. *M*——was represented by Mr. Obedullah, Pleader. The evidence put forward for the parties was duly heard and considered and thereafter the Bench which heard the case passed the following

ORDER.—"We should note that at the commencement of the 2nd day's hearing Mr. Obedulla, on behalf of Mr. *M*——, proposed to admit all the charges and to leave the case entirely in the hands of the Court. Upon inquiry from Mr. *M*——himself, however, it appeared that he was not prepared to accept his (Pleader's) advice and that such admissions as he was prepared to make were of a very qualified character. We preferred, therefore, to hear the case to the end, and the cross-examination of Mr. *M*——which was then proceeding was continued and finished. Mr. Obedullah, thereafter, addressed us on behalf of Mr. *M*——and orders were then passed upon the merits of the case as follows:—

We are all agreed upon what is to be done and upon what has been proved in this inquiry. It appears to us quite clear that as far back as August 1910, Mr. *M*——was brought into intimate connection with one Nabi Bakhsh, who had lately been convicted of the offence of cheating, he having falsely represented his employer, Mr. *M*——, to be the Hon'ble Mr. Muhammad Shafi, a Barrister in large practice. In the course of another case in 1909, it is also shown that Mr. *M*—— became fully aware that Nabi Bakhsh was strongly suspected of being a tout. In the face of that knowledge Mr. *M*——engaged Nabi Bakhsh as a Pleader's clerk or *munshi* and applied in the usual way for Nabi Bakhsh's name to be enrolled as such. After an inquiry from the Bar Committee this Court refused to enrol Nabi Bakhsh as a clerk and duly informed Mr. *M*——of the fact; and thereafter Mr. *M*——must be deemed to have known that Nabi Bakhsh was at any rate a suspected character. Notwithstanding this he continued to employ him, and from further evidence and from the statement made in the criminal case in which Nabi Bakhsh was charged with cheating, we hold that it is proved that Mr. *M*——was employing Nabi Bakhsh, at any rate outside the Court, in the way in which the legal practitioners usually employ their clerks. The charge is not, however, that he did employ him as a clerk after enrolment was refused by this Court, but of a different nature, and we need not, therefore, lay further stress upon this matter.

Certain statements made in the course of the trial of Nabi Bakhsh were admitted by both parties as evidence in this inquiry.

With regard to the first charge, it is shown to us on clear evidence, and admitted by Mr. *M*——himself, that in May 1911 he was summoned before the Bar Council and warned by them that Nabi Bakhsh was a tout and that his further employment of Nabi Bakhsh would compel the Bar Council to report the matter to the Judges of this Court. We find that Mr. *M*——thereupon, in consideration of the abstention of the Bar Council from reporting the matter to this Court and of their agreement to take up further action, gave a clear promise that he would *forthwith* dismiss Nabi Bakhsh from his employment. Mr. *M*——does not now deny this, but says that he had on 8th July given notice to Nabi Bakhsh to leave his employ. We

find that he did not make any attempt to fulfil his promise and that Nabi. Bakhsh was still in his service in July 1911, and, as shown by the evidence on the record of the criminal case which has been admitted in this inquiry, Nabi Bakhsh was acting as an introducer of clients to him and doing other work usually done by a professional clerk. It was proved that Nabi Bakhsh himself took down the address of the client who was eventually complainant in that particular case, and that when it became necessary for Mr. *M*—— to return the fee which he had taken in the case which led to criminal proceedings against Nabi Bakhsh, the money was returned through Nabi Bakhsh. There is no evidence that Mr. *M*——had then formed any intention of dismissing Nabi Bakhsh. We are aware that he says now that he had already given him notice at the beginning of July last to leave at the end of July. We are unable to accept that statement. The position, therefore, is that Mr. *M*——, after having given a very clear promise to dismiss Nabi Bakhsh, whose name had been entered in the list of suspected touts and to whom notice had been issued to show cause why he should not be proclaimed as a tout, retained Nabi Bakhsh in his service, and that he made a distinctly false promise in order to escape the further action of the Bar Council. This is the first charge and we find it fully proved, and it is a very serious one indeed against a legal practitioner.

As regards the charges numbered (*iii*) and (*iv*), Mr. *M*——was asked in the letter addressed to him by the Registrar of this Court to explain his conduct with regard to the remarks made in the judgment recorded by Mr. Sheepshanks on the 19th of January 1912. In reply to this inquiry he stated in his letter, Exhibit F: "The only thing I knew against him was a trivial conviction under section 504, Indian Penal Code, and a quarrelsome temper which gained him a host of enemies." That statement is clearly untrue. We are convinced that at that time Mr. *M*——knew a great deal more against Nabi Bakhsh than what he now states as the minimum of his then knowledge. We, therefore, have it that Mr. *M*——in the first instance made a definite promise to escape further action of the Bar Council, and that he broke that promise, and subsequently when an inquiry was made from him that he deliberately made a false statement, false to his knowledge. We have not allowed his Counsel to discuss the question of the power of the Bar Council to give orders to members of the Bar regarding, *e. g.*, the dismissal of an employee, because any such question is irrelevant to the charge in this case. But we have no hesitation in saying that the Judges are as a body resolved to do their best to support the Bar Council in all just and proper action taken by them for the maintenance of the integrity and the purity of the Bar.

We find Mr. *M*——guilty of the two charges dealt with above.

As to the question of sentence, it is very unpleasant to a Bench of this Court to have a member of the Bar brought before them for punishment for misconduct, but it is our duty, so far as in us lies, to maintain the character and position of the Bar and to do all in our power to keep up a high standard of conduct. At the same time this is the first case of the kind which has come before us and the sentence is, therefore, not made unduly severe. It is to be hoped, however, that no further cases will ever come before us. Should they do so it will be necessary to show greater severity.

Taking all the circumstances of the case into consideration, we order that Mr. *M*——'s license be suspended for six months from this date, 5th December 1912, under section 13, Act XVIII of 1879, clause (*f*).

The suspension of Mr. M——for six months from 5th December is to be notified in the Punjab *Gazette* in accordance with Order XXV, Chapter I, section 8, of the Rules and Orders of the Chief Court Volume III.

License suspended.

In re VISA SAMTA.

BOMBAY HIGH COURT.

CRIMINAL REVISION APPLICATION No. 245 OF 1914.

October 1, 1914.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

In re VISA SAMTA—APPLICANT.

Criminal Procedure Code (Act V of 1898), s. 517—Complaint of theft dismissed—Dispute as to ownership of property—Order, proper form of.

Where a complaint of theft brought on behalf of a *talukdar* against his tenant in respect of some fallen trees which the tenant had cut down and taken is dismissed on the ground of uncertainty of ownership, the proper order to be passed with regard to the wood is that it should be sold, if it has not been already sold, and the proceeds should be retained by the Court until they are shown to be payable to one or other of the parties, either in virtue of a decree of Court or in virtue of an agreement amongst themselves.

Criminal application for revision from an order passed by the Acting District Magistrate of Ahmedabad, in Miscellaneous Criminal Application No. 12 of 1914, confirming that of the Third Class Magistrate of Sanand.

Mr. *H. V Divatia*, for the Applicant.

Mr. *N. K. Mehta*, for the Complainant.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.—In this case the Talati of a certain village on behalf of the *talukdar* brought a complaint of theft against one of the tenants of the *talukdar* in respect of some fallen trees which the tenant had cut down and taken. The trying Magistrate disposed of the matter in favour of the accused so far as the matter of the offence went. But he ordered the property (the wood) to be restored to the complainant. The matter came before the District Magistrate with reference to this order about the property. The District Magistrate at first said:—"In these circumstances I think it would have a salutary effect if I directed that the wood be sold and the proceeds credited in the treasury as a criminal deposit to be paid to such one of the parties who shall bring either a decree of a competent Court or a consent of all the other parties." However, he did not give effect to this intention. He had the matter argued before him, and then he decided, as appears from this part of his judgment: "On the whole, since I

In re KOTAYYA PILLAI.

expect that in the event of a case being instituted in a Civil Court the *talukdars* would be adjudged to be the proprietors of the trees no great harm will be done by allowing the Magistrate's order to stand. I cannot, however, express too strongly my hope that the Sanand Magistrates will, in future, when criminal complaints are made of theft in cases where there is a *bona fide* dispute about property, and especially in the case of these trees at Garodia, dismiss the complaint under section 203." We think the District Magistrate is right in emphasizing the necessity for not treating cases of this kind as if they were criminal cases. By allowing the complainant to take the wood, however he has secured to him one of the chief advantages to be gained by this very bringing of the complaint which he so strongly deprecates. On the other hand, to allow the wood to be taken by the accused would be to disregard the only decision that there is on the question of ownership of the trees, that is, the decision arrived at by the Survey Settlement Officer that the *talukdar* is the owner.

We think that the order originally proposed by the District Magistrate is quite the best in this case. We cancel the order he has made and in its place make that order which the District Magistrate originally thought was the best, *i. e.*, that the wood should be sold if it has not been already sold and the proceeds should be retained by the Court until they are shown to be payable to one or other of the parties, either in virtue of a decree of Court or in virtue of an agreement amongst themselves.

Order modified.

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 584 OF 1914.

December 15, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Napier.

In re KOTAYYA PILLAI AND ANOTHER—PRISONERS—APPELLANTS.

Madras Civil Courts Act (III of 1873), s. 24—Evidence—Affidavit sworn to in Munsif's Court—

JELAGAN SUBRAMANIA NAIDU v. K. SINGARA MUDALI.

Affidavit sworn to before Head Clerk in absence of Nazir, admissibility of

An affidavit sworn to in the Court of a District Munsif is a declaration which a Court of Justice is bound to receive as evidence of the facts stated in it, and it has nonetheless this character because it was sworn to before the Head Clerk of the District Munsif's Court, who was performing the Deputy Nazir's duties during his absence under the District Munsif's order in accordance with section 24 of Act III of 1873.

Appeal against the order of the Court of Session of the Tinnevelly Division, in Case No. 53 of the Calendar for 1914.

The *Public Prosecutor*, for the Government.

JUDGMENT.—The accused were convicted of offences punishable under sections 467, 471, 109 and 199, Indian Penal Code.

As regards sections 467, 471, and 109 there is no doubt that Exhibit B, a receipt purporting to have been signed by prosecution first witness, is a valuable security.

As regards section 199 Exhibit B2, the affidavit sworn to in the Court of the District Munsif, Koilpati, is a declaration which a Court of Justice is bound to receive as evidence of the facts stated in it and it was so received in the Subordinate Judge's disposal of prosecution first witness's execution petition. It had not the less this character, because it was sworn to before the Head Clerk of the District Munsif's Court, who was performing the Deputy Nazir's duties during his absence under the District Munsif's orders in accordance with section 24 of Act III of 1873.

On the merits we see no reason for dissent from the decision of the learned Sessions Judge, and the sentences call for no action.

The appeal is dimissed.

Appeal dismissed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 543 OF 1913.

Present:—Mr. Justice Miller.

JELAGAN SUBRAMANIA NAIDU—COMPLAINANT—PETITIONER

versus

K. SINGARA MUDALI—ACCUSED—RESPONDENT.

Workmen's Breach of Contract Act (XIII of 1859)—Contract—Payment of advance by deduction from wages—Suit for breach of contract, whether within the Act.

A case in which the contract is that the workman shall work for wages, deducting from his wages a certain sum periodically to make good an advance, is within Act XIII of 1859.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the 20th February of the Court of the 3rd Presidency Magistrate, George Town, Madras, in Calendar Case No. 2859 of 1913.

Mr. *S. Krishnamachariar*, for the Petitioner.

ORDER.—The cases in this Court bind me to set aside the Presidency Magistrate's order. A case in which the contract is that the workman shall work for wages, deducting from his wages a certain sum periodically to make good an advance, has been held in this Court to be within the Act XIII of 1859. Vide *Queen-Empress* v. *Tulukanam* (1), *Tangi Joghi* v. *Hall* (2) (as to part of the advance in that case) and the recent case, Criminal Revision Case No. 120 of 1913, Case Referred No. 13 of 1910 [*Govinda Chetty* v. *Munnoany Naik* (3)] where Benson and Tyabji, JJ., following the other cases, declined to follow the one (Criminal Revision Case No. 674 of 1912) on which the Presidency Magistrate relies.

The order is set aside, and the case should be restored to file and dealt with according to law

Petition accepted.

(1) 7 M. 131; 1 Weir 685.
(2) 23 M. 203; 1 Weir 687.
(3) 20 Ind. Cas. 224; 14 Cr. L. J. 400.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 874 OF 1911.

July 16, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Tyabji.

BANGARUSAWMY AIYANGAR—

DEFENDANT No. 1—APPELLANT

versus

A. R. A. R. S. M. SOMASUNDARAM CHETTIAR, THROUGH HIS AUTHORISED AGENT A. R. A. R. S. M. MAYANDI CHETTIAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Promissory-note—Recital as to execution by three persons—Execution by two alone—Enforceability—Question of fact.

Where a bond, which contains a recital purporting to have been executed by three people, is executed by two persons alone the question whether such a bond can be enforced against the actual executants is one of fact, depending upon the circumstances of each case.

Where the executant agreed to be liable under the bond notwithstanding that another person mentioned in the bond as a co-executant did not sign it.

Held, that the bond was enforceable against the executant.

Sivasami Chetti v. *Sevugan Chetti*, 25 M. 389, 12 M. L. J. 17 and *Krishnama Chariar* v. *Narasimha Chariar*, 31 M. 114, 3 M. L. T. 308, referred to.

Second appeal against the decree of the Court of the Subordinate Judge of Tinnevelly, in Appeal Suit No. 562 of 1909, preferred against that of the Court of the District Munsif of Tinnevelly, in Original Suit No. 29 of 1908.

FACTS.—The suit was upon a promissory note executed by the defendants. The bond recited that it was to be executed by the defendants and one Desikachariar for the balance of the amounts due under three other bonds executed by the 1st defendant and others. It was, however, signed only by the defendants. The latter pleaded that the suit bond was handed over to the plaintiff as an escrow and was not intended to be enforced against them unless Desikachariar also joined in its execution. The District Munsif dismissed the suit, holding that the document was not enforceable even against the defendants. On appeal the Subordinate Judge decreed the suit, holding that the appellant (1st defendant) agreed to be liable under the bond even though Desikachariar did not join in its execution. The 1st defendant appealed to the High Court.

Mr. *K. Srinivasa Iyengar*, for the Appellant:—The document contains a recital as to its execution by three people. Two alone have signed. It is upon the plaintiff to prove that the bond was intended to be enforced against the actual executants. The plaintiff himself does not go into the box and the notices issued clearly proceed on the basis that the bonds, in renewal of which the suit bond was executed, were not cancelled. This shows that the suit document is incomplete and, therefore, not enforceable.

Mr. *C. S. Venkatachariar*, for the Respondents.—Whether the bond was intended to be enforced even though the other executants did not join in its execution, is a question of intention. The defendant who alleges a condition as attached to the document must prove the same. The Subordinate Judge has found that no such condition existed.

JUDGMENT.—The question whether when a document, which recites that it was executed by *A*, *B* and *C*, is executed by *A* and *A* alone, whether in such a case, *A* and *B* agreed to be liable under it only if *C* also joined in executing it, is a question of fact to be decided in the circumstances of each particular case. *Sivasami Chetti* v. *Sevugan Chetti* (1) and *Krishnama Chariar* v. *Narasimha Chairar* (2). In this particular case, the lower Appellate Court has after considering the circumstances and probabilities arrived at the conclusion that the 1st defendant (the appellant before us) agreed to be liable under Exhibit A, notwithstanding that one Desikachariar mentioned in the recital as a co-executant did not sign it. Though it must be admitted that the judgment is not quite satisfactory, we cannot say that there is no evidence on which the lower Appellate Court could have arrived at the conclusion at which it arrived. The plaintiff's 1st witness says that he made a demand on the 1st defendant for money due under the particular promissory note and that the 1st defendant promised to pay up soon, thus impliedly admitting that his liability under it was not made conditional on Desikachariar's joining in its execution. We are not satisfied that the Subordinate Judge has misconstrued the documentary evidence in any material particular.

(1) 25 M. 389; 12 M. L. J. 17.
(2) 31 M. 114; 3 M. L. T. 308.

We, therefore, dismiss this second appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2093 OF 1912.

August 10, 1914.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Kumaraswami Sastri.

BALASIDHANTAM AND OTHERS —DEFENDANTS NOS. 2 TO 4—APPELLANTS

versus

PERUMAL CHETTI AND OTHERS—PLAINTIFFS AND DEFENDANTS NOS. 1, 7 TO 10, 5 AND 6 AND 3—RESPONDENTS.

Court Fees Act (VII of 1870), s. 7, sub-s. iv (cc) —Landlord and tenant—Suit by former for ejectment and rent—Stamp duty paid on one year's rent—Competency of Court to inquire into title—Transfer of Property Act (IV of 1882, ss. 58 and 83—Mortgage by conditional sale—Sale and rental agreement—Document of even date containing an undertaking to reconvey under certain conditions—Deposit in Court—Refusal to receive money—Whether subsisting relation of landlord and tenant affected by deposit.

Where in a suit for ejectment and arrears of rent by certain landlords against their tenants, the plaintiffs pay stamp duty calculated upon one year's rent only under section 7, (XI) (cc) of the Court Fees Act, of 1870, the Court will not go into the question of title.

Where, in a suit by landlords against their tenants for ejectment and for arrears of rent, the tenants pleaded that the transaction between the parties was only a mortgage by conditional sale, that they had deposited the mortgage amount in Court under section 83 of the Transfer of Property Act and that as the plaintiffs (the mortgagees) had refused to receive the same from the Court, they were debarred from suing for any rent subsequent to the date of such deposit and from ejecting the defendants:

Held, that the mere deposit of the amount in Court did not put an end to the already subsisting relation of landlord and tenant between the parties and that the plaintiffs were entitled to sue for possession and rent.

Satyabadi Behara v. *Harabati*, 34 C. 228; 5 C. L. J. 192, and *Rukhminibai* v. *Venkatesh*, 31 B. 527; 9 Bom. L. R. 958, followed.

Second appeal against the decree of the District Court of Salem, in Appeal Suit No. 162 of 1910, preferred against that of the Court of the Principal District Munsif, Salem, in Original Suit No. 19 of 1910.

FACTS.—The suit was by certain landlords against their tenants for ejectment, on the ground that the term of the tenancy had expired, and for the recovery of the arrears of rent due by the latter. The defences were that the plaintiffs were only mortgagees by conditional sale of the suit land, that the defendants had deposited in Court the mortgage amount long before the date of suit and that as the plaintiffs had refused to receive the same, they were not entitled either to eject the defendants or to recover rent accrued due after the date of the deposit. This question turned upon the construction of three deeds: (1) an out and out sale in favour of the plaintiffs, (2) an agreement of even date by the plaintiffs in favour of their vendors undertaking to reconvey the land on their compliance with certain conditions and (3) a rental agreement by the vendors in favour of the plaintiffs, on which the present suit was based. The Courts below, holding that the transaction amounted to a sale with an agreement for re-purchase, decreed the plaintiffs' suit. The defendants then preferred this second appeal to the High Court.

Mr. *V. Venkatachariar*, for the Appellants:—The terms of the deeds support the position that the transaction is only a mortgage by conditional sale. *Kalka Prasad* v. *Bhuiyan Din* (1), *Mutha Venkatachalapati* v. *Pyanda Venkatachalapati* (2), *Balkishen Das* v. *W. F. Legge* (3) and *Ramayya* v. *Krishnamma* (4).

The mortgage amount having been deposited in Court under section 83 of the Transfer of Property Act and the mortgagees having refused to receive the same, they are not entitled either to eject the defendants or to sue them for rent accruing subsequent to such deposit. The mortgage relation has become extinct.

Mr. *B. Sitarama Rao*, for the Respondents:—It is unnecessary to consider whether the relationship of mortgagor and mortgagee subsisted or not. The suit is on a rental agreement executed in plaintiffs' favour, and they are entitled to possession and rents so long as the agreement remained in force. Mere deposit in Court of the mortgage amount does not put an end to the subsisting relationship of the parties.

(1) 2 Ind. Cas 180, 31 A. 300, 6 A. L. J. 222.
(2) 27 M. 348.
(3) 23 A. 149; 27 I. A. 58, 4 C. W. N. 153; 2 Bom. L. R. 523
(4) 23 M. 114.

MATTE SARAYYA *v.* VEPPARATHI VYDYANATHAM.

JUDGMENT.—The suit was brought under section 7, clause XI (*cc*), of the Court Fees Act, on payment of the Court-fees upon one year's rent. Therefore the title of the plaintiffs need not be gone into in this case. We express no opinion whether the documents, Exhibits A, B and I, constitute a sale with a condition to re-purchase or a mortgage by conditional sale. We are not to be understood as agreeing with the conclusion at which the Courts below have arrived upon this point. It is argued that as the full amounts mentioned in Exhibits A and B have been deposited in Court, the plaintiffs are not entitled to a decree for rent. As was pointed out in *Satyabadi Behara* v. *Harabati* (5) and in *Rukhminibai* v. *Venkatesh* (6), mere deposit of the amount does not put an end to the relationship already subsisting. Even if the plaintiffs were only mortgagees so long as Exhibit B subsists, they can sue for possession and for rent under it. We agree with the decisions of the Calcutta and Bombay High Courts and hold that the payment into Court has not taken away from the plaintiffs the right to sue for possession and rent under Exhibit B. We uphold the decree solely upon this ground. We think this is a fit case in which the parties should bear their own costs in this Court.

The second appeal is dismissed.

Appeal dismissed.

(5) 34 C. 223; 5 C. L. J. 122.
(6) 31 B. 527; 9 Bom. L. R. 958.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2215 OF 1912.

April 21, 1914.

Present:—Mr. Justice Miller and Mr. Justice Sadasiva Aiyar.

MATTE SARAYYA—DEFENDANT—APPELLANT

versus

VEPPARATHI VYDYANATHAM—PLAINTIFF—RESPONDENT.

Inam—*Service* inam—*Title-deed in grantee's name—Services connected with temple—Alienation by grantee—Trustee's suit for possession, maintainability of.*

The title-deed for an *inam* orginally granted to a dancing woman for performing certain services in a temple was issued in her name by the Government. She subsequently alienated the *inam*. The services having been neglected, the trustees of the temple sued for possession of the *inam*:

Held, that the suit by the trustees was not maintainable.

Pakkiam Pillay v. *Seetharama Vadhyar*, 14 M. L. J. 134, referred to.

Second appeal against the decree of the Court of the Subordinate Judge of Cocanada in Appeal Suit No. 103 of 1911, preferred against that of the Court of the District Munsif of Peddapur, in Original Suit No. 442 of 1909.

FACTS.—The land in suit was originally granted to a dancing woman for performing certain services in a temple. At the time of the Inam Settlement, the title-deed was issued in her name subject to the condition of performing the services in question. She subsequently alienated the *inam* by way of mortgage to a stranger, who obtained a decree against her and in execution thereof purchased the properties in Court auction and got into possession of the same. The trustee of the temple then sued the purchaser for possession of the *inam*, alleging that the services had been neglected. The Court of first instance dismissed the suit, on the ground that the plaintiff was not the *dharmakartha* of the temple. On appeal the Subordinate Juge held the plaintiff was the *dharmakartha* and decreed the suit. The purchaser then appealed to the High Court.

Mr. *V. Ramesam*, for the Appellant:—The *inam* in question was not granted to the temple but was conferred on the dancing woman. The dancing woman and not the temple was the owner. The *inam* title-deed also stood in the name of the dancing woman. The interest which the temple had in the proper performance of the services in question was not proprietary interest in the *inam*, as the Government and not the temple was interested in the reversion. If services are not properly performed, the temple authorities could obtain redress by representing the matter to the Government. The suit is, therefore, not maintainable.

Mr. *P. M. Srinivasa Iyengar*, for Mr. *P. Nagabhushanam*, for the Respondent:—The temple being interested in the performance of the services, the plaintiff was entitled to see that the *inam* was not improperly alienated so as to interfere with such performance. This interest was sufficient to entitle the plaintiff to sue for possession of the *inam*, which had been alienated in this case.

JUDGMENT.—There is nothing here to suggest that the *inam* was granted by the temple authorities. Exhibit D is the title-deed given by the Government to the person doing service in the temple, and makes the title conditional on the fulfilment of the terms of the grant.

There is no ground on which the temple trustees can intervene to prevent the alienation of the *inam*. No doubt the Government might resume and re-grant it if moved to do so, and it may be that if the present servant who is responsible for the alienation were removed from office, her successor in the office could recover the *inam* on the principle enunciated in *Pakkiam Pillay* v. *Seetharama Vadhyar* (1). But the trustees cannot recover possession of the land in the present suit, and we must reverse the decree of the Subordinate Judge and dismiss the suit.

Parties pay their own costs throughout.

Appeal allowed.

(1) 14 M. L. J. 134.

CALCUTTA HIGH COURT.

CIVIL RULE No. 1297 OF 1913.

August 14, 1914.

Present:—Mr. Justice Stephen and Mr. Justice Mullick.

GADADHAR PROSAD AND OTHERS—DECREE-HOLDERS—PETITIONERS

versus

Musammat AULADIN AND OTHERS—JUDGMENT-DEBTORS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 47, O. XXXIV, r. 12—Prior mortgagee, ex parte decree on subsequent mortgage against—Interest of prior mortgagee, whether can be declared subsequently—Application to prevent execution by such prior mortgagee, whether under s. 47.

Where a prior mortgagee is made a party to a suit on a subsequent mortgage and allows an *ex parte* decree to be passed against him, he is not precluded from having his right as a prior mortgagee declared under Order XXXIV, rule 12, of the Civil Procedure Code, 1908.

An application by such a prior mortgagee to prevent execution being taken out against the mortgaged properties comes under section 47 of the Civil Procedure Code, 1908, being a question between the parties.

Rule against an order of the Munsif, Second Court, Gya, in the matter of Mortgage Execution Case No. 68 of 1913.

Babu *Kulwant Sahay*, for the Petitioners.

Moulvi *Khursid Hussain*, for the Opposite Party.

JUDGMENT.—In this case the decree-holder before us obtained a Rule which arises as follows.

He obtained an *ex parte* decree in a mortgage suit and subsequently obtained a final decree. One of the parties to that suit was the present opposite party, who was joined as having an interest in the land. He now comes in and states that he has the interest of a mortgagee prior to the decree-holder. The Court below has made an order under Order XXXIV, rule 12, Civil Procedure Code, declaring his interest as a prior mortgagee.

It is argued on behalf of the petitioner that this order was one which the Court had no authority to make, for as the petitioner was a party to the suit he ought to have declared his prior mortgage in the suit, and not having done so, the decree is binding on him and constitutes *res judicata* as far as this issue is concerned; and it is contended that in his present application he is asking to have that decree to some extent set aside, which cannot be done except in review. This contention seems to us one which cannot prevail. In the first place, we consider that this is an order properly made under Order XXXIV, rule 12. There is in that rule nothing to prevent its application to a party in a suit. No issue was raised in the suit by the plaintiff as to the interest of the defendant and the matter was not brought by him before the Court for adjudication. The remedy of the present petitioners seems to lie under this rule. We also consider that the present matter is one which in fact arises under section 47 of the Code of Civil Procedure, being a question between the parties as it relates to execution. It is now suggested that it does not relate to execution, but that it is an application to vary the decree. It, however, arises in the course of execution. The object of the application is to prevent execution being taken out against certain property; and under these circumstances we hold that it is an application under section 47; and we discharge the rule with costs, hearing fee being assessed at 2 (two) gold *mohurs*.

Rule discharged.

BOMBAY HIGH COURT.

CIVIL REVISION APPLICATION No. 199 OF 1914.

August 18, 1914.

Present:—Mr. Justice Beaman and Mr. Justice Heaton.

NATHABHAI TRICAMLAL—PLAINTIFF—APPLICANT

versus

RANCHODLAL RAMJI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), ss. 134, 137—Principal and surety—Omission to pursue suit against principal on account of difficulty in service—Striking off his name—Surety not discharged—Civil Procedure Code (Act V of 1908), O. IX, r. 5, O. XXIII, r. 1, applicability of.

Where in a suit against several defendants, there is some difficulty in serving one of them and hence his name is struck off, if not at the request, at least with the consent of the plaintiff, the striking out of the name, even before a year has elapsed, would be a procedure under Order IX, rule 5, rather than Order XXIII, rule 1.

In a suit against the principal debtor and surety, the mere omission of the plaintiff to pursue his suit against the principal debtor with the result that his name is struck off and the suit dismissed against him under Order IX, rule 5, does not discharge the surety, provided the suit be still in time against the principal.

Civil application under extraordinary jurisdiction, from the decision of the Small Cause Court Judge, Ahmedabad, in Suit No. 3190 of 1913.

Mr. *T. R. Desai*, for the Applicant.

Mr. *Ratanlal Ranchhoddas*, for the Respondents.

JUDGMENT.—The plaintiff sued the two defendants on a promissory note. The 2nd defendant pleaded that he was a surety. There was some difficulty in serving the 1st defendant, and we gather from the record that his name was struck out. As a year had not elapsed, presumably this was done, if not at the request, at least with the consent of the plaintiff. The defendant No. 2 then contended that as the act of the plaintiff in having the defendant No. 1's name thus struck off operated as a complete discharge of the principal debtor, he, the surety, was likewise discharged and the suit must be dismissed.

The learned Judge who tried this suit as a Small Cause Court suit was of opinion that this contention was sound and dismissed the plaintiff's suit.

We think that the striking off of the defendant No. 1's name was a procedure under Order IX, rule 5, rather than Order XXIII, rule 1. And all the authorities in all the Courts of India who have had this question under consideration, although they differed upon another point, are in agreement that the mere omission of the plaintiff to pursue his suit against one of the defendants with the result that that defendant's name is struck off and the suit dismissed against him under Order IX, rule 5, does not discharge the surety, provided the suit be still in time against the principal. That being so and confining our decision to that ground alone, we think that the order of the learned Judge below dismissing the suit was wrong.

Even were that not so, it would still be a question whether, in view of the form of the suit, the Judge ought to have taken it for granted, as he appears to have done, that the plaintiff was suing the 2nd defendant merely as a surety. If, in fact, he was suing him as a principal, none of the considerations upon which the dismissal of the suit has been based would apply at all.

We must, therefore, reverse the decree of the learned Judge below and remand the case to him for trial upon the merits.

Costs will be costs in the cause.

Rule made absolute.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 81 OF 1913-14 OF SULTANPUR DISTRICT.

May 26, 1914.

Present:—Sir Duncan Colvin Baillie, S. M., and Mr. Tweedy, J. M.

Raja RUDRA PRATAB SAHI—PLAINTIFF—APPELLANT

versus

RAM CHARAN PANDE—DEFENDANT—RESPONDENT.

Oudh Rent Act (XXII of 1886), s. 107H—Groves brought under cultivation—Bila tasfia, land held as—Under-proprietary rights, accrual of—Presumption.

A person who was a former proprietor of a village and had got Settlement Court decrees for *sir* lands and under-proprietary rights in the village

RUDRA PRATAB SAHI v. RAM CHARAN PANDE.

and had his claims at the time of the Settlement for large areas besides the *sir* dismissed in default was in possession of some old groves. These groves having subsequently been brought under cultivation were recorded as land held *bila tasfia*, and the landlord sued for assessment of rent on that land:

Held, that the provisions of section 107H of the Oudh Rent Act applied to the land in suit, inasmuch as it could reasonably be inferred that the possession of the grove was not that of an ordinary tenant whose rights come to an abrupt conclusion when the land ceases to be grove.

Appeal from the decree of the Commissioner, Fyzabad, dated 26th May 1913.

JUDGMENT.

BAILLIE, S. M. (*April 8th*, 1914.)—The suit was for assessment of rent on four *bighas* and nine *biswas* of land recorded as held *bila tasfia* by the respondent, who has a decree as an under-proprietor for certain other land in this village. The Court of first instance held that the respondent had proved some special rights in Nos. 192, 246, 252 and 305/2, and on that ground dismissed the claim for these numbers but assessed rents on all the other numbers. In appeal the Deputy Commissioner held that the respondent had rights of a proprietary nature in Nos. 192, 245 and 246/1 and accordingly dismissed the suit for them. He held that the suit must fail for the whole of No. 245, because the respondent had rights of some sort in an undivided part of the number. The decision of the Court of first instance as regards Nos. 252 and 305/2 was reversed and rent assessed on these numbers. The respondent has filed an appeal against the order assessing rent as a whole and has specially made claims in regard to Nos. 252 and 305/2. I have first to take the *zemindar's* appeal into consideration. The grounds on which the Deputy Commissioner and the Court of first instance both found that the respondent had rights of a proprietary character in these Nos. 192, 245 and 246/1 are that a suit had been brought by the proprietor for the time being against the respondent in the Civil Court for possession of certain lands amongst which these numbers were included and that this suit was dismissed in regard to these numbers. The Deputy Commissioner lays down that the suit was for proprietary possession, that it was resisted on the ground of adverse proprietary possession and that it must, therefore, be held that adverse proprietary possession was established. I have carefully examined the decision in that case. I do not regard the defence in the civil suit as claim of adverse proprietary possession at all. There could in a *taluka* be no such adverse independent possession. The defendant, now respondent, alleged, it appears to me, no more than under-proprietary rights: but, as a matter of fact, there was no finding whatsoever that he had under-proprietary rights. The finding simply was that the land was grove and it was on this ground that the suit for possession against him was dismissed. It would have been dismissed even if he had simply the rights of a tenant in the groves. The finding of the Deputy Commissioner that the respondent has been found to have adverse proprietary possession in regard to these numbers must certainly be reversed, but there appears to me to be every reason to believe that the respondent's possession was not that of an ordinary statutory tenant. He had got a decree for *sir* lands and he had claimed various large areas besides the *sir*, all such claims at Settlement having been dismissed one after another in default, but he was an old proprietor and had under-proprietary rights in the village and these were his old groves. I consider that it may be inferred that his possession of the groves was not that of an ordinary tenant whose rights come to an abrupt conclusion when the land ceases to be grove. In these circumstances I think that it may be held that section 107H applies to Nos. 192, 245 and 246/1 and that rent may be assessed under that section at the revenue *plus* twenty per cent. *malikana*.

As regards Nos. 252 and 305/2, the appeal of the defendant must, I think, be dismissed. He relies on the decision of Mr. Brownrigg dismissing a suit for arrears of rent in regard to these numbers, but that suit was dismissed on the ground that the proprietor's own title was doubtful, and not on the ground that the defendant had any rights whatsoever. Mr. Brownrigg's decision does not demonstrate that defendant's possession of Nos. 252 and 305/2 is in any way different from his possession of the other numbers on which rent was assessed. The result is that I modify the orders of the lower Courts and direct that rent be assessed as above mentioned on these numbers and

dismiss both appeals as regards all other numbers. Costs on parties.

TYRRELL, J. M.—I concur with the proposed order.

Appeal partly allowed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 525 OF 1913.

August 19, 1914.

Present:—Sir Basil Scott, KT., Chief Justice; Mr. Justice Beaman and Mr. Justice Hayward.

BASANGAUDA NAGANGAUDA AND OTHERS—DEFENDANTS—APPELLANTS

versus

BASANGAUDA DODANGAUDA—PLAINTIFF—RESPONDENT.

Hindu Law—Mitakshara School—Succession—Brother's widow excludes first cousin.

Under the *Mitakshara* School of Hindu Law the widow of a brother would be the next reversioner in preference to the first cousins.

The only essentials of a good legal acceleration are that it should be to the next in reversion and that it should cover the whole life-estate. No consent of reversioners is needed, still less any proof of necessity.

Second appeal from the decision of the First Class Subordinate Judge, Bijapur, in Appeal No. 11 of 1912, varying the decree passed by the Additional Subordinate Judge at Bagalkot, in Civil Suit No. 151 of 1910.

This appeal first came up for hearing before Beaman and Hayward, JJ., who differed in their opinions and then it was put up before Sir Basil Scott, C. J., for decision.

FACTS of the case appear fully from the following judgments of Beaman and Hayward, JJ.

BEAMAN, J.—The point of greatest importance and difficulty in this appeal is whether Timawa, widow of Kardepa, or the first cousins of the deceased Dodangauda stand nearest in the reversion.

Dodangauda and Kardepa were undivided brothers. Kardepa died, leaving him surviving his widow, Timawa. Then Dodangauda died and his widow Doddawa took her life estate. She professed to give away the whole of it in 1883 to her deceased husband's first cousins, the defendants. Twenty-six years later she adopted the plaintiff. Timawa, the widow of Kardepa, is still alive.

The defendants rely on the doctrine of acceleration which may now be taken to be established law. I shall have to say a few words upon that later. Here it is sufficient to state that true acceleration can only occur between the tenant of the life-estate and the nearest reversioner. Therefore if Timawa was the nearest reversioner in 1883 there could have been no acceleration in that year in favour of the defendants, and the plaintiff would, in the absence of any other defence, be entitled to succeed.

It may be noted here, though this fact falls more properly to be considered in discussing the doctrine of acceleration, that the life-estate comprised certain *vatan* property as well as other non-*vatan* immoveable property. It is not disputed that under the law of *vatans*, the defendants were the nearest reversioners to the *vatan* lands. So that in respect to so much of the claim, if the acceleration be therwise good, there can be no doubt but that the plaintiff must fail. The larger portion of the life-estate, however, is not *vatan* land; and the decisions of both Courts below are based on the assumption that Timawa, and not the defendants, was the nearest reversioner. In my opinion, although two learned Judges below appear to have taken it for granted that she was and early in the argument here Pleaders on both sides were disposed to support that view, she is not.

It is contended for the plaintiff that the decision in *Lallubhai Bapubhai* v. *Mankuvarbai* (1) concludes the point. That case was confirmed by the Judicial Committee, and undoubtedly settled the law it professed to lay down. The question is, whether that or any other authority goes the length of holding that the widow of a brother is nearer in the reversion than first cousins? It can only be by an extension, of any actual decision, in other words, by taking the supposed principle of such a case as that of Mankuvarbai and extending it to the case before us, that this can be affirmed. It is, therefore, necessary to be sure that we are rightly apprehending the principle underlying the decision in *Mankuvarbai's* case (1) before saying that it not only can, but must, be extended to cover this case.

What was decided in *Mankuvarbai's* case (1)? This and this only. Where

(1) 2 B. 388.

there is competition between reversioners after the extinction of all designated heirs, the widow of a *gotraja sapinda* excludes male *gotraja sapindas* in a remoter line. I can accept that at once as undoubtedly the law of this Presidency, whether really good Hindu Law or not, and yet hold, for reasons which will be fully stated, that the case before us is not necessarily governed by that decision or by the principle upon which it is based. In a much later case decided by Telang, J., probably the greatest Hindu Judge who has sat on this Bench, it was held that where there is a competition between reversioners after the exhaustion of all designated heirs, the widow of a *gotraja sapinda* is postponed to any male in the same line. And that decision was followed and explained in a very recent case, *Kashibai v. Sitabai* (2), decided by the present learned Chief Justice. Almost synchronously a Bench of this Court consisting of my brother Hayward and myself decided a similar case, *Khandacharya* v. *Govindacharya* (3), on exactly the same principle and professedly following *Rachava* v. *Kalingapa* (4) and *Kashibai* v. *Sitabai* (2).

I rely upon those three cases. I say that so far as the law permitted after the decision in *Mankuvarbai's* case (1), they correctly lay down the Hindu Law applicable to such facts as those before us, and that the principle of those cases is the principle which ought always to be applied.

That principle does not, in any way, conflict with the actual decision in *Mankuvarbai's* case(1), though it is open to argument whether there are not dicta in the judgment of West, J., and afterwards in the judgment of the Judicial Committee, which imply the extension of the reason of that case as far as the plaintiff would have it extended in the case before us.

The point really lies in a very narrow compass. I do not propose to attempt any elaborate examination of the Hindu law books, or any nice criticism of the textual commentaries with which the subject has been encumbered. But a careful critical study of West, J.'s judgment in *Mankuvarbai's* case (1) and of the judgment of the Judicial Committee confirming it, shows that in spite of the extraordinarily learned and exhaustive examination of the whole available Hindu Law, the conclusion rested finally on what was held to be an established custom rather than any authoritative deduction from the words of the Hindu law-givers and commentators.

The latter were found to be so nebulous, contradictory, inconsistent and unconvincing as to afford but little solid ground upon which to base a decision either way. I understand that the custom was made out from the answers of local Shastris to questions propounded to them by the authors of West and Buhler. It is possible that such answers may have truly represented established local customs; but in strictness they can hardly amount to what the law ordinarily requires as proof of custom. They are in reality no more than the dogmatic interpretation by a body of unknown persons of certain ancient writings with which they were supposed to be familiar. In dealing with this point their Lordships of the Judicial Committee say, *obiter*, that the Shastris have gone so far as to declare that a sister-in-law excludes first cousins. As that is precisely the case before us, the plaintiff naturally relies most strongly on this passage. It is, however, as I have just said, purely *obiter*. And it is noteworthy that in fact the Shastris consulted were not unanimous on this point. One decided that the sister-in-law did, another that she did not, exclude a first cousin. And apart from that there is, as far as I know, no authority whatever, either in the accredited law books or in decided cases, for the proposition on which the plaintiff's success in this case must depend. So far from it being a proved custom in this Presidency that a sister-in-law excludes a first cousin, I am moderately confident that no such rule of succession has ever been alleged, much less proved, in our Courts. The textual basis of the rule laid down in *Mankuvarbai's* case(1) appears to have been chiefly a passage in Brihaspati. The reason contained in the passage is so childish and fanciful, and would lead, if pushed to its logical conclusion, to such absurdities, that it is no wonder Telang, J., declined to adopt

(2) 11 Ind. Cas. 560; 13 Bom. L. R. 552; 35 B. 389.
(3) 12 Ind. Cas. 566; 13 Bom. L. R. 1005.
(4) 16 B. 716.

it, saying that it looked, as indeed it does, like proving too much. The rule in *Mankuvarbai's* case (1), which must, I think, be regarded as something of a judge-made innovation, could hardly be made good by any mere collation of the recognised sources of Hindu Law. But in applying that law, it was held that a custom had grown up in the Bombay Presidency, which warranted laying down the broad rule that, as between competing reversioners, the widow of a *gotraja sapinda* took in preference to a male *gotraja sapinda* in a remoter line. Had the point needed decision at the time, it is possible that West, J., would have extended the rule so as to give preference to the widow of a nearer male *gotraja sapinda* over a remoter male *sapinda* in the same line. But Telang, J., refused to do this, holding that where the competitors were in the same line, sex and not mere proximity was the determining consideration, and that any male in the same line excluded the widow of any other male, although the latter, had he been living, would have been nearer to the propositus, and so the next reversioner. It is only by taking the reasoning or parts of the reasoning in West, J.'s judgment, by saying that it in effect establishes this proposition, that the widow of a deceased *gotraja sapinda* fills her husband's place in all heirship competitions, that the plaintiff can hope to succeed in his contention that Timawa was a nearer reversioner than the defendants. But that is not the law. Since *Bachava's* case (4) it cannot be argued that greater propinquity in the same line makes a widow nearer in reversion than a male in the same line. So that the only real question arising on the cases, is what is meant by "the line?" In my opinion all the cases are here in agreement. There is not one in which where the question was, which of two persons claiming to be reversioners is entitled to the estate, the line was started within the group of designated heirs, or as it is often called the "compact series."

No support is to be found anywhere for such a method, except the conflicting replies of the local Shastris, unsupported by reason or text.

It appears to me to be too clear to admit of doubt that where we have to look for the next reversioner, we must start the line outside the group of designated heirs. Within that group there could, of course, never be any conflict between the widow of a designated heir and a designated heir. It is only after the exhaustion of the designated heirs, that the search for the nearest reversioner begins. The plaintiff's contention appears to be, that although the statement just made is self-evident, yet where the compact series is exhausted, the first line must be started from the father, not from the grandfather of the propositus. If that were done here, the line would begin with the father of Kardepa and Dodangauda, himself one of the designated heirs, within the compact series, and, of course, the widow of either of his sons would be in the line, while his nephews would not. It will be seen that whether by mere accident, or because the learned Judges responsible for those judgments rejected any such method, this has never once been done. The language of Telang, J., is particularly clear on the point. The line is to start in the first instance from the paternal grandfather. When that line is exhausted without yielding a reversioner, a fresh line is to be started from the paternal great-grandfather and so on. In the case which Hayward, J., and I decided, we followed this rule, and, speaking for myself, I am sure I did so because it did not occur to me as arguable that a line laid out for the purpose of finding a reversioner could properly be started within the compact series. This too was what was done, and I cannot believe by pure accident, in all the other cases. But it might be said of them that there was no surviving widow of any male within the compact series, while in *Khandacharya's* case (3) there was. Still in that case the Court started the line not from the father of Venkatesh, the deceased propositus, but from his paternal grandfather Venkatesh I. Even so the widow of his brother came nearer in the reversion than second cousins. But had there been first cousins in the competition, it is plain upon the principle stated in the judgment that the result would have been different and that the widow would then have been postponed. If in the present case the line be started from the paternal grandfather, it is clear that Timawa is not only in

the same line as the defendants but in precisely the same degree of propinquity. The latter fact is unimportant now. If she represents a deceased male *gotraja sapinda* in the same line, then she comes last of that line and any male found in it excludes her. The defendants are in the line, and, in my opinion, they clearly exclude her. Nothing in the decided cases compels me to extend the rule, as I am asked to extend it here, so as to exclude the first cousins in favour of the sister-in-law. I think that doing so would be entirely opposed to the sense of the Hindus of this Presidency and the spirit of the old Hindu Law. Women are probably much more favoured already in this Presidency under the liberal decisions of this High Court than elsewhere in India; but I find it difficult to believe that there is really anything in the recognized Hindu scriptures or the authoritative commentaries on them to warrant the proposition for which the plaintiff is now contending. If the rule really rested on the extravagant texts of Brishaspati, then there would be no need to search along any line for the next reversioner, for neither of the brothers Kardepa or Dodangauda are dead, each is only half dead, and no reversion has opened.

But if there is a question of reversion to be investigated, it pre-supposes the complete exhaustion of the compact series and places the starting point of the search outside that series, invariably, as Telang, J., states, first at the paternal grandfather. Let that be done here and it will be seen at once that Timawa was not the next reversioner in 1883 while the defendants were.

The doctrine of acceleration, very clearly stated in the judgment of Lord Morris, in *Behari Lal* v. *Madho Lal Ahir Gayawal* (5), would seem to have been almost invariably entangled in subsequent decisions of the Indian Courts with the altogether different doctrine of alienation. Briefly, Hindu widows in enjoyment of life-estates may not alienate any part of the immoveable property, except for legal necessity. Analysis will show that this is the single recognized justification, although the language of Judges often obscures it and suggests that pious motives may be substituted for necessity and may validate even larger alienations and freer powers to alienate than could be seriously considered on a narrow ground of mere secular necessity. Yet whether the necessity be temporal or spiritual, so sought for as legal justification for these alienations, it will always be seen on close examination to be necessity and nothing else. Long ago the legal notion got abroad and soon received judicial sanction that the consent of all the nearest (in order) reversioners was good proof of the necessity for the alienation. If there had been no necessity, it was argued, the reversioners would never have consented to lose their expectant rights. Here it is to be observed that in applying this doctrine, it is not the consent of the reversioners, *per se*, which makes good what would otherwise be a bad alienation by a life tenant, but the presumed, though undiscovered, necessity of which that consent is good proof. If there are on the date of the alienation three reversioners in this order, *A*, *B*, *C*, and the alienation be made to *B*, *A* consenting, then it may be presumed that in *A's* judgment there was a true necessity for the alienation. In a less degree too, of course, if *C* consents; for, although *C* is last in the reversion, it is quite possible that but for the alienation to *B*, he might have been the nearest reversioner at the termination of the life-estate. But no inference of this kind could reasonably be drawn from the consent of *B* to an alienation to himself. Most men will consent to receiving a benefit, and in those cases giving this "consent" (which in this connection hardly has any meaning) would not, in fact or at the bar of reason and common sense, point towards the existence of any necessity. A great majority of cases falling under this doctrine are, however, cases of alienations to outsiders. If the consent of all reversioners be obtained to such an alienation, it is probably true in fact, as assumed by law, that that consent indicates the existence of some necessity for the alienation. I have laboured this extremely elementary proposition more than its intrinsic content would seem to need, because I have found in so many decided cases recurring confusion between the principles governing this kind of alienation and a proper case of acceleration.

(5) 19 C. 236 at p. 241; 19 I. A. 30.

The only essentials of a good legal acceleration are that it should be to the next in reversion and that it should cover the whole life-estate. But the consent of the reversioner in whose favour the reversion is accelerated, or of any other more distant reversioner, is obviously immaterial. Nor does any question of necessity arise. The reason why the two conditions I have stated are essential is, and I think always ought to be, obvious. By accelerating (as the word implies) the tenant of the life-estate may be said figuratively to commit legal suicide. She brings about exactly the same legal results as would follow by operation of law upon her natural death. If at the date of the acceleration the widow with the life-estate were to die, the next reversioner in whose favour the acceleration is made would, of course, take the whole life-estate accelerated.

But no acceleration can be made in favour of any one but the next reversioner, for that would be more than committing legal suicide, it would be making a will as well. And this the widow has no power to do, as far as the immoveable property in which she has the life-estate is concerned.

It is, therefore, absurd to talk of accelerating in favour of, say, the reversioner third in order of proximity, with the consent of the two who stand nearer. That is not acceleration but alienation. Similarly it would be absurd to talk of accelerating four-fifths of the life-estate. For since the validity (in theory) of the acceleration depends upon the result corresponding exactly with the result which would follow the natural death of the widow accelerating, there can never be any question of deliberate reservation in her own favour. It does not, however, follow from this, as indicated in an earlier passage of this judgment, that the life-estate may not be composite and that there may not be different reversioners to its parts. Thus where the life-estate in immoveables comprises *vatan* and other property, it is quite possible that the nearest reversioner to the *vatan* may not be the nearest reversioner to the rest of the immoveable property. This I believe to be the only real exception to the general rule that a true acceleration must pass the whole life-estate. And in strictness it is not an exception. For, so far as the *vatan* property accelerated is concerned, the acceleration does bring about exactly the same legal result as the death of the life-tenant would have done.

Theoretically, acceleration is not an alienation at all, but a mere renunciation, the obliterating of a bar. The life-estate is withdrawn in its entirety it is voluntarily extinguished, and it is not the tenant of the life-estate, but the law, which does the rest. It will, therefore, become apparent that no consent of the reversioners or anyone else can be needed to validate a true acceleration. Still less any proof of necessity. The condition that the acceleration must comprise the whole life-estate is essential to its theoretical perfection. So that a widow with a life-estate in twenty fields cannot accelerate ten of them and retain ten, and this applies universally and irrespective of the proportion of what is alienated to what is reserved. But I should doubt whether niggling objections on this score, such as have been raised here and been acceded to by the Courts below, can fairly be said to arise under a commonsense and rational application of the general principles. For example, it is contended for the plaintiff that because the widow with the life-estate did not specifically accelerate the right, she had to nominate an officiating *vatandar* when she accelerated the *vatan* lands, that was a reservation which invalidates the acceleration. I think that is going too far. In the first place, I believe it was merely an unintentional omission, the right being of no value that I can see to the widow. I have not the least doubt that had she thought of it and been competent to accelerate it, she would have done so. But the real answer perhaps is that without the sanction of Government she was not competent to alienate this right. And it may, of course, have been that neither she nor the next reversioner in whose favour she accelerated cared to raise the question before the Revenue Authorities as long as the widow lived. In point of fact we were told during the argument that she never attempted to exercise this right for many years after the acceleration of 1883. She has asserted it recently, but probably under legal advice for the sole purpose of taking this objection. Now,

small and unintentional omissions of that sort might occur in the acceleration of every large life-estate in immoveable property. I think in this country, where such transactions are often effected without professional assistance, all such *casus omissi* ought to be neglected.

What is to be looked at is the intention of the tenant of the life-estate, and that is not to be defeated, if on the whole plain, merely because she has failed to enumerate every tree or shed or right of way or other unimportant right annexed to or inherent in the property.

I am of opinion that the failure to mention this *vatan* right specifically in the acceleration of 1883 does not invalidate it as being a conscious and intentional reservation to the accelerating tenant of the life-estate of any part of it in her own favour.

In my opinion, therefore, the plaintiff fails on every point and his suit ought to be dismissed with all costs throughout. In the event, however, of my being wrong in holding that Timawa was not the next reversioner, I should entirely concur with the order proposed by my brother Hayward. The only point of law, therefore, upon which we differ is whether in 1883 Timawa or the defendants stood next in the reversion. That point must be referred under section 98 of the Civil Procedure Code.

HAYWARD, J.—Plaintiff sued as the adopted son to recover certain property, non-*vatan* and *vatan*, transferred twenty-six years before his adoption by his adoptive mother to the first cousins of his adoptive father.

The original Court held that the transfer was ineffectual as an acceleration or surrender by the adoptive mother of the non-*vatan* property, as there was in existence a widow of a brother who was the next reversioner in preference to the first cousins of the adoptive father; but that the transfer was effectual as an acceleration or surrender by the adoptive mother of the *vatan* property, as the widow of the brother was excluded from inheritance to *vatan* property and the first cousins were the next reversioners under the Vatan Act.

The first Appeal Court held that the transfer was not even effectual as an acceleration or surrender by the adoptive mother of the *vatan* property, as it did not include the right to appoint an officiating Patil and was consequently not a surrender of the whole of the *vatan* property under the Vatan Act.

The second appeal to this Court has resulted in the suggestion towards the close of arguments that the widow of a brother would not be the next reversioner in preference to the first cousins, as assumed up to that stage of the proceedings by all parties. The suggestion has been that a special rule would govern the order of succession of widows of brothers, excluding them from their place at the end of the first collateral lines of the brothers descending through the father and postponing them to the end of the second collateral lines of the first cousins descending through the grandfather, and that the general rule placing widows of collateral *gotraja sapindas* at the end of the collateral lines of their husbands and preferring them to males of remoter collateral lines would only come into operation in respect of the second collateral lines of the first cousins descending through the grandfather and apply to those lines and the subsequent lines descending through the great-grandfather, the great-great-grandfather and other remoter grandfathers.

The suggestion has not, in my opinion and with deference to my learned brother, been shown to be based on any solid foundation. The *Mitakshara* has laid down the rules of succession as follows in Chapter II, section IV, placs. 1 and 7. "On failure of the father, brothers share ..... .on failure of brothers also, their sons share ....." and in Chapter II, section V, plac. 4: "On failure of the father's descendants, the heirs are successively the paternal grandmother, the paternal grandfather, the uncles and their sons", and in Chapter II, section V, plac. 5: "On failure of the paternal grandfather's descendants, the paternal great-grandmother, the great-grandfather, his sons and their sons inherit. In this manner must be understood the succession of kindred belonging to the same general family" (Setlur's Collection of Hindu Law Books on Inheritance). The *Mitakshara*

thus dealt with the first collateral lines of *gotraja sapindas* descending from the father, the second collateral lines descending from the grandfather and the remoter collateral lines descending from the remoter grandfathers. The *Mitakshara* made no specific mention, however, of the widows of collateral *gotraja sapindas*, but it was decided in the case of *Lakshmibai* v. *Jayram Hari* (6) by Melvill, J., that the general rule was "the wives of all *sapindas* ..... must be held to have rights of inheritance co-extensive with those of their husbands" in view of the mention of the grandmother and the great-grandmothers, following the opinion expressed by West and Buhler in their work on Hindu Law. This decision was developed in the subsequent case of *Lallubhai Bapubhai* v. *Mankuvarbai*(1). West, J., criticized a case in which a sister-in-law had been postponed to a first cousin and quoted another in which a sister-in-law had been preferred to a first cousin (page 442) and after referring to other cases of widows of *gotraja sapindas*, laid down the general rule that "the widow of the *gotraja sapinda* of a nearer collateral line appears entitled to precedence over the male *gotraja* in a more remote line" (page 449). The Privy Council referred to the case in which the sister-in-law had been preferred even to first cousins and confirmed the general rule, as a matter of custom in the Bombay Presidency, in the appeal entitled *Lallubhai Bapubhai* v. *Cassibai* (7). In the case of *Kesserbai* v. *Valab Raoji* (8) Westropp, C. J., remarked that "the rule laid down...(that the widows of *gotraja sapindas* stand in the same places as their husbands, if living, would respectively have occupied) was intended to be subject to the right of any person whose place is so specially fixed on that roll, as (amongst others) that of the sisters," whose place he had indicated as being next after the grandmother, that is to say, before the grandfather (pages 197 and 209). In the case of *Nahalchand Harakchand* v. *Hemchand* (9) West, J., further emphasized the right of persons whose place was specially fixed to precede widows of *gotraja sapindas* by saying: "the members of the 'compact series' of heirs specifically enumerated take in the order in which they are enumerated. preferably to those lower in the list and to the widows of any relatives, whether near or remote, though where the group of specified heirs has been exhausted, the right of the widow is recognised to take her husband's place in competition with the representative of a remoter line" (page 34). The compact series of heirs has been referred to as the series ending with the brother's son in both the *Mitakshara* and *Mayukha* (Mitakshara Chapter II, section V, plac. 2, and Mayukha Chapter IV, section VIII, plac. 18.—Setlur's Collection of Hindu Law Books of Inheritance). The particular privileges reserved by these two cases did not, therefore, extend to members of the second collateral lines descended from the grandfather. In the case of *Rachava* v. *Kalingapa* (4) Telang, J., did not refer to all the rules of succession quoted above from the *Mitakshara*. It was not necessary to do so as the case before him related only to succession among members of the second collateral line descending from the grandfather. He did not even quote *verbatim* the rules relating to succession among members of the second collateral lines descending from the grandfather or of the remoter collateral lines descending from remoter grandfathers. But he stated without qualification that "the decision in *Lallubhai Bapubhai* v. *Mankuvarbai* (1) having been affirmed by the Privy Council, the eligibility for inheritance of female *gotraja sapindas*, who have become such by marriage, is no longer open to dispute. And it also must be taken to be the result of that decision that where the contest lies between a female *gotraja* representing a nearer line and a male *gotraja* representing a remoter line of *gotraja sapindas*, the former inherits by preference over the latter" (pages 718-719). Similar remarks apply to the cases of *Kashibai* v. *Sitabai* (2) decided by a Bench including the present Chief Justice and *Khandacharya* v. *Govindacharya* (3) decided by the present Bench. It appears, therefore, to me that the general rule in favour of widows of *gotraja sapindas* of nearer collateral lines excluding male *gotrajas* of

(6) 6 B. H. C. R. (A. C. J.) 152 at p. 156.
(7) 5 B. 110 at pp. 125, 126; 7 C. L. R. 445; 7 I. A. 212.
(8) 4 B. 188 at p. 200.
(9) 9 B. 31.

remoter lines has been laid down as a general rule having application to all collateral lines, and not merely to the second and subsequent collateral lines descending from the grandfather and remoter grandfathers, by a long series of decisions of this Court.

The result of that view, if correct, would be that the brother's widow was the next reversioner to the non-*vatan* property in preference to the first cousins of the adoptive father. The brother's widow has been found not to have given her consent to the transfer of the non-*vatan* property. That finding proceeded on the view that there was no evidence of such consent, overlooking the twenty-six years' acquiescence which might well have been regarded as good evidence of implied consent. If it had been a case of alienation to third parties, it might have been necessary to consider whether that finding could not be challenged as consequently wrong in law and whether, in any case, the consent was necessary of the female next reversioner in addition to the consent of the subsequent male reversioners in view of the remarks in the cases of *Vinayak* v. *Govind* (10) and *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (11). But it was not a case of alienation to third parties. It was a gift to the subsequent reversioners and the doctrine of consent indicating legal propriety or necessity could not be extended to gifts to reversioners, as pointed out in the case of *Pilu Appa* v. *Babaji* (12). The transfer, moreover, could not be held effectual as an acceleration or surrender, because it did not pass the estate to the next but to the subsequent reversioners. It could only have been held effectual as a joint acceleration or surrender of the estates both of the holder and the next reversioner to the subsequent reversioners. But something more than mere implied consent of the next reversioner would have been necessary to constitute that reversioner a party to the acceleration or surrender in favour of the subsequent reversioners.

The result of my view, even if correct, would not, however, affect the validity of the transfer of the *vatan* property. The brother's widow would, in any case, be excluded from the inheritance by the special provisions of the Vatan Act, and the transfer would *prima facie* be valid as an acceleration or surrender in favour of the next reversioners and not merely of subsequent reversioners. It has, however, been contended that it was invalid, as it related merely to the *vatan* property and as it did not include the right to appoint an officiating Patil under the Vatan Act and as it was not, therefore, an acceleration or surrender of the whole estate vested in the *vatandar*. But it does not appear to me to be contrary to the general principle that the whole estate must be surrendered, as laid down by the Privy Council in the case of *Behari Lal* v. *Madho Lal Ahir Gayawal* (5), to regard the *vatan* property with its special rules of succession as a separate estate vested in the *vatandar* and to hold that the rule has no application to property like the right to appoint an officiating Patil which, at most, would be property inalienable under the Vatan Act without the special sanction of Government.

The first Appeal Court's decision decreeing the claim would, therefore, in my view of the case, have to be confirmed as regards the non-*vatan* property, but reversed and the claim dismissed as regards the *vatan* property and the parties ordered to bear their own costs throughout, including the costs in this Court.

Mr. *P. D. Bhide*, for the Appellant.

Mr. *K. H. Kelkar*, for the Respondent.

JUDGMENT.

SCOTT, C. J.:—In my opinion Timava, the widow of Kardepa Dodangauda's brother, is a nearer heir of Dodangauda than his uncle's sons, the defendants.

I entirely agree with the reasoning and conclusion of Hayward, J., upon the point. The compact series of heirs ends with the brother's son (Mitakshara, Ch. II, section V, pl. 2; Mayukha, section VIII, pl. 18).

The grandmother's place is specially fixed and this alone gives her preference over unspecified *sapindas* in the line of the father. I can find no reason for treating the brother's widow as a *sapinda* to be postponed to all

(10) 2 Bom. L. R. 820, 25 B. 129 at pp. 135, 136.
(11) 9 Bom L. R. 1348, 30 A. 1 at p. 21, 3 M L. T. 1; 12 C. W. N. 74, 6 C. L. J. 766; 5 A. L. J. 1; 35 I. A. 1 (P. C.), 17 M. L. J. 605.
(12) 4 Ind. Cas. 584, 11 Bom L. R 1291; 34 B. 165.

males capable of inheriting in the line of the grandfather. On the contrary, the position that brother's wives are *sapindas* in the line of the father for all purposes, results clearly from the following passage in the Acharakanda of Vijnaneshwara which was discussed in *Lallubhai Bapubhai* v. *Mankuvarbai* (1), and very recently by the Judicial Committee in *Ramchandra Martand Walker* v. *Vinayak Venkatesh* (13):—"In like manner brothers' wives also are (*sapinda* relations to each other), because they produce one body (the son), with those (severally) who have sprung up from one body (*i. e.*, because they bring forth sons by their union with the offspring of one person and thus their husband's father is the common bond which connects them)." Mr. Justice Hayward has referred to *Kesserbai* v. *Valab Raoji* (8) and *Nahalchand Harakchand* v. *Hemchand* (9). I will only add in support of his conclusion reference to *Russoobai* v. *Zoolekhabai* (14) and *Trikam Purshotam* v. *Natha Daji* (15). In the first of these cases the judgment was delivered by Sir Charles Sargent, one of the Judges who decided *Ramchandra* v. *Krishnaji* (16) referred to in *Rachava* v. *Kalingapa* (4). He said of a step-mother: "It is a necessary inference from ..*Lallubhai Bapubhai* v. *Mankuvarbai* (1) that she is entitled to inherit as a *gotraja sapinda*. The latter case, as explained by the judgment in *Rachava* v. *Kalingapa* (4), must be taken as deciding that the widows of *gotraja sapindas* in the case of collaterals are to be preferred to the male *gotrajas* in a more remote line, and *a fortiori* the widow of a male *gotraja* in the ascending line...will have that preference over such collateral." The uncle's sons are indeed mentioned in pl. 4 of Ch. II, section 5, of the *Mitakshara*, but they cannot be regarded as specially mentioned in the succession so as to preclude the operation of the above rule. In *Trikam Purshotam* v. *Natha Daji* (15) Chandavarkar, J., said: "If once it is conceded that a half-sister is a *gotraja sapinda*, she stands nearer to the propositus in the line of heirs than a paternal uncle."

(13) 25 Ind. Cas. 290; 18 C. W. N. 1154; 27 M. L. J. 333; 1 L. W. 831; 20 C. L. J. 573; 10 N. L. R. 112; 16 M. L. T. 447; (1914) M. W. N. 835; 16 Bom. L. R. 863; 12 A. L. J. 1281.

(14) 19 B. 707.

(15) 12 Ind. Cas. 359; 13 Bom. L. R. 863; 36 B. 120

(16) S. A. No. 624 of 1888 (unreported).

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 18 OF 1913-14 OF HARDOI DISTRICT.

March 28, 1914.

Present:—Mr. Tweedy, J. M.

Thakur LAL MUNESHAR BAKHSH SINGH—DEFENDANT—APPELLANT

versus

SHAHZADE KHAN—PLAINTIFF—RESPONDENT.

Nankar, *cash, right to—Under-proprietary right—Ejectment, notice of, cancellation of*—Prima facie *case of under-proprietary rights to be established.*

A right to receive a cash *nankar* does not necessarily connote a right to possession of land as an under-proprietor, but may, when coupled with some other facts, go to establish a *prima facie* case of under-proprietary rights.

A notice of ejectment ought to be cancelled by the Revenue Courts in cases where a *prima facie* claim to under-proprietary rights has been established.

Appeal from the decree of the Commissioner, Lucknow, dated 21st October 1913, upholding the order of the Assistant Collector, Hardoi, dated 4th June 1913.

FACTS.—The defendant landlord issued a notice of ejectment against the plaintiff, who contested it on the ground that he was not liable to ejectment as a mere tenant, inasmuch as his predecessors were former *zemindars* and as he was a *sirdar* and was getting a cash *nankar* from the landlord, which was set off every year against the rent due from him. The lower Courts cancelled, the notice on the ground that a right to receive a cash *nankar* does of itself mean an under-proprietary right. This proposition of law was challenged in appeal before the Board of Revenue.

Pandits *Gokaran Nath Misra* and *Bansi Dhar Misra*, for the Appellant.

Babu *Lachhman Prasad* and Babu *Manni Lal*, for the Respondent.

JUDGMENT.—There is no doubt that a cash *nankar* does not necessarily connote a right to possession of land as under-proprietor. This may be admitted without coming to the conclusion that the Commissioner's decision is wrong. There are other circumstances in the case which tend to strengthen the conclusion at which he has arrived, among which may be mentioned the case which was decided in 1882 by the Subordinate Judge, where under-proprietary rights were decreed to other persons bearing the same relationship to the

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zemindar Hasai that is borne by the respondent. The pedigree which is on the record proves that the respondent is the grandson of Hasai and this fact coupled with the receipt of the cash *nankar*, which is set off against the rent, justifies the conclusion that a *prima facie* case of under-proprietary rights has been established. The appeal is dismissed with costs. This order will govern Nos. 19 and 20.

Appeal dismissed.

CALCUTTA HIGH COURT.
CIVIL RULE No. 175 OF 1914.
July 22, 1914.

Present:—Mr. Justice D. Chatterjee and Mr. Justice Walmsley.

AHMADULLAH CHOWDHURY—DECREE-HOLDER—PETITIONER

versus

HARKARU SAHA AND ANOTHER—OPPOSITE PARTY.

Bengal Tenancy Act (VIII of 1885), s. 170 (3)—Non-transferable occupancy holding, whether can be transferred—Landlord, right of—Decree for arrears of rent—Deposit by private purchaser.

A right of occupancy which is not transferable by custom or local usage can be transferred, but where the transfer is a sale of the whole holding, the landlord in the absence of his consent is entitled to enter on such holding.

A private purchaser of such an occupancy holding is quite competent to make a deposit under section 170 (3), Bengal Tenancy Act, to prevent the landlord from selling the holding in execution of a decree for arrears of rent as, his interest is such as is voidable on the sale.

Tarak Das Pal Chowdhry v. *Harish Chandra Banerjee*, 16 Ind. Cas. 977; 16 C. L. J. 548; 17 C. W. N. 163, followed.

Rule in the matter of Rent Execution Case No. 1691 of 1913 of the Court of the Munsif of Katihar.

Babu *Kali Kinkar Chakravarti*, for the Petitioner.

Babus *Jogendra Nath Mukherjee* and *Karanamoy Ghose*, for the Opposite Party.

JUDGMEMT.—The petitioner is the landlord. He obtained a decree for arrears of rent against his registered tenant in August 1912 and advertised for sale the occupancy holding in arrear. The opposite party deposited the decretal amount under section 170 (3) of the Bengal Tenancy Act, on the allegation that he had purchased the holding from the judgment-debtor in January 1909 and had been in possession ever since. The petitioner opposed the deposit, but the learned Munsif allowed it and relied on the case of *Tarak Das Pal Chowdhry* v. *Haris Chandra Banerjee* (1). It is contended before us that the said case is distinguishable as the purchaser had been in possession for more than 12 years to the knowledge of the landlord, whereas in this case the possession did not exceed three or four years. The learned Judges, however, did not rely on the possession for more than 12 years. They say: "It is not material for the purpose to consider.....whether he has acquired by possession for a period longer than 12 years the status of a tenant of a non-transferable holding." The learned Vakil for the opposite party contends that the ruling of the Full Bench in the case of *Dayamoyi* v. *Ananda Mohan Roy* (2) supports his right. One of the questions referred was: "Whether a right of occupancy which is not transferable by custom or local usage is a right which can be transferred at all?" And it was answered in the affirmative subject, however, to the qualification that "where the transfer is a sale of the whole holding, the landlord in the absence of his consent is ordinarily entitled to enter on the holding." The landlord, therefore, can terminate the purchaser's interest at any time, and his right to do so is independent of an execution sale. We do not think, however, that on that account the interest is not one which is voidable on the sale. The effect of the sale is to give the auction-purchaser the right to oust the transferee, and it has been held in the case of *Tarak Das Pal Chowdhry* v. *Harish Chandra Banerjee* (1) that that fact makes the interest of the purchaser one that is voidable on the sale. If that be so, the purchaser has interest which is voidable on the sale and the deposit was quite competent. The Rule is, therefore, discharged with costs, one gold *mohur*.

Rule discharged.

(1) 16 Ind. Cas. 977; 16 C. L. J. 548; 17 C. W. N. 163.

(2) 27 Ind. Cas. 61; 18 C. W. N. 971; 20 C. L. J. 62

KASHINATH *v.* SHANKER RAM.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 6 OF 1915.
January 4, 1915.
Present:—Mr. Justice Piggott.
KASHINATH—APPLICANT
versus
SHANKER RAM AND OTHERS—
OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 16—Trial by Bench of Honorary Magistrates—Difference of opinion—Benefit of doubt—Reference to District Magistrate, whether legal—Practice.

Where there is an irreconcilable difference of opinion between the members of a Bench of two Honorary Magistrates as to the guilt of an accused, they should follow the principle laid down by the Local Government for their guidance though not formally issued by the District Magistrate of their district under section 16 of the Criminal Procedure Code and, giving the benefit of the doubt, should acquit the accused.

A reference by a Bench of Honorary Magistrates on difference of opinion between them to a District Magistrate is irregular and not justified by any provisions of Criminal Procedure Code.

Criminal revision against an order of the District Magistrate of Benares.

Mr. *Satya Chandra Mukerjee*, for the Applicant.

JUDGMENT.—In this case a number of persons were on their trial before a Bench of Magistrates exercising jurisdiction within the limits of the Municipality of Benares. That Bench consisted of two members, Pandit Ram Chander Naik Kalia and Babu Sita Ram. I find on a reference to the Civil List of this Province that each of these Magistrates sitting singly exercises the powers of a Magistrate of the third class, but that any two Magistrates within the Municipality of Benares sitting together as a Bench are empowered to exercise the jurisdiction of a Magistrate of the second class. After a complete trial the two Magistrates differed in opinion. Pandit Ram Chander Naik Kalia found the four accused persons not guilty and recorded a judgment concluding with an order of acquittal; Babu Sita Ram was of opinion that the offence charged was proved against all the accused persons and recorded a judgment convicting and sentencing them to pay a fine of Rs. 50 each. The two Magistrates then signed an order referring the case to the District Magistrate of Benares for consideration and orders. The District Magistrate recorded a note upon this reference, to the effect that under the standing rules for conduct of business by a Bench of Honorary Magistrates, "when there is a Bench of two and one is for conviction and the other for acquittal, the accused is to be acquitted". No further orders appear to have been passed in the case. The complainant has brought the matter before this Court in revision. The proceedings of the Honorary Magistrates were, as a matter of fact, irregular. Under section 16 of the Code of Criminal Procedure the Local Government may, or subject to the control of the Local Government the District Magistrate may, make rules consistent with this Code for the guidance of Magistrates' Benches respecting various subjects, including amongst others "the mode of settling differences of opinion which may arise between the Magistrates in session." The Local Government has drawn up a draft of certain rules recommended for general adoption. The seventh of these rules provides as follows:—"In regard to a finding, when the number of the members is uneven the opinion of the majority shall prevail, when the number is even and the members are equally divided the accused shall get the benefit of the doubt." The intention of the Local Government in framing these draft rules obviously was that the District Magistrates should formally issue the said rules, or rules to the same effect, for their own districts in the exercise of the powers conferred upon them by section 16 of the Code of Criminal Procedure. It is not clear whether this has been done for the Benares district, but under the circumstances I do not think it worth while to make further inquiry on this point. Even supposing that no formal order has been issued by the District Magistrate of Benares in this matter, the Bench of Honorary Magistrates, when they found that there was an irreconcilable difference of opinion between them as to the guilt or innocence of the accused in this particular case, might well have accepted the principle laid down by the Local Government and passed orders accordingly. The order of reference to the District Magistrates was irregular and not justified by any of the provisions of the Code of Criminal Procedure. As the record now stands before me, the trial of the accused persons is technically incomplete. The District Magistrate's endorsement on the order of reference is not in itself, and obviously not intended to be, an order of acquittal,

Strictly speaking the record requires to be completed by a formal order, signed by both the Magistrates, to the effect that, in view of the difference of opinion embodied in their respective judgments, they follow the principle laid down by the Local Government for their guidance and giving the accused the benefit of the doubt, formally acquit them. I do not think, however, that the interference of this Court is called for. For one thing it is clear that in substance the opinion of the Magistrate who was in favour of the accused persons has been give effect to. If, however, any parties concerned think it desirable to move the Bench of Magistrates, or the District Magistrate himself, with a view to correcting the informality which I have noticed and placing on the record a proper order finally disposing of the case, I have no doubt that in view of the remarks which I have made such a course would be adopted.

I dismiss this application.

Application dismissed.

BOMBAY HIGH COURT.

CRIMINAL REFERENCE No. 42 OF 1914.

August 13, 1914.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

EMPEROR—PROSECUTOR

versus

GOVINDA BABAJI BABDE—ACCUSED.

Dekkhan Agriculturists' Relief Act (XVII of 1879), ss. 2 (4), 64—"Money", whether includes cattle—Creditor receiving bullocks from agriculturist—Duty to give receipt.

Money as defined in section 2 (4) of the Dekkhan Agriculturists' Relief Act includes cattle, and a creditor purchasing bullocks from an agriculturist is bound to give a receipt as required by section 64 of the Act.

Criminal reference made by the Additional Sessions Judge of Poona.

Mr. *M. R. Bodas*, for the Accused.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.—The Additional Sessions Judge of Poona has referred this case to us. It seems that a creditor was convicted and sentenced under section 67 of the Dekkhan Agriculturists' Relief Act for not giving a receipt as required by section 64. The Additional Sessions Judge was under

the impression that section 64 did not apply to the case, because the only payment, in respect of which he found it proved that a receipt was not given, was the delivery of the two bullocks, whereas the section speaks of money. The definition of money, however, in the Act itself says that money shall be deemed to include agricultural produce, implements and stock. Under the head of stock it would necessarily include cattle. The conviction, therefore, so far as the law goes, is perfectly correct. Nor do we see any good reason to induce us to interfere with the conviction in so far as it is based on evidence. But it seems to us that the fine in the circumstances is somewhat excessive and we reduce it to Rs. 15. The difference between the Rs. 15 and Rs. 40, if paid, should be refunded.

Conviction confirmed ; Sentence reduced.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 645 OF 1914.

June 4, 1914.

Present:—Mr. Justice Sharfuddin and Mr. Justice Teunon.

KEDAR MULLICK AND OTHERS—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 118—Proceedings pending—Some defence witnesses called upon to show cause why they should not be prosecuted under s. 193, Indian Penal Code—Accused prejudiced—Order, whether sustainable.

Where proceedings under section 118, Criminal Procedure Code, were still pending against an accused, the Magistrate called upon some of the defence witnesses to show cause why they should not be prosecuted under section 193, Indian Penal Code, whereby the other defence witnesses were frightened and did not give evidence:

Held, that the action of the Magistrate was highly injudicious and was calculated seriously to hamper and prejudice the accused and the order under section 118 could not be sustained.

Criminal revision of an order of the Magistrate.

Babu *Jyotish Chandra Hazra*, for the Petitioners.

Babu *Atulya Chandra Bose*, for the Opposite Party.

JUDGMENT.—In this case the ten petitioners before us have been required to furnish

security for good behaviour under section 118 of the Criminal Procedure Code. It appears that in the course of the inquiry into the truth of the information on which action had been taken, when the prosecution evidence was exhausted, the accused were called upon to adduce evidence in their defence. They had in attendance 60 witnesses and on the day on which they were required to give evidence eighteen witnesses, were examined on their behalf. At the close of that day's proceedings at the instance of the Public Prosecutor, the trying Magistrate called upon two of the witnesses, *viz.*, Nos. 4 and 6, to show cause why they should not be prosecuted under section 193, Indian Penal Code, in respect of some of the statements they had made in the course of their depositions. On the following day 12 more witnesses were examined of whom at least 4 did not support the defence. On the following day out of the remaining witnesses the defence ventured to examine only three. The explanation they furnish is that the proceedings taken by the Magistrate, as a matter of fact, frightened their witnesses or prevented them from giving evidence.

It cannot be disputed that the action taken against the two defence witnesses during the pendency of these proceedings was highly injudicious and was calculated seriously to hamper and prejudice the accused in their defence. On that ground we make this Rule absolute, set aside the order made under section 118, Criminal Procedure Code, and direct that a further inquiry be made by another Magistrate into the truth of the information on which action was taken. In these terms we make this Rule absolute.

Rule made absolute.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 402 OF 1914.

CRIMINAL REVISION PETITION No. 334 OF 1914.

December 18, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Napier.

V. KRISHNAMMA AND OTHERS—COUNTER-PETITIONERS NOS. 1 TO 5—PETITIONERS

versus

CHITTURI CHINNA PERRAJU—PETITIONER—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 195—Sanction to prosecute—Sanction, when not justified—Prima facie case, whether can be indicated in sanction order.

A Judge is entitled to call for such records as he thinks would assist him in the exercise of his discretion, but he cannot sanction the prosecution of witnesses on inferences drawn against them from such records when they were not produced before or at the time of their deposition and when the witnesses were not given an opportunity to explain them.

Per *Napier, J.*—A *prima facie* case cannot be indicated against a person in the order sanctioning his prosecution

In re Paree Kushammad, 26 M. 116; 2 Weir 189 and *Panpapati Sastri v. Subba Sastri*, 23 M. 210; 2 Weir 186, dissented from.

Mr. Hume v. Poresh Chunder Ghose, 22 Ind. Cas. 321; 41 C. 446; 15 Cr. L. J. 49, followed.

Petition, under section 195 (6) of the Code of Criminal Procedure, 1898, praying the High Court to set aside the order of the Sessions Court of Kistna, in Criminal Miscellaneous Petition No. 14 of 1914, granting sanction for the prosecution of the petitioners in connection with Calendar Case No. 49 of 1913, on the file of the Sub-Divisional Magistrate, Bandar Division (Criminal Appeal No. 7 of 1914 on the file of the Sessions Court).

Messrs. *O. R. Osborne* and *T. Rama Chandra Rou*, for the Petitioners.

Mr. *A. Venkatarayuliah*, for the Respondent.

Mr. *J. C. Adam*, for the Government.

ORDER.

OLDFIELD, J.—I would deal this case on the short grounds that (1) petitioners were witnesses who had no control over the conduct of the case in which they gave evidence, and no right of evidence in the appellate proceedings in connection with which their prosecution was sanctioned, (2) they, therefore had, at no time an oppor-

tunity to combat the learned Sessions Judge's inferences from the evidence on which he relied against them and which in fact was first admitted in appeal not before or during their depositions, when they might have reconciled them with it. I, therefore, concur in revoking the sanctions, and express no opinion as to the duty or right of a superior Court to scrutinise the grounds on which they were given or the limits within which such scrutinising should be confined.

NAPIER, J.—This is an application to revise the sanction granted by the Sessions Judge of Kistna on the hearing of Criminal Appeal No. 7 of 1914, in which he reversed the conviction of the accused by the Sub-Divisional Magistrate of Bandar. The sanction was granted with respect to prosecution witnesses Nos. 2, 4, 5, 8 and 9 and was for their prosecution on a charge under section 193, Indian Penal Code.

The first point taken by Mr. Osborne in this petition is that the evidence has been misunderstood by the Sessions Judge and is not sufficient to establish a *prima facie* case or raise a reasonable probability of conviction. He relies on the well-known judgment of Bashyam Aiyangar, J., in *In re Paree Kuzhammad* (1) and on the case of *Pampapati Sastri* v. *Subba Sastri* (2), which undoubtedly support the proposition of law he contends for. I can only repeat here what I said here on other occasions that, with the greatest deference to that eminent Judge, Sir Bashyam Aiyangar, and the other learned Judges who expressed that view, I am entirely unable to concur in it. The question has been considered by the Full Bench of the High Court of Calcutta in *Mr. Hume* v. *Poresh Chunder* (3), and the conclusion at which the Court arrived has been stated by the learned Chief Justice in language so felicitous that I will not attempt to add anything to it. I adopt that conclusion and that language in their entirety. I will quote one passage at page 457: "The reports abound with expressions of opinion evoked by the peculiar circumstances of the case in which they arise. If they are all to be read into the section as of universal application, then the enactment of the Legislature will pass out of recognition." I would also refer to an observation of Stephen, J., on this very point. He points out that the duty of the Magistrate is precisely the same where sanction has been granted as in cases where it has not, and observes: "From this it follows that there is no reason why the Court to whom the application for sanction is made, should perform any of the acts that will fall within the scope of the Magistrate's duty if the sanction is granted: and there is a very good reason why it should not, namely, that the same thing should not be done twice, and section 195 certainly does not say that it should." To my mind a most serious objection is that, if this test is to be one of the controlling elements in the upholding of a sanction by the High Court, it follows that where a sanction has been so upheld, the case goes to the Magistrate with the *imprimatur* of the opinion of the High Court that there is a *prima facie* case against the accused. I cannot imagine a more serious interference with the powers vested by law in the magistracy and the duty imposed on them of discharging an accused where they are satisfied that there are not sufficient grounds of committing the accused for trial under section 209 or in warrant cases of discharging him under section 253, when they find that no case against the accused has been made out which, if unrebutted, would warrant his conviction. No attempt has been made in any case that I am aware of to reconcile this proposition with the words of clause 4 of section 195: "The sanction referred to in this section may be expressed in general terms and need not name the accused person, but it shall, so far as practicable, specify the Court or other place in which, and the occasion on which, the offence was committed." Even putting aside the words "expressed in general terms" which are to my mind conclusive against the proposition, I fail to see how a *prima facie* case can be indicated against a particular person in the sanction order when that sanction order need not even name the accused person. There are other arguments which can be used against the view: but as I am of opinion that it is fundamentally

(1) 26 M. 110; 2 Weir 180.
(2) 23 M. 210; 2 Weir 188.
(3) 22 Ind. Cas. 821; 41 C. 446; 15 Cr. L. J. 49.

incorrect and that the true view is expressed in the case above referred to, I do not think it necessary to pursue the matter any further.

The next objection taken is that the Sessions Judge in exercising his discretion adopted a procedure and used materials for his decision which have operated unfairly against the petitioners. They were, as stated above, witnesses in a criminal case. Their evidence was that they were present in the village and saw the preparations for the attack by the accused in that case. The Court before whom they appeared accepted their evidence as true and convicted the accused. The appeal was heard by the Sessions Judge and at the hearing of the appeal at which they were, of course, not represented, the Judge made use of two records of a case which had not been filed in the lower Court. It is suggested by the Vakil who appears for the counter-petitioner that extracts from the records were procured by the Vakil who appeared in the lower Court, but he admits that there is nothing to show that the witnesses had their attention drawn to any passage in those records for the purpose of giving them an opportunity to offer any explanation or even that they were referred to in argument. The Sessions Judge used those records to establish that at the date on which they stated they saw the accused at Chittoor they could not have been in that place. The language of his order is as follows: "I sanction the prosecution of. . . . , as it appears to me clear from the *documentary evidence* that the evidence that they saw the accused at Chittoor on the night of August 8th is false." Now, first of all these documents are not documentary evidence, as they were not exhibited either in the Court of first instance or in the Appellate Court. I am of opinion that the Judge was entitled to call for records which he thought would assist him in the exercise of his discretion. But he appears to have lost sight of the very important fact that no suggestion based on these records had been made to the witnesses at the trial and that they were not before him during his inquiry, and so were unable to offer any explanation on the case made out against them on this new material. It is true that it is not necessary that the persons with respect to whom the inquiry is held should have notice. But it has been held by the Full Bench of this Court in a judgment that binds me, *Queen-Empress* v. *Sheik Beari* (4), that the opinion should be formed after the party concerned has had an opportunity of being heard. It must be borne in mind that there is a practical difference between the position of a complainant and a witness The complainant has an interest in the case; and even if he does not appear on the appeal, he will certainly make himself aware of it. A witness has no further interest in the case after his evidence has been taken He is brought there by process of law and departs when permission has been accorded to him. That months afterwards sanction to prosecute him should be granted in proceedings of which he had no notice on materials which were not produced at the trial, and possibly were capable of instant explanation if he had been present, seems to me an improper exercise of judicial discretion. I confine my observations to the facts of this particular case and in this case I am satisfied that we should interfere, and I agree with my learned brother that the sanction should be revoked.

Petition allowed: Sanction revoked.

(4) 10 M. 232; 2 Weir 181 (F. B).

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEALS NOS. 5 AND 6 OF 1914.

July 27, 1914.

Present:—Mr. Fawcett, J. C., and Mr. Crouch, A. J. C.

MULO *walad* BHAWANI AND ANOTHER—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (*Act XLV of* 1860), *ss.* 361 (*Explanation*), 366—*Passing out of keeping of natural guardian—Kidnapping—Offence, whether committed—Confinement what constitutes.*

Where a little girl, who has no intention of starting life independently, leaves her house for the purpose of seeking refuge with another relation, she cannot be considered to have passed out of the

keeping of her natural guardians within the meaning of the explanation to section 361, Indian Penal Code, until she has by some overt act passed into the keeping of some one else. Therefore, a person who induces her to accompany him shortly after she leaves her house is guilty of an offence under section 366 of the Penal Code.

Where a child of 12 is removed a very great distance from her home and has been deprived of all independent judgment or will power by threats and inducements, she is confined because she is not conscious of the desire to escape.

Appeal against the decision of the Additional Sessions Judge, Hyderabad.

Mr. *Lalchand Hassomal*, for Appellant No. 1.

Mr. *E. Raymond*, Public Prosecutor, for the Crown.

JUDGMENT.

CROUCH, A. J. C.—The two appellants have been convicted of offences under sections 366 and 368, Indian Penal Code, and have been sentenced to five years' rigorous imprisonment.

We must be satisfied:—

I. That the girl Kunwar had been kidnapped.

II. That she had been kidnapped with the intent that she might be compelled to marry against her will, or be seduced to illicit intercourse.

III. That each accused knew that she had been kidnapped with such intent.

IV. That each accused was guilty of wrongfully concealing or confining her.

It has been proved that the girl is between eleven and thirteen years of age (Exhibit 31) and is married. Being a Hindu she could, under no circumstances, contract another legal marriage during the life-time of her husband. Any intercourse with a man with whom she had gone through the form of marriage would be illicit.

There can be no doubt that, while living with her aunt, Santok, in a village in the Baroda State, she suddenly disappeared; that she was taken by Doongerji to Ahmedabad; that Doongerji offered to sell her to Bavaji (Exhibit 13); that Doongerji took her to Bikho and left her with him, having probably sold her; that Bikho sold her for Rs. 105 to Chagoji, brother of appellant, Mohanji; that Mohanji took her to Hyderabad, where they were met by Kastow and taken to the house of Jivi; that Jivi is, mistress of appellant Mulo; that Mulo was in the house while the girl and Mohanji were there; that Mohanji took the girl to Hyderabad station with the intention of taking her to Khanpur where Kastow had already gone in advance; that Mulo was in company of Mohanji and the girl at Hyderabad station and intended to accompany them at any rate as far as Shadadpur.

The girl Kunwar states that she had left her aunt's house without her knowledge or permission and was going to her sister's, when Doongerji met her and by promises of fine clothes, ornaments, etc., induced her to accompany him. Mr. Lalchand contends that the girl had run away from her natural guardians and was no longer in their keeping when Doongerji met her. But where a little girl, who has no intention of starting life independently, leaves her home for the purpose of seeking refuge with another relation, she cannot be considered to have passed out of the keeping of her natural guardians until she has, by some overt act, passed into the keeping of some one else, for it is ordinary experience that a child's resolution to run away from home fails as soon as the difficulties of doing so are brought home to it. It would be ridiculous to attach to the temporary fancy of a child the legal consequences of a deliberate repudiation of the obligations attaching to its status. The facts established make it clear beyond any reasonable doubt that Doongerji enticed the gril to abandon all intention of returning to her relations with the intent to sell her as wife to some purchaser and to persuade her to live as wife with the man with whom she should go through the form of marriage; that is, he kidnapped her with the intent to seduce her to illicit intercourse.

It is admitted by Mohanji that he himself drew up the deed of sale by which the girl was sold to his brother Chagoji for Rs. 100. Chagoji had already two wives, and we accept the conclusion framed by the learned Sessions Judge that the girl was brought for the purpose of being sold to some prospective husband.

The girl remained in Chagoji's house for about two months. During that time Chagoji and other inmates of his house must certainly have learned all that they wished to know about the girl. They would naturally conjecture that she was

married and had been kidnapped and if they did not actually hear from the girl's own lips that she had a husband living and had been decoyed to Ahmedabad, it must have been because they deliberately avoided doing so. The girl declares that she disclosed her story, and the learned Sessions Judge has believed her. We see no reason for discrediting it. The facts that Mohanji wrote the deed of sale, that he was a member of Chagoji's household and that he brought the girl to Hyderabad are sufficient to satisfy us that he was privy to all that was done by Chagoji.

Mr. Lalchand argues that the girl, after once passing into the keeping of Dongerji, was never confined. The girl describes her life, and if her description be true she was never, for one moment free to run away. She was certainly never free to return to her relations. Where a child of 12 years old is removed a very great distance from her home, and has been deprived of all independent judgment or will power by threats and inducement, very little physical restraint is necessary to effectually confine her. She is nonetheless a prisoner because she is not conscious of the desire to escape. We are of opinion that she was confined, from the time of passing into the keeping of Doongerji up to the arrest of Mohanji at the Hyderabad station.

It was Mohanji who actually brought her to Hyderabad, in whose custody she was when the Police came to her rescue. We are of opinion that the case against Mohanji has been satisfactorily proved.

But as against Mulo, the facts established do not, in our opinion, constitute more than a case of grave suspicion. There is no evidence that he, personally, directly or indirectly exercised any restraint over the girl. There is no evidence that he was taking any part in the disposal of the girl—for, though he was found in the company of Mohanji at the Railway station he had taken a ticket for Shahdadpur only, and the ticket clerk admits that he frequently went there on business. Though there is good reason to suppose that Jivi, his mistress, gives active assistance to Kastow in temporarily accommodating girls brought to Hyderabad for sale, it is at least possible that Mulo who visits Jivi only occasionally is not privy to this conduct. The girl states that she gave out at Hyderabad that she was a niece of Mohanji, and Mulo may have believed it. There is no evidence that he knew that she had been kidnapped beyond the statement of the girl herself that she informed him. We do not think it safe to accept this statement as proof, without any corroboration.

We confirm the conviction and sentence in the case of Mohanji, but reverse the conviction of Mulo and order him to be acquitted and discharged.

FAWCETT, J. C.—I concur and have only a few remarks to add.

The case, I think, clearly falls within the principles laid down in *Emperor* v. *Jetha*(1) which has been followed by this Court in *Emperor* v. *Manshomal* (2). Even if it is untrue that the girl really intended to go to her sister, and even if she was intending to run away from her aunt's house for good, yet she had gone only some 5 miles or so, when Doongerji met her and induced her to go with him, and cannot, in my opinion, be said to have been out of the keeping of her aunt, whose house she had left only shortly before and who was for the time her lawful guardian, within the meaning of the Explanation to section 361, Indian Penal Code. If the girl had been some days away from her relations or had got completely out of their control, the case might have been different. I also think that in this case there is no sufficient reason to disbelieve the girl's statement that she was intending to go to her sister.

As regard Mulo's complicity, I think there is a reasonable doubt, of which he should be given the benefit: though his conduct in accompanying Mohanji and the girl at the Railway station and making a false statement to the Head Constable, Abdul Gaffur, as to the girl going on a pilgrimage and his relations with Jivi, in whose house the girl was kept at Hyderabad, undoubtedly raise strong suspicions against him.

Mulo acquitted.

(1) 6 Bom. L. R. 785; 1 Cr. L. J. 931.
(2) 16 Ind. Cas. 768; 6 S. L. R. 71; 13 Cr. L. J. 736.

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE No. 129 OF 1914.

August 19, 1914.

Present:—Mr. Justice Sharfuddin and Mr. Justice Teunon.

EMPEROR—PROSECUTOR

versus

SABER AKUNJI—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 337—Forfeiture of pardon—Formal withdrawal or declaration, whether necessary before prosecution—Accused, plea open to.

Under the present Code of Criminal Procedure no formal withdrawal of a pardon and no formal declaration that the pardon has been forfeited are required. If the person who has accepted a conditional pardon be subsequently proceeded against, it is open to him to plead on his trial that the pardon has not in fact been forfeited, that is to say, that he has not violated the conditions on which the pardon was tendered and accepted. This then becomes one of the issues to be heard and determined at the trial.

Case referred by the Sessions Judge, Khulna, on May 26th, 1914, under section 438, Criminal Procedure Code.

Babu *Atulya Charan Bose*, for the Crown.

JUDGMENT.—In this case it appears that one Saber Akunji and a certain number of others were charged with the commission of a dacoity on the 29th of October 1913. Under section 337, Criminal Procedure Code, pardon was tendered to Saber Akunji and was accepted by him on the usual condition that he should make a full and true disclosure of the whole of the circumstances within his knowledge relating to the offence in question. In the Court of the Committing Magistrate it appears that Saber Akunji did make a statement implicating himself and others in the commission of the dacoity. But when the trial took place in the Court of the Sessions Judge, he resiled from that statement and professed complete ignorance of the matter. Thereupon proceedings were taken against him and he was committed to the Court of Session to take his trial. The learned Sessions Judge has thereupon made this reference to this Court with a view to having it declared that the proceedings taken against the accused were without jurisdiction, on the ground that the pardon had not been declared forfeited and the ground of forfeiture had not been reduced into writing. Under the present Code of Criminal Procedure no formal withdrawal of a pardon and no formal declaration that the pardon has been forfeited are required. If the person who has accepted a conditional pardon be subsequently proceeded against, it is open to him to plead on his trial that the pardon has not in fact been forfeited, that is to say, that he has not violated the conditions on which the pardon was tendered and accepted. This then becomes one of the issues to be heard and determined at the trial. In the present case, there is no need that the issue should be separately tried; for if on his statement made in the Court of the Committing Magistrate and on other evidence it be found that he took part in the commission of the dacoity in question, it will follow that when he resiled from his first statement in the Court of Session and denied all knowledge of the matter, he violated the conditions on which the pardon had been tendered. So that the two questions whether he has forfeited the pardon and whether he has or has not been guilty of the offence of dacoity may be heard and determined together. In support of this view and for the information of the Sessions Judge, we would refer him more particularly to the following reported cases: *Emperor* v. *Kothia* (1), *Kullan* v. *Emperor* (2) and *Emperor* v. *Abani Bhusan Chuckerbutty* (3). With these remarks we return the record and direct that the trial be now proceeded with.

Record returned.

(1) 30 B. 611; 8 Bom. L. R. 740; 4 Cr. L. J. 346.
(2) 2 Ind. Cas. 343; 32 M. 173; 9 Cr. L. J. 571.
(3) 8 Ind. Cas. 721; 37 C. 845 at p. 851; 11 Cr. L. J. 702; 15 C. W. N. 25.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 1034 OF 1914.

August 19, 1914.

Present:—Mr. Justice Sharfuddin and Mr. Justice Teunon.

DEPUTY SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL—PETITIONER

versus

KAILASH CHANDRA GHOSH AND ANOTHER—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 235, 239—Charges, joinder of—Offences committed on different dates—Same transaction.

Where certain persons were wrongfully confined by the accused, who fined them and realized a certain portion of the fines and released them on their promising to pay the balance of the fine three days later, but on their failing to do so they were

again confined, maltreated and shoe-beaten and were turned out by the accused on being informed that the Police were coming:

Held, that as they were all confined for one purpose *i. e.*, for the purpose of extorting money, the whole thing was one transaction and that there was no misjoinder of charges if they were tried together.

Rule against the order of the Sessions Judge, Pabna, dated 12th May 1914.

Mr. *Orr*, for the Petitioner.

Mr. *J. N. Roy* and *Babus Harish Chandra Ray* and *Jogendra Narayan Majumdar*, for the Opposite Party.

JUDGMENT.—This Rule was issued calling upon the District Magistate of Pabna and the opposite party to show cause why the order of the Sessions Judge, dated the 12th May 1914, should not be set aside and the appeal re-heard on the merits. It appears that the two accused, Kailash Chandra Ghosh and Ram Chandra Ghosh, were tried under sections 347, 352 and 352 coupled with section 114, Indian Penal Code, convicted and sentenced. On appeal to the Sessions Judge an order was passed for a re-trial on the ground of misjoinder. In order to understand how the question of misjoinder arose certain facts have to be stated. There is a gentleman named Rai Banamali Ray Bahadur who is a *zemindar*. There is a prevailing practice in his estate that no one is allowed to slaughter cows. It appears that on the *Bakr-id* day just before the occurrence, some Muhammadans slaughtered a cow. This was considered to be a breach of the practice of the estate and on the 14th December four men, *viz.*, Mazamali Shekh, Abdul Shekh, Umedali Shekh and Manik Shekh, were called to the *cutchery* by two *peadas*, and the Inspector and *naib* fined Abdul Shekh Rs. 200, and Mazamali, Umedali and Manik Shekh Rs. 50 each on account of the slaughter of the cow. It appears that on the 14th December only Rs. 9 was realised and the rest was promised to be paid three days later. On the 17th, the rest of the money was not paid, with the result that on the 18th, these persons were again brought to the *cutchery* and again confined. On coming to know that information had been sent to the Police on behalf of the confined persons, they were beaten with shoe and ejected from the place in which they had been wrongfully confined. The question is, whether the occurrence that took place on the 14th December and the one that took place on the 18th December were two distinct transactions or form parts of one and the same transaction. It appears that the object was to punish certain Muhammadans of this estate for a breach of the rule of that estate in slaughtering a cow. It was with that object these four persons were brought to the *cutchery*, fined and a portion of the fines realised. These men had promised to pay the balance of the fines three days later, but they failed to do so, and so on the 18th, it is said, wrongful confinement again took place. There can be no doubt, therefore, that what took place on the 18th was in continuation of what took place on the 14th. It has been contended that on the 18th, another offence was committed, namely, offences under sections 352 and 352 read with section 114, Indian Penal Code. Therefore, this was a distinct offence and not in the same transaction, even supposing that the wrongful confinement on both days constituted one transaction. We think that the shoe-beating and other maltreatment of the Muhammadans when released from their wrongful confinement were the concluding portions of the same transaction. They were all confined for one purpose, namely, for the purpose of extorting money, and on being informed that the Police were coming, these men were shoe-beaten and turned out. The whole thing was really one transaction. The learned Sessions Judge was, however, of opinion that these were two distinct transactions. Therefore, he held that there was a misjoinder and ordered a re-trial. The view that we have taken on the facts stated above is supported by the cases of *Emperor* v. *Datto Hanmant Shahapurkar* (1) and *Emperor* v. *Sherufalli Allibhoy* (2). Our attention has also been directed to two cases by Mr. Roy, the Counsel for the accused, *viz.*, the cases of *Budhai Sheikh* v. *Emperor* (3) and *Gul Mahomed Sircar* v. *Cheharu Mandal* (4). The facts of the two last-mentioned cases are different from the facts of the present case.

We, therefore, make the present Rule absolute, set aside the order of the learned Sessions Judge, dated the 12th May 1914, and direct that the appeal be now heard on the merits.

Let this record be sent down at once.

Rule made absolute.

(1) 30 B. 49; 7 Bom. L. R. 633; 2 Cr. L. J. 578.
(2) 27 B. 135; 4 Bom. L. R. 930.
(3) 33 C. 292; 10 C. W. N. 32; 3 Cr. L. J. 126.
(4) 10 C. W. N. 53; 3 Cr. L. J. 141.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 1201 OF 1914.

October 23, 1914.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, Mr. Justice Teunon, and Mr. Justice Fletcher.

FAUJDAR THAKUR—COMPLAINANT—PETITIONER

versus

KASI CHOUDHURI AND OTHERS—ACCUSED—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 439—Revision by private prosecutor against order of acquittal—High Court, jurisdiction of, to set aside acquittal—Practice.

Per *Jenkins C. J.*, and *Fletcher J.*—A High Court has jurisdiction to set aside on revision an order of acquittal at the instance of a private prosecutor but it should ordinarily exercise this jurisdiction sparingly and only where it is urgently demanded in the interests of public justice.

Per *Teunon, J.*—A High Court has ample jurisdiction, under section 439, Criminal Procedure Code, to interfere with an acquittal and remedy the wrong, if wrong has been done. Section 439 is expressed in the widest terms and vests in the Court an absolute and unqualified discretion which cannot be restricted by any series of decisions.

Criminal revision against an order of the Sub-Divisional Magistrate of Samastipur, dated 20th June 1914.

Babu *Debendra Narain Bhattacharjee*, for the Petitioner.

Babu *Gour Chandra Pal*, for the Opposite Party.

Mr. *Sultan Ahmed*, for the Crown.

JENKINS, C. J.—A charge was framed under section 148 of the Indian Penal Code against 23 persons, and after a lengthy trial they were acquitted. The complainant thereupon applied to this Court for the exercise of its revisional powers under section 439 of the Criminal Procedure Code, with the result that a Rule was issued in these terms: "Let the record be sent for and let a Rule issue calling upon the District Magistrate of Darbhanga and the opposite party to show cause why the order of acquittal complained of should not be set aside and a re-trial ordered. Pending the disposal of the Rule further proceedings under section 476, Criminal Procedure Code, will be stayed." Cause has now been shown.

The petition on which the Rule was made does not mention proceedings under section 476 of the Criminal Procedure Code.

From the judgment, however, it appears that the Trial Magistrate expressed his intention to direct under section 476 of the Criminal Procedure Code the prosecution of Ram Khelawan Tewari under section 195 of the Indian Penal Code, and also of two persons described as Faujdar and Bahadur. Though Faujdar alone was the petitioner, the stay apparently was intended to operate in favour of all three.

The case lasted, we have been told, about three months before the lower Court, many witnesses were examined, and an elaborate judgment was pronounced by the Trial Magistrate who fully discussed the voluminous evidence in the case, with the result that he came to a conclusion in favour of the accused on the two principal issues in the case. He held that the accused's party were in possession of the land in dispute, and that the injuries inflicted on the complainant's party were a justifiable exercise of the right of defence.

I understand that the Rule was granted on the ground that the Court was not satisfied with these conclusions, and that the interests of justice required an interference with the order of acquittal.

It is evident, however, that the conclusions of the lower Court must have rested largely, if not in their entirety, on the Trial Magistrate's appreciation of the evidence adduced before him.

The only question then is whether in the proper exercise of its discretion the Court ought to interfere for the purpose of setting aside the acquittal and sending back the case for a repetition of the lengthy trial of the case.

That we have power to interfere seems clear; but to the question whether we ought to interfere I would answer in the negative.

Section 417 of the Criminal Procedure Code enables the Local Government to direct the Public Prosecutor to present an appeal to the High Court from an order of acquittal passed by any Court other than a High Court.

This provision, which first appeared in the Code of 1872 provides the valuable safeguard that an accused cannot have his acquittal questioned by way of appeal except at the instance of the Local Government. But even with this safeguard the provision has met with considerable animadversion in recent times.

In this case, however, the Court, so far from having the assurance of such a safeguard, is confronted by the fact that the application to set aside the acquittal is opposed, not only by the accused, but also by the Deputy Legal Remembrancer on behalf of the Crown.

And I can quite understand this opposition. The complainant and his companions in the theft that led to blows were obviously mere puppets, and the real moving spirit is this same Ram Khelawan Tewari who is described as the petitioner's master and who has throughout been present in Court sitting behind the eminent Counsel and Vakils who have appeared on behalf of the complainant.

I will not discuss his merits or his frailties as disclosed by the Trial Magistrate's judgment, but it is apparent that this is one of a series of unsuccessful attempts to assert possession of the piece of land in dispute against the accused's party.

It has failed; but more than that, it has been held that possession was with the accused's party and proceedings against Ram Khelawan Tewari have been directed. This is a serious matter for him, and he obviously has an urgent personal interest in securing interference with the Magistrate's order. In view of all the circumstances before us, I am convinced that the purpose of the application is not to secure the due administration of justice but to serve a personal end.

This, therefore, is not a case in which the Court should (in my opinion) interfere, and in expressing this view, I believe, I am acting in harmony with the tendency of the best judicial opinion as also sound principle.

The pronouncements of the High Courts of Madras, Bombay and Allahabad consistently support the view that as a general rule it is expedient not to interfere on revision, at the instance of a private person, with an acquittal after trial by the proper tribunal and that applications for that purpose should be discouraged on public grounds: *Thandavan* v. *Perianna* (1), *Heerabai* v. *Framji* (2), *Queen-Empress* v. *Ala Baksh* (3), *In re Sheikh Aminuddin* (4), *Emperor* v. *Madar Bakhsh* (5), *Qayyum Ali* v. *Faiyaz Ali* (6).

This, too, was the view that prevailed in this Court until recent times [*Municipal Committee of Dacca* v. *Hingoo Raj* (7), *Deputy Legal Remembrancer* v. *Karuna Baistobi* (8)], but it is said that of late the matter has been differently regarded.

If there has been any conscious departure in more recent cases from the rule of prudence which prevailed in the authorities I have cited, I cannot agree with it.

Our attention has been invited to a decision in which I took part, as though it supported the new departure [*Bakhal Das Roy* v. *Kailash Banu* (9)]. I am in no way impressed by the value of that decision. In the first place, it appears that the Vakil of the accused was not present and the decision possesses all the infirmity of a judgment given without the assistance of the argument for the accused. And apart from that the circumstances were exceptional.

The error was one of pure law apparent on the face of the record, while the offence was one under section 504; and I have always understood that offences of an essentially personal character, such as defamation or insult, were viewed differently for the purpose of revision, and for an obvious reason.

According to my understanding, therefore, this decision is of no assistance in the present case: if, however, it contravenes what I regard as the true rule of guidance, then I do not hesitate to regard it as erroneous.

As I have already indicated, I am not prepared to say, the Court has no jurisdiction to interfere on revision with an acquittal, but I hold it should ordinarily exercise this jurisdiction sparingly and only where it is urgently demanded in the interests of public justice.

This view does not leave an aggrieved complainant without remedy; it would always be open to him to move the Government to appeal under section 417, and this appears to me the course that should be followed.

(1) 14 M. 363; 2 Weir 571.
(2) 15 B. 349.
(3) 6 A. 484; A. W. N. (1884) 208.
(4) 24 A. 346; A. W. N. (1902) 89.
(5) 25 A. 128; A. W. N. (1902) 200.
(6) 27 A. 359; 1 Cr. L. J. 1053; A. W. N. (1904) 278.
(7) 8 C. 895.
(8) 22 C. 164.
(9) 5 Ind. Cas. 721; 11 C. L. J. 113; 11 Cr. L. J. 213.

The result then in this case is that in my opinion the Rule should be discharged.

But as I understand from my learned colleague that he would make the Rule absolute, we are equally divided in opinion and the case, with our opinions thereon, must, therefore, be laid before another Judge.

TEUKON, J.—In this case one Kasi Choudhuri and twenty-two others were placed on their trial before the Sub-Divisional Magistrate of Samastipur on charges of rioting under sections 148 and 147 of the Indian Penal Code.

On behalf of the prosecution it is alleged that on the death of one Rameswar Choudhuri his lands (including the field in dispute known as plot No. 65 in village Hatharua) were inherited by his widow Paltu, that some 1½ years before the occurrence now in question she removed to the house of her daughter and son-in-law in a neighbouring village called Chok Salem, and on the 4th April 1913, by a registered deed, sold her inheritance to the real complainant, one Ram Khelawan Tewari. Ram Khelawan, it is said, took possession and on the day now in question, 15th March 1914, sent his servant Faujdar Thakur and six or seven labourers, with two bullock-carts, to bring home the crop of *arhar* from plot No. 65.

The case for the prosecution then is that while these men were loading the crop into the carts, the accused and others, to the numbers of 30 or 35, armed with *lathis* and *gorasas* (axes) fell upon the party of labourers, put them to fight and inflicted upon them a number of injuries.

The medical and other evidence in fact shows that of the seven or eight labourers, six were wounded, sustaining in all twenty-eight injuries, of which one is described as severe, five were on the head and nine on the back.

In so far as the occurrence is concerned, the Trying Magistrate has accepted the case for the prosecution as substantially true. He finds that Faujdar and his companions were unarmed, and that they were attacked by a mob of men armed with *lathis* and *gorasas* and that this mob included the majority, if not all, of the accused placed on their trial.

He comes to no finding as to the complicity of the individual accused, obviously because he next proceeds to acquit them all, on the ground that of the accused Kasi and Narsingh (who are cousins of Rameswar) and their sons Ramyad and Baldeo (and Bachu) were in possession of the field in question and that they and their companions were, therefore, acting in the exercise of the right of private defence of property.

This brings us to a consideration of the defence.

The accused have said nothing regarding either the occurrence or possession, but have contented themselves with pleading not guilty. Their case, in so far as it can be ascertained from the cross-examination of the prosecution witnesses and the depositions of the few defence witnesses examined, is that Rameswar (the deceased husband of Paltu) and his brother Mahadeo were not separate, as is the case for the prosecution, but joint in mess and property, that Rameswar predeceased Mahadeo, that Mahadeo in his life-time adopted Ram Golam, the son of his cousin Kasi, that since Mahadeo's death some 18 years ago first Ram Golam, and, on his death, Kasi on behalf of Ram Golam's minor son, Chandrika, has been in possession.

With regard to the adoption of Ram Golam the Trying Magistrate observes that "this line of defence" was dropped, and that the defence then resolved itself into a bare assertion of possession. Possibly this attitude was taken up in the course of argument, but in so far as the record goes possession based on the adoption of Ram Golam is the only case that the defence made any attempt to establish. There is uncontradicted evidence that Mahadeo and Rameswar lived apart from their cousins (or second cousins), Kasi and Narsingh; and of possession by Narsingh and his sons (who, P. W. No. 12, are again separate from Kasi and his son) since the death of Mahadeo there is not a tittle of evidence on the record.

As regards Kasi's possession, the finding is based on (1) the estate register of mutations or changes among its tenants for the years 1319 to 1321, (2) a *chaukidari* assessment register, (3) certain receipts, (4) an oral complaint made by Ramyad to the

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Manager of the Estate (P. W. No. 14) and (5) the oral evidence of three defence witnesses.

The prosecution, it may be observed, relies upon the same receipts and upon what the Trying Magistrate cursorily describes as the *khatian*, that is, the entry in respect of plot No. 65 in a Record of Rights finally published in or about the year 1901-02.

That entry, it may be noted here, shows that the tenants in possession are *Musammat* Paltu and Ram Golam (adopted son).

The mutation registers were produced by the defence witness No. 1, who describes himself as the "mutation inspector" of the circle. It is significant that the defence did not call for any register prior to 1318, and from this and the evidence of the witness it may be safely inferred that up to 1318 or rather 1319 the estate registers are in conformity with the Record of Rights. The change introduced in 1319 was the substitution of the name of Chandrika for the name of his deceased father, Ram Golam. This change, it may be said, in no way affected the position of the widow Paltu, and, in any case, as the witness says, was made without any reference to her or to any one interested on her behalf.

The assessment register does not show the name of Paltu but, as appears from the evidence of the witness who produces it, the register is based on hearsay and the absence of the widow's name may further be due to its being considered that she was not liable to assessment.

Such receipts as have been produced show that from the year 1292 to 1308 (say 1901-02) the payment was made by Kasi on behalf of Mahadeo, that in 1908 and in 1912-13 the payments were by Kasi or by Kasi's son, Ramyad, on behalf of Paltu and Ram Golam. The change in name, it is suggested by the Trying Magistrate, is due to some change in the *Malik's* register, but that change was obviously due to the Record of Rights, and the receipts are in accordance with that record.

On the complaint of Ramyad to the Manager no action was taken. It was subsequent to the purchase of Ram Khelawan, and is obviously of no more value than Ram Khelawan's unsuccessful application to the same Manager for mutation.

From this resume of this portion of the evidence it is clear that, in coming to his finding regarding possession, the Magistrate has relied on registers that are either worthless or inadmissible, has misapprehended the true significance of the receipts produced and the acceptance of such receipts by one or more of the agnates who now claim possession on their own account, and has also wholly overlooked the probative value that under section 103B of the Bengal Tenancy Act should have been given to the entry in the Record of Rights.

I need not examine the oral evidence on either side, as the Magistrate's view of this evidence (both as regards Paltu's possession and as regards the possession of Ram Khelawan subsequent to his purchase) has been coloured by his erroneous view of the documents already referred to and also by a prejudice against Ram Khelawan based largely on Police reports wholly inadmissble in evidence.

There being no evidence of any adoption, and that case having been in fact abandoned, it is clear that all the documentary evidence and even the oral evidence adduced by the defence (*vide*, for instance, D. W. No. 3) indicates that in so far as prior to Ram Khelawan's purchase Kasi and his son Ramyad cultivated these fields, they did so on behalf of the widow, and it is doubtless because of her complaints against them (*vide*, *e. g.*, defence witness No. 4) that she retired to Chok Salem and finally sold her lands to Ram Khelawan.

On my consideration of the evidence I am, therefore, satisfied that there are grave reasons for thinking that the finding as to possession is wrong. In any case, on a finding arrived at by a process of reasoning vitiated by so many errors no value can be placed.

Even, however, if we assume that the Magistrate is right in his finding that possession was with Kasi and others and that the act of the complainant in removing or seeking to remove the crops constituted the offence of theft, we have next to consider whether the Magistrate has adequately dealt with the further questions regarding the right of private defence.

On these questions all he says is this :

"As the *thana* is no less then six miles from the place of occurrence, *Ganouri Lal* v. *Queen-Empress* (10) must clearly be distinguished. *Pachkauri* v. *Queen-Empress* (11) is followed. In that case it was held that if accused were rightfully in possession of the land and found it necessary to protect themselves from aggression on the part of another body of men, they were justified in taking such precautions as they thought were required, and using such force or violence as was necessary to prevent the aggression. This applies to the circumstances of this case."

This judgment does not show that it was present to the mind of the Magistrate that the burden of proving circumstances bringing the case within the general exception contained in section 96 of the Indian Penal Code was upon the accused. It further does not show that he had any due regard to the restrictions placed upon the exercise of the right of private defence by the 3rd and 4th clauses of section 99. True he says, the *thana* is six miles off, but he makes no reference to *daffadars* and *chaukidars* of whom one, it is in evidence, lives not more than 10 *bighas* from the field in dispute. He has not adverted to his own finding that Faujdar and his six or seven companions were unarmed, nor, so far as appears, has he taken into consideration the number of persons injured and the number and position of the injuries sustained. He does not appear to have inquired whether, for instance, the injuries on the back were caused in the exercise of the right of private defence, nor has he made any endeavour to ascertain which of the accused is responsible for specific injuries. Even if some of the accused have succeeded in bringing themselves within the exception, it does not follow that all have done so.

For these reasons I am satisfied that there has been no proper trial of this case and I should, therefore, set aside the order of acquittal in the case of each of the accused and direct that they be re-tried before another Magistrate in accordance with law.

It has been urged before us, that inasmuch as under section 417 of the Code the right to present an appeal against an acquittal is vested in the Local Government, and in the Local Government alone, and inasmuch as the Local Government, so far from appealing, has appeared through its accredited representative in support of the Magistrate's judgment, we ought not, at the instance of a private complainant, to interfere with or disturb the present order of acquittal. But doubtless for good reasons, the Legislature has not constituted the Local Government the sole arbiter in these matters. An alternative remedy against injustice done to injured complainants has been provided in section 439 of the Code (I need not here refer to the Charter), and even where, as in this case, the Local Government has taken the unusual course, in my experience the unprecedented course, of appearing to justify what is *prima facie* riotous behaviour, it is conceded that we have ample jurisdiction to interfere and remedy the wrong, if wrong has been done. It has indeed been faintly suggested on behalf of the accused that by proceeding under section 494 of the Code, the Local Government may nullify any order this Court may make. But this suggestion has not come from learned Counsel appearing on behalf of the Local Government. It is not to be anticipated that the Local Government will take this course, and we need not, therefore, at the present stage consider whether the Judge's order of consent predicated by section 494 is not again an order subject to the revisional jurisdiction of this Court.

The question thus becomes one, not of jurisdiction but of discretion and as to the manner in which discretion should be exercised, a large number of decided cases, of which the cases of *Heerabai* v. *Framji* (2), *Thandavan* v. *Perianna* (1); *Queen-Empress* v. *Ala Baksh* (3) and *Municipal Committee of Dacca* v. *Hingoo Raj* (7) are examples, have been cited before us. But with all deference to the learned and experienced Judges who decided those cases, I am not pressed by their decisions, nor do I consider it necessary to determine whether the present case does or does not fall within one or other of the rules of general principles therein enunciated. The enactment has set up no bars or limits to our discretion. That being so, this discretion cannot be fettered by judicial decision, and in this connection it is sufficient to cite the observations of his Lordship the Chief Justice to be found in the case of *Mr. Hume* v. *Porash Chunder Ghose* (12): "The section is expressed

(10) 16 C. 206.

(11) 24 C. 680, 1 C. W. N. 423.

(12) 22 Ind Cas. 321, 41 C 413, 15 Cr. L. J. 49,

in the widest terms and vests in the Court an absolute and unqualified discretion. Not one jot or tittle can be taken away from or added to the plain and express provisions of the Legislature by any decision of the Court; nor can the discretion vested by the section in the Court be crystallised or restricted by any series of cases; it remains free and untrammelled to be fairly exercised according to the exigencies of each case." With these observations I am in entire agreement and, in my opinion, they are equally apposite to the section now under consideration, as to the section then in question.

In the interests of public justice it may, in certain cases, in my opinion, be as important to redress injustice done to complainants as in other cases to remedy the wrongs of persons unjustly condemned. In the view I have taken of this case and for the reasons I have given, justice, in my opinion, demands that there should be a re-trial. I should, therefore, as I have already stated, set aside the order of acquittal and direct that the accused be re-tried by another Magistrate in accordance with law.

[As the Chief Justice and Teunon, J., differed in opinion the case was referred to Fletcher, J., who expressed the following:—]

OPINION.—This case has been laid before me under the provisions of section 429 read with section 439 of the Code of Criminal Procedure, owing to there being a difference of opinion between the learned Chief Justice and Teunon, J., before whom the case came. Twenty-three persons were charged with having committed an offence punishable under section 148 of the Indian Penal Code.

After a trial which lasted about three months, the Magistrate acquitted all the accused. An application was then made to this Court to set aside the acquittal and to direct a re-trial. That application came on before Sharfuddin and Teunon, JJ., who issued a Rule on the opposite party to show cause why the order of acquittal should not be set aside and a re-trial ordered. The Rule subsequently came on for hearing before the Chief Justice and Teunon, J., who differed in opinion—the Chief Justice being of opinion that the Rule ought to be discharged, whilst Teunon, J., was of opinion that the Rule should be made absolute.

The application to set aside the order of acquittal is opposed both by the accused and by the Local Government.

The present application raises a point of considerable public importance, namely, —ought the Court ordinarily to exercise the powers which it undoubtedly has under section 439 of the Code of Criminal Procedure to set aside an order of acquittal at the instance of a private prosecutor? All the High Courts in India have for many years past consistently held that they ought not so to do. It will be sufficient if I give the references to the reported cases in support of this position. They are *Queen-Empress* v. *Badrudin* (13), *Heerabai* v. *Framji* (2), *Thandavan* v. *Periama* (1), *Queen-Empress* v. *Ala Baksh* (3), *Queen-Empress* v. *Prag Dat* (14), *In re Sheikh Aminuddin* (4), *Qayyum Ali* v. *Faiyaz Ali* (6), *Municipal Committee of Dacca* v. *Hingoo Raj* (7) and *Deputy Legal Remembrancer* v. *Karuna Baistobi* (8). The learned Chief Justice was of opinion that the settled practice of the Courts founded on sound judicial opinion and public grounds should be adhered to.

Teunon, J., on the other hand, was of opinion that as section 439 of the Code of Criminal Procedure is drawn in the widest terms, no previous decisions could, in any manner, fetter the way in which the Court should exercise the discretion vested in it under the section. In support of this view, Teunon, J., referred to certain remarks of the Chief Justice in the case of *Mr. Hume* v. *Poresh Chunder Ghosh* (12). But with all due respect to the learned Judge those remarks of the learnd Chief Justice do not affect the point under consideration. The Deputy Legal Remembrancer informed me that some four or five rules have of recent times been granted by this Court on application by private prosecutors to set aside orders of acquittal. He, however, also informed me that all these rules, excepting one, were granted by the Bench which granted the Rule in the present case. That cannot, in my opinion, be taken as casting doubt on the well-established rule adhered to both in this Court and in the other High Courts in India over a long series of years. That Rule is founded on grounds of public interest and

(13) 8 B. 197.
(14) 20 A. 459; A. W. N. (1898) 117.

convenience and ought, I think, to be adhered to.

In addition to the difference of opinion of the learned Judges in the present case as to there being a settled practice that the Court will not ordinarily interfere in revision at the instance of a private prosecutor with an order of acquittal, the learned Judges also differed as to whether the circumstances in this case were such as would induce the Court in any event to interfere.

The learned Chief Justice was of opinion that there was no reason to think that the Magistrate whose judgment rests on an appreciation of the evidence that had been given before him came to a wrong conclusion. Teunon, J., on the other hand, thought that there were strong grounds for thinking that the judgment of the Magistrate amounted to a miscarriage of justice. I see no reason to assent to the view of Teunon, J.

No one can doubt that the complainant in this case is merely the creature of Ram Khelawan Tewari and that this prosecution forms one of a series of cases in which Ram Khelawan Tewari has tried to enforce his right to the land in question.

I, therefore, agree with the view set out by the learned Chief Justice in his judgment. The Rule must, therefore, be discharged.

Rule discharged.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 238 OF 1914.

CRIMINAL REVISION PETITION No. 205 OF 1914.

January 25, 1915.

Present:—Mr. Justice Spencer and Mr. Justice Seshagiri Aiyar.

VENKATARAMA AIYAR AND OTHERS—ACCUSED—PETITIONERS

versus

KRISHNA AIYAR—COMPLAINANT—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 250, 422, 423, 435 and 439—Compensation awarded against complainant for vexatious complaint by 2nd class Magistrate—Appeal to Sub-Divisional Magistrate—Order, whether can be set aside without notice to accused—Compensation, when should be awarded.

In all judicial proceedings where no specific rule as to notice exists, the rule "*audi alteram partem*" applies as a principle of natural justice.

An Appellate Court can alter or set aside, to the prejudice of an accused, an order awarding compensation to him under section 250 of the Code of Criminal Procedure only on proper notice to him.

Emperor v. *Palaniappavelan*, 29 M. 187; 3 Cr. L. J. 455, followed.

Ambakkagari Nagi Reddi v. *Basappa*, 1 Ind. Cas. 79, 33 M. 89; 5 M. L. T. 262; 9 Cr. L. J. 150; 19 M. L. J. 130, *Guruswami Naicken* v. *Tirumurthi Chetty*, 25 Ind. Cas. 848, 27 M. L. J. 629, 1 L. W. 908; 16 M. L. T. 426; 15 Cr. L. J. 648, distinguished.

Aligirisami Naidu v. *Balakrishnasami Mudaliar*, 26 M. 41; 2 Weir 564; *Imperatrix* v. *Sadashiv Narain Joshi*, 22 B. 549; *In the matter of the Petition of Umrao Singh* v. *Fakir Chand*, 3 A. 749; A. W. N. (1881) 53; *In the matter of the Petition of Teacotta Shekdar*, 8 C. 393; 10 C. L. R. 239; *Beni Modhab Kurmi* v. *Kunud Kumar Biswas*, 30 C. 123; 6 C.W. N. 799, *In the matter of Byravalu Naidu*, 26 M. 127; 2 Weir 321, followed.

An order under section 250 of the Criminal Procedure Code can be justified only when the Court finds not merely that the complaint was false but also that it was frivolous and vexatious.

Emperor v *Bindesri Persad*, 26 A. 512; A. W. N. (1904) 116; 1 A. L. J. 234, 1 Cr. L. J. 433; *Ram Singh* v. *Mathura*, 14 Ind. Cas 599; 34 A. 354; 9 A. L. J. 308; 13 Cr. L. J. 247, referred to.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the first Class Sub-Divisional Magistrate of Kumbakonam, in Criminal Appeal No. 311 of 1913, preferred against that of the Court of the Bench Magistrates of Kumbakonam, in Summary Trial No. 1944 of 1913.

Mr. *K. S. Jayarama Aiyar*, for the Petitioners.

The *Public Prosecutor*, for the Government.

ORDER.

SPENCER, J.—The question raised at the hearing of the revision petition is whether the order of the Sub-Divisional Magistrate setting aside the award of compensation to the accused by the Kumbakonam Bench Magistrates was bad for want of notice to the accused.

It was argued, in the first place, that Chapter XXXI of the Criminal Procedure Code does not apply to appeals against orders under section 250 and, therefore, that section 422 which directs that notice of appeals should merely be given to the officer appointed by Government to receive notices of appeals does not govern the case: in the second place, that in the absence of any provision for notice the maxim "*audi alteram partem*" should govern the proceedings.

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The first argument will not, in my opinion, hold good, for the reason that section 250 does not declare what the powers of an Appellate Court are in disposing of appeals under clause 3 of the section and it is necessary to invoke the aid of section 423 for this purpose. Section 439 illustrates the difference in this respect between section 250 and section 195, which has been held to be a self-contained section.

On the second point I agree with the observation of Sir Subramania Aiyar, J., in *Emperor* v. *Palaniappavelan* (1) that the accused should have notice of the appeal in order that they may have an opportunity of supporting the order passed in their favour.

It seems to be an anomaly, which might be cured when the Criminal Procedure Code is amended, that no provision should be made for notice to the person most interested in the order being upheld in the case of an appeal being preferred against an order of compensation passed by a 2nd or 3rd class Magistrate, but that if such an order is passed by a first class Magistrate and the matter is taken to the High Court for revision of his order, section 439 (2), strictly construed, will make it imperative that notice should go to the accused.

A Bench of two learned Judges of this Court have held that notice to the accused is not imperative in the case of appeals under section 250 [*Ambakkagari Nagi Reddi* v. *Basappa* (2)], and this is probably what was meant by another Bench in *Guruswami Naicken* v. *Tirumurthi Chetty* (3) when they declared that the accused has no right of audience in such an appeal.

In the former case the Court declined to interfere in revision on the ground that there was no illegality, and I consider that I am bound by that decision, although I am aware that in respect of orders passed under other sections of the Code which do not contain a direction for notice to be given, Courts have sometimes interfered in revision with orders that are merely improper, but not illegal, for want of notice, following the general rule that an order should not be made to a person's prejudice without giving him an opportunity of being heard, *e.g.*, *Algirisami Naidu* v. *Balakrishnaswami Mudaliar* (4), *Imperatrix* v. *Sadasiv Narain Joshi* (5), *In the matter of the Petition of Umrao Singh* v. *Fakir Chand* (6) and *In the matter of Teacotta Sheikdar* (7).

Here the Sub-Divisional Magistrate's order, besides being improper for want of notice to the accused, requires to be set aside for another reason. He says he finds it difficult to conclude that the complainant's story must necessarily have been false. The Bench held that it was vexatious. No doubt an accusation may be false as well as frivolous and vexatious [*Beni Madhub Kurmi* v. *Kumud Kumar Biswas* (8)], but it is necessary to find whether it is or is not frivolous or vexatious. As the Appellate Court has not decided this and as the Public Prosecutor says that he does not wish to support the order, I would direct the Appellate Court to re-hear the appeal after giving notice to the accused.

SESHAGIRI AIYAR, J.—The Bench Magistrate of Kumbakonam directed the complainant to pay compensation to the accused on the ground "that the complainant only wanted to vex and annoy the accused." On appeal, the Sub-Divisional Magistrate reversed this order, because he was unable "to conclude from the records that it (the complaint) must necessarily have been false." This judgment is wrong. As was pointed out in *Emperor* v. *Bindesri Prasad* (9), section 250 not only refers to false complaints, but to frivolous and vexatious complaints as well. It is open to doubt whether the view taken in *Ram Singh* v. *Mathura* (10), that the section does not deal with false accusations, but only with vexatious complaints . . . . . is correct. However as the Appellate Magistrate has not found that the complaint was not vexatious, his order must be reversed.

The question now arises whether in rehearing the appeal the Sub-Divisional Magistrate should not give notice to the accused. I feel no doubt that even though failure to

(1) 29 M. 187; 3 Cr. L. J. 455.
(2) 1 Ind. Cas. 79; 33 M. 89; 5 M. L. T. 262; 9 Cr. L. J. 150, 19 M. L. J. 130
(3) 25 Ind. Cas. 848; 27 M. L. J 629; 1 L. W. 908, 16 M. L. T. 426; 15 Cr. L. J. 648.
(4) 26 M. 41; 2 Weir 564.
(5) 22 B 549.
(6) 3 A. 749; A. W. N. (1881) 53.
(7) 8 C. 393; 10 C. L. R 289.
(8) 30 C. 123; 6 C. W. N. 799.
(9) 26 A. 512; A. W. N. (1904) 116; 1 A. L. J. 234; 1 Cr. L. J. 433.
(10) 14 Ind. Cas. 599. 34 A. 354; 9 A. L. J. 308; 13 C. L. J. 247.

give notice may not render the proceedings of the Court illegal, it would certainly affect their propriety. Under section 435 of the Code of Criminal Procedure the superior Courts are invested with powers, not only to set aside incorrect or illegal orders of the Courts below, but also to examine the propriety of any finding, sentence or order. This language has been deliberately used to enable the higher authorities to see that no violation of natural justice takes place and that no order to his prejudice is passed behind the back of a person who is interested in upholding it; it was on this principle that a Full Bench of this High Court in *Aligirisami Naidu* v. *Balakrishnasami Mudaliar* (4) interfered with an order of discharge. Sir S. Subramania Aiyar in *Emperor* v. *Palaniappavelan* (1) bases his decision upon the ground that justice requires that a party to be affected by an order should have an audience before it is vacated to his prejudice.

A great deal of the argument before us was directed towards showing that Chapter XXXI of the Code of Criminal Procedure relating to criminal appeals is not applicable to appeals in compensation cases. I am not convinced that this contention is sound. The learned Vakil for the petitioner argued that the use of the words in section 250, clause (3), "as if such complainant had been convicted," would not import the provisions of the Appeal Chapter. The powers of the Appellate Court to grant redress have to be gathered, so far as I am able to see from section 423. Section 250 is not self-contained, as are sections relating to the grant of sanction and to convictions for contempt (sections 195 and 486). I am not prepared to hold that Chapter XXXI does not apply to compensation appeals.

The learned Public Prosecutor argued that as section 422 only provides for a notice of appeal to the officer appointed by the Local Government, it negatives the contention that notice should go to any other person. This section does not say that others are not to have notice. It imposes a necessary condition. It does not override the principles of natural justice and of jurisprudence.

If an order for compensation is passed by a first Class Magistrate, the injured party can seek redress only under the revisional powers of the High Court. When a petition from a complainant is entertained, notice under clause (2) of section 439 must go to the accused. I cannot accede to the contention of Mr. Grant that the term *accused* in that sub-section will not include an accused who had been acquitted and to whom compensation has been awarded. If in passing orders on revision, an accused to whom compensation has been given has to be heard, it does not stand to reason to hold that he is not entitled to a hearing when an appeal is preferred by the complainant. Section 422 does not, in my opinion, compel us to introduce any such anomaly.

I respectfully agree with the observations of Sir Arnold White, C.J., in *In the matter of Byravalu Naidu* (11) that the principle of giving compensation is to recompense by way of damages the party who has been vexatiously dragged before a Criminal Court. Clause (5) of section 250 supports this view. If this is correct, it would be improper to deprive a man of what has been awarded to him without giving him an opportunity of supporting the decision in his favour.

The decision in *Ambakkagari Nagi Reddi* v. *Basappa* (2) does not disapprove of the dictum of Sir S. Subramania Aiyar in the earlier case. In *Gurusami Naicken* v. *Tirumurthi Chetty* (3) the only question was whether the Public Prosecutor should have had notice. I do not take these decisions to lay down as a rule of law that the accused to whom compensation has been awarded is not entitled to notice before the order in his favour is set aside. It may be that the Legislature should provide specifically for notice. But as the law at present stands, I am unable to agree with the contentions of the learned Public Prosecutor that the accused is not entitled to be heard in the Appellate Court. The first Class Magistrate should give notice to the accused before disposing of the appeal.

Order set aside; Case sent back.

(11) 26 M. 127; 2 Weir 321.

NARSING CHARAN MAHAPATRA *v.* EMPEROR.

CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 396 OF 1914.
May 5, 1914.
Present:—Mr. Justice Sharfuddin and Mr. Justice Teunon.
Chowdhury NARSING CHARAN MAHAPATRA—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 336—Temple—Place of public resort—Person in charge to take necessary precautions to ensure safety of visitors—Well not properly enclosed—Gross negligence—Endangering safety of people.

On the occasion of a festival a temple becomes a place of public resort and it is the bounden duty of the person in charge to take all reasonable precautions necessary to ensure the safety of those crowding thither by his license and invitation. Therefore if he omits to enclose a well in the courtyard standing by the path which the pilgrims must necessarily take in order to reach the shrine, omits not only to indicate at night its position by lights, but also removes the light placed near the well at the instance of the officers on duty, and consequently a man falls into the well, his conviction under section 336 of the Penal Code will be upheld

Criminal revision against an order of the Sub-Divisional Magistrate of Jajpur, dated the 13th January 1914.

Babus *Dasarathi Sanyal* and *Upendra Kumar Roy*, for the Petitioner.

JUDGMENT.—In this case the petitioner has been convicted under section 336 of the Indian Penal Code and sentenced to pay a fine of Rs. 50.

It appears that in Jajpur in the District of Cuttack, there is a temple known as the Biroja Temple, and that year by year on the *Ashtami* day pilgrims and others in large numbers visit this temple in order to view the deity therein enthroned and present offerings. There are a number of *shebaits*, and the petitioner, it appears, has taken a lease from some of them having a 10-anna interest and for the last few years has been the general Manager of all.

Close by the gate leading from an outer courtyard into the chief or inner temple known as the Thakurani's Temple, there is a well. The well is surrounded by a masonry platform 1½ to 2 feet high, and the ring or parapet of the well stands again about 1 foot above the platform. The well is otherwise unprotected.

On the last *Ashtami* day, the 8th of October 1913, at about 8 or 9 P. M. while the Police Officers on duty were controlling the rush of people seeking entrance into the Thakurani's Temple, a man named Dhroba Prusti fell into the well. Thereupon at the instance of the Sub-Inspector in-charge, the petitioner had a light placed on or near the one-foot parapet. It has then been found that at a later hour the petitioner had the light removed and that thereafter between 1 and 2 A. M. while the people were again crowding into the Thakurani's Temple, a boy named Gananath Panda fell into the well. He had no previous knowledge of the well and in the darkness could not see it.

On these facts the petitioner, who it has been found was in charge of the arrangements, has been convicted under section 336, *i. e.*, of doing an act so rashly or negligently as to endanger human life or safety, and has been sentenced, as we have already stated, to pay a fine of Rs. 50.

On his behalf it is contended that the facts found do not constitute an offence within the meaning of the section.

We are unable to accede to this contention. On the occasion of the festival in question, the temple, it is clear, becomes a place of public resort, and it was the bounden duty of the petitioner as the person in charge to take all reasonable precautions necessary to ensure the safety of those crowding thither by his license and invitation. The well in question stands by the path which the pilgrims must necessarily take in order to reach the shrine which they had come to visit, and in omitting to enclose the well, in omitting even to indicate its position by lights, and lastly, in removing the light placed near the well at the instance of the officers on duty, it appears to us, the petitioner acted with gross negligence and thereby endangered the safety of large numbers.

The Rule is accordingly discharged.

Rule discharged.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 459 OF 1914.

November 3, 1914.

Present:—Mr. Lindsay, J. C.

PUTTU—ACCUSED—APPELLANT

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss 164, 288—Evidence Act (I of 1872), ss. 145, 155—Accused, evidence to be used against—Admissibility in evidence—Contradiction of statements made in Court.

Statements taken under the provisions of section 164, Criminal Procedure Code, and not covered by those of section 288, Criminal Procedure Code, are inadmissible in evidence against the accused, but admissible, under the provisions of section 145 and 155 of the Evidence Act, only for the purpose of contradicting the statements subsequently made in Court by the persons making those former statements.

Appeal against the order of the Additional Sessions Judge, Lucknow, dated 12th August 1914.

Mr. *P. C. Bhattacharji*, for the Appellant.

The *Government Pleader*, for the Crown.

JUDGMENT.—Puttu, the appellant in this case, has been convicted on a charge of attempt to murder under section 307 of the Indian Penal Code and has been sentenced to transportation for life. The charge against him was that he attacked one Debi on the night of the 27th-28th of April last with a knife or some other cutting instrument and inflicted severe injuries upon him —injuries which, if they resulted in Debi's death, would have justified a charge of murder against the prisoner who had caused them. The accused Puttu appears to be a sort of cousin of this man Debi. Both of them are *Lodhs* and all the important prosecution witnesses in the case are of the *Lodh* caste also. There seems to be no doubt from the medical evidence that a very determined and murderous assault was committed on the complainant, Debi, on the night in question. There were no less than sixteen injuries, three of which amounted to grievous hurt within the definition of that term in the Indian Penal Code. The scene of the crime is some two miles from the *thana* and a report was made at the Police Station at 7 o'clock on the morning of the 27th of April. In this report which was made by Debi himself, it was stated that Debi was asleep at the time the assault was committed. He said that he was roused from slumber by finding himself held down, that he recognised Puttu, who stabbed him with a knife and afterwards attacked him with a *gandasa*. In the report it was also stated that a son of Puttu, named Girdhari, and another man called Nohra were present at the time and were standing close to the bed-side. The names of certain witnesses who were said to have arrived at the time the assault was being committed were mentioned in the report. The Police proceeded to make an inquiry, and five witnesses were found who are said to have declared themselves to be eye-witnesses of what had happened.

These five men were Jalpa, Ranjit, Ram Charan, Jansa and Mohan. Their statements were taken by the Sub-Inspector and were very soon afterwards taken again by a Tahsildar Magistrate under the provisions of section 164 of the Code of Criminal Procedure. It is not explained why it was thought necessary to have these statements recorded by the Tahsildar Magistrate. The *thanadar* was not called as a witness in the case. All we have in this connection is the evidence of the Tahsildar Magistrate to the effect that he did record the statement. In those statements these five witnesses said that they had been sleeping at various spots close to the scene of the occurrence, that they had heard Debi call out that Puttu was murdering him, that they ran to the spot and saw Puttu running away and that when they got there Debi at once accused Puttu as being the person who had inflicted the injuries upon him. These witnesses were examined before the Committing Magistrate and again in the Sessions Court, and they have gone back upon the stories which were recorded before the Tahsildar Magistrate. According to their present statements none of them actually saw Puttu on the night in question. They also tried to make out that when Debi was first asked what had happened he did not mention Puttu, but after some lapse of time he informed them that he thought that Puttu was probably the person who had attacked him. In addition to these five persons two *chaukidars* were called as witnesses in the case. They were examined

in the Committing Magistrate's Court under the provisions of section 540 of the Code of Criminal Procedure. In the Sessions Court they were put forward as witnesses for the defence. According to their statements when they interrogated Debi as to what had happened, he said that some member of the family had wounded him and that it was probably Puttu.

Referring to the evidence of the five witnesses Jalpa, Ranjit, Ram Charan, Jansa and Mohan, the learned Judge came to the conclusion that they had been corrupted by the accused or by some person on his behalf, that their statements in the Sessions Court were untrue and that the real story of the case had been given by them in their statements before the Tahsildar Magistrate. The learned Judge does not seem to have considered the point as to whether these statements made before the Tahsildar Magistrate were admissible in evidence against the accused. That he has made use of them as such evidence is plain beyond dispute. He says distinctly in his judgment that he sees no reason why the statements which these persons made before the Tahsildar should not be regarded as substantially true. It is quite clear, therefore, that the learned Judge gave effect to this view in order to convict the prisoner. In doing so the learned Judge has committed an error of law. These statements were not admissible in evidence against the accused. They were, it is true, admissible under the provisions of sections 145 and 155 of the Indian Evidence Act for the purpose of contradicting the statements made by these five witnesses in Court but they were not admissible for any other purpose. They were statements which were made behind the back of the accused and in respect of which he has had no opportunity of cross-examining. They were not statements, moreover, to which the provisions of sections 288 of the Code of Criminal Procedure apply. That section enacts a special provision for the admission against the accused at the Sessions trial of a statement made by a witness in the Court of the Committing Magistrate after the accused has had a proper opportunity for cross-examination. There is no provision in the law of evidence which allows statements such as were made here before the Tahsildar Magistrate to be used as evidence against the prisoner. The result, therefore, is that using these previous statements for the only purpose for which they were admissible, the evidence of the five prosecution witnesses in the Sessions Court has been discredited and must be taken, therefore, to be of no value in the case. We are left merely with the statement of the complainant, Debi, and having regard to certain other facts in the case, it appears to me that it is quite impossible to find the prisoner guilty on the statement of Debi alone. To begin with, we have it proved that the statement which Debi has made at the time of the trial is a different statement from the one which he made at the Police Station. In this latter statement it has already been pointed out that Debi mentioned the names of two other persons who, he said, were present at the time of the attack made upon him. He does not mention the names of these two persons now. He also stated not only at the Police Station but in the Committing Magistrate's Court that he was asleep at the time this attack was made upon him. His story before the Sessions Judge was to the effect that he was awake. In the first report he also stated that the accused Puttu had made his escape before the witnesses arrived at the scene, and he made the same statement before the Sessions Judge, a statement which certainly is scarcely consistent with what these five witnesses said before the Tahsildar Magistrate, namely, that they had seen the accused leaving the scene of the crime.

There is another point to be noticed in connection with this case. A plan of the site of the occurrence was prepared and has been proved in the Court below. On this plan there are marked various places at which witnesses are said to have been lying on the night in question at the time when Debi was attacked. The spot where the witness Mohan (P. W. No. 7) was on that night is shown to be over 50 yards from the spot where Debi was lying. It is also shown that the fourth prosecution witness Ranjt was lying at the place about 200 yards away from the spot where Debi was attacked. Another spot is indicated with reference to which it is said that other witnesses were lying there at the time. This place is between 70 and 80 yards from the scene of the occurrence. It is apparent, therefore, that according to this map the nearest spot at which any of

the witnesses was at the time when Debi was first attacked was 50 yards away. The next nearest spot was some 70 yards away, while the place where the witness Ranjit was, was about 400 yards distant. Cases like the present one are by no means uncommon and I have had, as a Sessions Judge, a very large experience of them. It is surprising to find how often in cases of this kind witnesses are discovered who depose to have been awake at the time the attack is delivered and to having seen the assailant or assailants make his escape from the scene of the crime. It is hardly too much to suppose that all these witnesses who were at these various distant points at the night of the occurrence were asleep at the time when Debi was attacked and stabbed. I have no doubt he called out as soon as he was roused from slumber, but it would take some time for his cries to reach the ears of these witnesses. It would also take some time for them to wake up and to proceed to the spot where Debi was lying. And it seems difficult to believe that once the alarm had been raised by Debi, his assailant or assailants would tarry at the spot any longer than they could possibly help. I think it extremely improbable that any of these witnesses could have seen the accused Puttu on the night in question. There is evidence on the record to show that Puttu and Debi were on bad terms. Debi admits that he had been put out of caste on a complaint made by Puttu, a fact, however, which renders it more likely that Debi owes Puttu a grudge than the latter owes a grudge to Debi. It is said that there were other causes of quarrel between the parties and I take it as a fact that bad feeling between the two men did exist. All the same, I am not convinced that it necessarily follows from this that we must accept the statement of Debi when he says that Puttu was the man who attacked him. It is possible that Debi may not have recognised any one at all, but that he came to the conclusion that because Puttu was his enemy he was the only man who could have committed the crime. There is some indication of this in the story told in the first report, in which we find that Debi tries to implicate not only Puttu but his son Girdhari and another man named Nohra.

The result, therefore, is that excluding the evidence which the learned Sessions Judge wrongly admitted to the record, there is no sufficient proof to justify the conviction of the prisoner Puttu. I, therefore, allow this appeal, set aside the conviction and sentence and direct that Puttu be acquitted and released.

Appeal allowed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 518 OF 1914.
CRIMINAL REVISION PETITION No. 440 OF 1914.
January 4, 1915.

Present:—Mr. Justice Spencer and Mr. Justice Seshagiri Aiyar.

EMPEROR—COMPLAINANT—PETITIONER
versus
KRISHNA PANDARAM—ACCUSED No. 2—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 399, 426—Order of detention, whether sentence—Reformatory Schools Act (VIII of 1897), ss. 8, 10—Sessions Judge, whether can suspend operation of order.

An order of detention passed by a District Magistrate under section 10 of the Reformatory Schools Act (VIII of 1897) is not a "sentence" within the meaning of section 426 of the Code of Criminal Procedure, nor is it a punishment enumerated in section 53 of the Indian Penal Code. A Sessions Judge, therefore, has no power to suspend its operation under section 426 of the Code of Criminal Procedure.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Sessions Court of Coimbatore, in Criminal Appeal No. 110 of 1913, preferred against the judgment of the Court of the District Magistrate of Coimbatore, in Calendar Case No. 1 of 1913.

The *Public Prosecutor*, for the Government.

ORDER.—Under section 426 of the Code of Criminal Procedure the Sessions Judge clearly had no power to pass an order that the prisoner, who had been tried, convicted and sentenced in due course of law by a Subordinate Court, should be treated as an under-trial prisoner pending the disposal of his appeal. The Sessions Judge further directed that the sentence passed by the District Magistrate upon the prisoner should be suspended. The sentence was one of six months' rigorous imprisonment, and in lieu thereof the District Magistrate directed under

section 399 of the Criminal Procedure Code that the accused should be detained for four years in the Reformatory School. Sections 8, 10 and 30 of the Reformatory Schools Act make a distinction between an order for detention and a sentence. This distinction is also made clear from section 53, Indian Penal Code, which does not include such orders among punishments. We are, therefore, of opinion that the order for detention was not a sentence within the meaning of section 426, and thus the Sessions Judge's order, as it stood, to suspend the sentence would not prevent the carrying out of the order of detention. No doubt there was a sentence in lieu of which the prisoner was directed to be detained, but that sentence was not in operation as it was superseded by the order for detention. We, therefore, set aside the Sessions Judge's order.

Order set aside.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER NO. 484 OF 1911.

June 21, 1912.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice N. Chatterjea.

HARIHAR SINGH—PETITIONER—APPELLANT

versus

MOHESWAR PROSHAD—OPPOSITE PARTY—RESPONDENT.

Provincial Insolvency Act (III of 1907), s. 43, proceedings under, nature of—Criminal proceedings—Procedure not followed—Insolvent, conviction of, whether sustained.

Proceedings against insolvents under section 43 of the Provincial Insolvency Act are in the nature of criminal proceedings, and it is necessary that there should be a charge, a finding and a conviction as a foundation for the sentence and these should be strictly and accurately pursued and if on any of these three points a substantial defect should appear, it would be a ground for reversing the proceedings.

Therefore, where a Judge does not follow the procedure but arrives at his conclusion of guilt of an insolvent not on evidence but substantially on the report of the Receiver of his property, the conviction of the insolvent cannot be sustained.

Appeal against the order of the District Judge, Mozaffarpur, dated the 20th of August 1911.

Babu *Jogendro Chandra Ghose*, for the Appellant.

Babu *Aukhoy Kumar Banerjee*, for the Respondent.

JUDGMENT.

JENKINS, C. J.—In my opinion the order of the Judge sentencing this insolvent to a maximum term of imprisonment of one year cannot be sustained. It must be understood that proceedings such as these are in the nature of criminal proceedings: and "in all criminal cases it is necessary that there should be a charge, a finding and a conviction as a foundation for the sentence. Everything should be strictly and accurately pursued; and if in any one of these three points a substantial defect should appear, it would be a ground for reversing the proceeding." The section itself provides safeguards which have not been observed, for it is prescribed that the Court "in every such case shall record the facts constituting the offence with the statement (if any) made by the debtor." More than that, the Judge has arrived at his conclusion of guilt not on evidence but substantially on the report of the Receiver. It is true that there was also a deposition of the debtor, but the learned Vakil who appears to support the order of the learned Judge is unable to suggest that there was anything in the deposition of the debtor that would justify the order and the sentence that has been passed. In the circumstances there is but one course open to us, and that is to reverse the order of the Judge and to direct that the insolvent be set at liberty.

The respondent must pay the insolvent's costs of the appeal, hearing fee two gold *mohurs*.

N. CHATTERJEA, J.—I agree.

Order reversed.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 37 OF 1914.

May 6, 1914.

Present:—Mr. Hayward, J. C.

GANDALAL MURARJI AND OTHERS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Opium Act (I of 1878)—Rules framed under s. 5—Rule 4 (iii) (c)—Ultra vires—Conviction based on, whether legal.

Rule 4 (*iii*) (*c*) of the Rules framed by the Bombay Government under section 5 of the Opium Act is a rule of evidence as to the fact of possession, and not a rule as to the conditions of possession as contemplated by section 5, and as such is *ultra vires* of the section. Therefore, a conviction based on the rule is illegal.

Appeal against the order of the Additional City Magistrate, Karachi.

Mr. *Dipchand Chandumal*, for the Appellants.

Mr. *C. M. Lobo*, Assistant Public Prosecutor, for the Crown.

JUDGMENT.—The owner of an opium smoking den has been convicted of possessing 103 *tolas* of *chandul* contrary to rule 4 (*iii*) (*a*) of the rules under section 5, as provided by section 9 (*c*) of the Opium Act. He has not appealed, but 12 out of 16 others found smoking *chandul* in the opium den have appealed against their convictions of possessing opium contrary to rule 4 (*iii*) (*b*) and (*c*) of the rules under section 5, as provided by section 9 (*c*) of the Opium Act.

It has been contended on behalf of the appellants that the 103 *tolas* of *chandul* belonging to the owner of the den were not in their possession either jointly or separately, and that there was no evidence to show that any of them was actually in possession jointly or separately of more *chandul* than allowed by the rules, that is to say, of more than "half quarters" of a *tola*, whatever that may mean, as prescribed in rule 4 (*iii*) (*b*) and that they cannot legally be deemed to have been in possession of more than "half quarters" of a *tola* without actual proof of the fact, as rule 4 (*iii*) (*c*) is *ultra vires*, being a rule of evidence and not a rule strictly under section 5 of the Opium Act.

It seems to me clear that the possession of the 103 *tolas* of *chandul* by the owner of the den cannot be presumed to have been also the possession of his customers. It is improbable he would admit any claim of his customers to any of the *chandul*, but that which they might actually be smoking. There was no evidence to show that any of the smokers was actually in possession either separately or jointly of more than "half quarters" of a *tola*, whatever that might mean, as mentioned in rule 4 (*iii*) (*b*) and (*c*) and there appears to me no warrant for prescribing a presumption to the contrary from the mere fact that they were all found in an opium den by rule 4 (*iii*) (*c*) under section 5 of the Opium Act. Such a presumption would amount, in my opinion, to a rule of evidence as to the fact of the possession and not to a rule as to the conditions of possession contemplated by section 5 of the Opium Act. At all events the rule as drafted, "shall be held to have committed a breach," is in the form of a presumption of evidence and not of a condition of possession as contemplated by section 5 of the Opium Act. It might, no doubt, be possible to draft a condition of possession having much the same effect as intended by the rule, but such a condition could not, in my opinion, be raised here without an improper straining of the actual words of the rule. The necessary effect would appear, however, more properly obtainable by inserting express provisions against smoking in an opium den in the Opium Act similar to the provisions against gambling in the Gambling Act.

The appellants are entitled, therefore, to have their convictions reversed as based on rule 4 (*iii*) (*c*), which must be held *ultra vires* of section 5 of the Opium Act. They are, therefore acquitted; those in jail are ordered to be discharged, and those who have paid fines will have their fines refunded.

Convictions and sentences reversed.

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 2128 OF 1913.

February 13, 1914.

Present:—Mr. Justice Scott-Smith.

EMPEROR—PROSECUTOR

versus

CHUNI AND ANOTHER—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 110—

In re GANDELLA RAMUDU.

Obtaining decree by forged documents, whether cheating or extortion—Proceedings under s. 110, whether legal—Joint trial—Association in same offences.

The obtaining of decrees by means of forged documents is neither cheating nor extortion as defined in the Penal Code. Therefore, persons habitually committing such acts cannot be proceeded against under section 110 of the Criminal Procedure Code.

Two accused cannot be tried together unless their association in the same offence is made out.

Case reported by the Sessions Judge, Hoshiarpur Division, with his No. 1698, dated the 3rd December 1913.

FACTS of the case appear from the following Reference made by the Sessions Judge:—

"The District Magistrate of Kangra has taken security for good behaviour from Chuni and Bhuru, money-lenders of Kathiari village, under section 110, Code of Criminal Procedure. It appears to me that he has done so because he believes that these persons habitually commit extortion or cheating.

"The evidence against them is that they manufacture forged bonds and obtain decrees by false and forged evidence.

"These acts do not, in my opinion, constitute either extortion or cheating as defined in the Penal Code.

"It is true that forgery and obtaining decrees by false evidence are frequently spoken of in English as 'cheating' and in vernacular *dagha*, but in strict legal parlance such offences do not constitute either cheating or extortion as defined in sections 415 and 390 of the Indian Penal Code.

"I am of opinion that these words, as used in section 110 (*d*) of the Criminal Procedure Code, must be understood by the Courts to be as defined in the Penal Code.

"It, therefore, appears to me that thereis no evidence that these persons habitually commit cheating.

"I, therefore, report the above result of my examination of this file to the Chief Court under section 438, Criminal Procedure Code, and recommend that the order requiring Chuni and Bhuru to give security under section 110, Criminal Procedure Code, be set aside."

ORDER.—I agree with the Sessions Judge that the obtaining of decrees by means of forged documents is neither cheating nor extortion as defined in the Penal Code.

In *Ganeshi* v. *Queen-Empress* (1) it was held that section 110, Criminal Procedure Code, did not apply to the case of a person who had the reputation of bringing false claims upon forged entries in account books.

In *Mahian Mal* v. *Empress* (2) it was held that an habitual forger does not come within any of the classes of offenders specified in section 110, Criminal Procedure Code, from whom security may be demanded.

The above rulings are clear expositions of the law with which I agree.

I would also point out that the two petitioners could not be tried together unless their association in the same offences was made out.

I accept the revision and set aside the order of the District Magistrate calling upon Chuni and Bhuru to furnish security, and discharge them.

Revision accepted.

(1) 25 P. R. 1884 Cr.

(2) 28 P. R. 1900 Cr.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 248 OF 1914.
CASE REFERRED No. 25 OF 1914.
April 24, 1914.

Present:—Mr. Justice Ayling.

In re GANDELLA RAMUDU *alias* MARRI AND ANOTHER—ACCUSED.

Jurisdiction—Imprisonment.

A Magistrate is not competent to impose a sentence of imprisonment to take effect in continuation of a period of sentence which the accused is undergoing in default of furnishing sufficient security.

Case referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by the District Magistrate of Godavari, in his letter, Ref. on C. No. Magl. of 1914, dated 26th March 1914.

Mr. *C. F. Napier*, for the Government.

ORDER.—The Magistrate's order that the sentence of one month's simple imprisonment imposed by him shall take effect in continuation of the period of imprisonment which the accused was undergoing in default of security is illegal. Vide *Emperor* v. *Muthukumaran* (1). So much of his order is set aside and the sentence will take effect from date of judgment.

Order partly set aside.

(1) 27 M. 525; 1 Cr. L. J. 1000.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 35 OF 1914.
June 10, 1914.
Present:—Mr. Fawcett, J. C.

ASLUM *walad* GUL MAHOMED—APPELLANT
versus
EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 524—Seizure by Police of property—Presumption in favour of possessor—Evidence Act (I of 1872), s. 110.

The words "is unable to show that it was legally acquired by him" in section 524 of the Criminal Procedure Code must be read consistently with the ordinary Law of Evidence, and not as intended to supersede anything in that law.

Where on a proclamation being issued under section 523 no one except the accused claims to be the owner of the property attached and no evidence is adduced to show clearly that the claim is false, the proper and safest course for the Court is to follow the presumption laid down in section 110 of the Evidence Act and to hold the accused as the owner in the absence of proof to the contrary.

Appeal against the order of the City Magistrate, Karachi.

Mr. *Dharamdas Thawardas*, for the Appellants.

Mr. *Partabrai D. Punwani*, Assistant Public Prosecutor, for the Crown.

JUDGMENT.—This is an appeal from an order of the City Magistrate, Karachi, directing under section 524, Criminal Procedure Code, that certain property seized by the Police under section 523 from the possession of one Aslum should be sold and the proceeds credited to Government.

Before the Magistrate the appellant, Aslum, produced several witnesses in support of his claim to the property, some of which actually bears his name: but the Magistrate says he is not satisfied with his evidence and has accordingly passed the order complained of.

There are, no doubt, grounds on which some, at any rate, of this evidence can be attacked as suspicious, and I am far from saying that there may not be a reasonable doubt as to all the property having been honestly acquired by the appellant. But, on the other hand, it is certainly in his favour that, though the Sub-Inspector of Police in his report of 11th May 1913 says, a search is being made for the owners,—who (it may be remarked) might be the more easily traced as some of the articles bore certain names, mentioned in that report—and though a proclamation regarding the property was issued over six months ago, yet no one else has come forward to claim this property. Nor has there been elicited any evidence which *clearly* shows that the claim is a false one, and that the witnesses produced by appellant are liars who have conspired with him to support a false claim.

In these circumstances, I think the proper and safest course is to follow the presumption laid down in section 110 of the Evidence Act and to hold that accused is the owner in the absence of proof to the contrary. It is said that the words "is unable to show that it was legally acquired by him" in section 524 reverses this presumption; but I do not agree with this view. Those words must be read consistently with the ordinary Law of Evidence, and not as intended to supersede anything in that law, for there is nothing in the section to indicate that the latter was the intention of the Legislature. This view is also in general accordance with the ruling of the Bombay High Court in *Emperor* v. *Bahinu* (1), that the discretion given by the words "such order as he thinks fit respecting the disposal of such property" in section 523, Criminal Procedure Code, must be judicially exercised, and where there is nothing to show the title to the property produced, it should be ordered to be delivered to the person in whose possession it had been at the time of attachment. In the present case I think there are no sufficient grounds for holding that the Crown should have the property rather than the appellant from whose possession it was taken.

The Magistrate's order is accordingly reversed, and he should be directed to give the property in question to the appellant.

Order reversed.

(1) 5 Bom. L. R. 25.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 1092 OF 1914.

January 6, 1915.

Present:—Mr. Justice Piggott.

MANGAT RAI—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 436—Discretion of Sessions Judge—Power of High Court to interfere

A High Court should be slow to interfere with the exercise of the very wide discretion with which Sessions Judges have been invested under the provisions of section 436 of the Code of Criminal Procedure.

Fattu v. *Fattu*, 26 A. 564; A. W. N. (1904) 125; 1 A. L. J. 292; 1 Cr. L. J. 519, followed.

Criminal revision from an order of the Sessions Judge of Meerut.

Mr. *Satya Chandra Mukerji* (with him Mr. *Harendra Krishna Mukerji*), for the Applicant.

Mr. *R. Malcomson*, Assistant Government Advocate, for the Crown.

JUDGMENT.—A complaint was made by one Bansi against the applicant Mangat Rai, *patwari* of his village, containing allegations which, if proved, would undoubtedly serve to establish the commission of an offence punishable under section 218 of the Indian Penal Code, if not also an offence under the forgery sections of the Indian Penal Code. After an inquiry which on the face of it appears to have been somewhat cursory, the Magistrate passed an order of discharge without even examining the accused. The matter was taken to the Sessions Judge in revision, and he has ordered a commitment on the record as it stands. I find that his order has since been complied with and Mangat Rai stands committed to the Court of Session on a charge drawn up prior to the filing of this application in this Court. The principles applicable to the conduct of a Magistrate when inquiring into the commission of an offence exclusively triable by the Court of Session and to the exercise of the discretion vested in the District Magistrate or the Sessions Judge by the provisions of section 436 of the Code of Criminal Procedure, have been very clearly laid down in the case of *Fattu* v. *Fattu* (1), with which I find myself in the fullest possible agreement. I regard the present case as a somewhat unfortunate one. The inquiry by the Magistrate in the first instance seems to have been perfunctory and unsatisfactory in several respects. Moreover, the Magistrate apparently entertained an opinion that Bansi's denial on oath of the genuineness of certain writing purporting to be his signature was of no evidential value unless that denial was corroborated. The Sessions Judge has, on the other hand, so framed his order that he would almost appear to have been under the impression that the Magistrate was bound to commit the accused for trial merely because the evidence given by Bansi, if believed, would justify conviction. The impression left on my mind by an examination of the record is that the case was one in which the learned Sessions Judge would have exercised a sounder discretion if he had ordered further inquiry to be made, instead of ordering commitment on the record as it stands. At the same time it cannot be denied that the Sessions Judge's order was within his discretion, and the ruling to which I have just referred is in favour of the principle that this Court should be slow to interfere with the exercise of the very wide discretion with which Sessions Judges have been invested under the provisions of section 436 of the Code of Criminal Procedure. Another point for consideration in this case is that there has now been an order of commitment, which it would not be proper for this Court to quash except on a point of law. On the whole as the case now stands, I think it better that the trial of Mangat Rai should proceed in accordance with the commitment order. I dismiss this application.

Application dismissed.

(1) 26 A. 564; A. W. N. (1904) 125; 1 A. L. J. 292; 1 Cr. L. J. 519.

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 1320 OF 1913.

November 15, 1913.

Present:—Mr. Justice Johnstone.

AHMADA AND ANOTHER—CONVICTS—PETITIONERS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 415, 419—Cheating by personation—Inducing muharrir of a fair to write false name in certificate of sale—Muharrir deceived—Evidence—Thumb impression—Expert opinion, value of.

AHMADA v. EMPEROR.

Two persons *A* and *L* persuaded a *muharrir* at a fair to write in a certificate of sale of a mare that *L* was the purchaser and one *S* the seller. *A* affixed his thumb mark for *S*. It was found that (*i*) the mare was not stolen property, but (*ii*) it was come by in some doubtful fashion and that (*iii*) the *muharrir* was deceived:

Held, that for whatever reasons *L* and *A* did deceive the *muharrir* and did induce him to write a false certificate, they were guilty of cheating by personation.

The deliberate opinion of an expert that two thumb marks exactly agree is on quite a different plane from an opinion as to handwriting and is sufficient to conclude that the same thumb made both the marks.

Criminal revision from an order of the Additional Sessions Judge, Shahpur Division, Lyallpur, dated the 4th July 1913.

Chaudhari *Nabi Bakhsh*, for the Petitioners.

Bhagat *Govind Das*, for the Respondent.

JUDGMENT.—In this case the accused, Ahmada and Lalu, were *challaned* upon section 419, Indian Penal Code, for cheating one Shams-ud-din (P. W. No. 2), a *muharrir* at Lyallpur Fair, by persuading him, in the exercise of his duty, to write in a *parchi* or certificate of sale of a mare that Lalu was the purchaser and one Sultan the seller, and affixing his thumb-mark. The learned Magistrate before whom the case came for trial, after recording the evidence for the Crown, thought that the offence disclosed by the evidence was forgery punishable under section 465, Indian Penal Code, and drew up a charge accordingly, and in the end found both accused guilty as charged and sentenced them to twelve months' rigorous imprisonment.

On appeal the learned Sessions Judge remarked that the Magistrate, in holding that no cheating by personation had occurred, had overlooked the fact that the *muharrir*, Shams-ud-din, had been deceived. Later in his judgment the learned Sessions Judge remarks that conviction under section 419, Indian Penal Code, can be supported on the record, and goes on to say:—

"The prosecution has not succeeded in showing that the mare to whom (?) the certificate related was stolen property, but there is little doubt that she was come by in some doubtful fashion, otherwise the proceedings of the two brothers at the horse fair would be a meaningless farce. I uphold the convictions and dismiss both appeals."

The learned Judge who admitted this revision did so because of a doubt in his mind whether *on the Sessions Judge's findings* a conviction under section 419, Indian Penal Code, could be sustained. The Sessions Judge's findings of fact seem to be:—

(*i*) the mare is not proved to be stolen property;

(*ii*) it was, however, come by in some doubtful fashion;

(*iii*) the *muharrir* was deceived.

The definition of cheating in section 415, Indian Penal Code, runs thus:—

"Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to 'cheat.'"

Mr. Nabi Bakhsh in this connection draws my attention to several rulings, such as *Mojey* v. *Queen-Empress* (1) and rulings of the Madras High Court, and argues that no harm was caused, or was likely to be caused, to the *muharrir* by the alleged deception, the possibility of his getting into trouble being very remote. On the other hand, in *Mahadev Lal* v. *Dhauraj* (2), where a person went to an opponent's Pleader and, pretending that he was one of that Pleader's clients, tried to induce him to write a letter that would have damaged the opponent's case, it was held that cheating of that Pleader by personation was complete.

But, to whatever extent High Courts may have contradicted themselves and each other, I find in the rulings of this Court principles laid down which I must follow. In *Nand Lal* v. *Queen-Empress* (3) it was held that "intentionally" in section 415 aforesaid only governs the clause in which it occurs, and in *Emperor* v. *Mohabat* (4) it was laid down that the words "fraudulently or dishonestly" only qualify the first part of the section, and in both cases the facts

(1) 17 C. 606.
(2) 12 C. W. N. 750; 7 C. L. J. 375; 7 Cr. L. J. 342.
(3) 36 P. R. 1888 Cr.
(4) 20 P. R. 1889 Cr.

are in line with those of the present case. In the later ruling, indeed, the facts are so exactly on all fours with those now before me that, when I find the Full Bench their upholding a conviction under section 419, Indian Penal Code, there is nothing more to be said on this aspect of the case.

The other points raised need not detain us long. It is contended, on the strength of *Jalal-ud-din* v. *Emperor* (5), a case of handwriting experts, *Pancha Mondal* v. *Emperor* (6) and *Emperor* v. *Abdul Hamid* (7) (thumb-impression cases), that inasmuch as here the only evidence, that the thumb-mark on the *parchi* is Ahmada's and no other person's, is the opinion of the expert, the fact should not be considered sufficiently proved. (The *muharrir* cannot identify the affixer of the mark, as is natural enough.)

My view here is that each case must be dealt with on its own merits; and, in my opinion, the deliberate opinion of an expert that two thumb-marks exactly agree is on quite a different plane from an opinion as to handwriting. It is a reasonable deduction from experience that no two human beings have the same thumb-markings, and, if no differences whatever can, after the most careful examination, be found between one thumb-mark and another, the conclusion is irresistible that the same thumb made both. Add to this that Sultan, the alleged vendor, seems to be a mythical person.

The facts, then, have been rightly found against the petitioners; and the absence of proof that the mare had actually been stolen is immaterial. For whatever reason, petitioners *did* deceive the *muharrir* and did induce him to write a false certificate and they are thus, under the rulings of this Court, guilty of cheating by personation. Petitioners do not ask for a further opportunity to produce defence evidence in view of the lower Appellate Court's virtual alteration of the sections from 465 to 419.

I dismiss the petition.

Petition dismissed.

(5) 15 Ind. Cas. 979; 147 P. L. R. 1912; 13 Cr. L. J. 563; 18 P. W. R. 1912 Cr.
(6) 1 C. L. J. 385; 2 Cr. L. J. 311.
(7) 32 C. 759; 2 Cr. L. J. 259; 9 C. W. N. 520.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION NO. 177 OF 1913.

June 13, 1913.

Present:—Mr. Fawcett, J. C., and Mr. Crouch, A. J. C.

MURLIDHAR JERAMDASS—APPLICANT

versus

NARAYENDAS—RESPONDENT.

Penal Code (Act XLV of 1860), s. 499, Excep. III—Privileged occasion—Substantial truth—Exaggeration—Interference in revision with a pending case—Criminal Procedure Code (Act V of 1898), s. 439.

Where the occasion is privileged, it is not necessary to justify every detail of the charge, provided the gist of the libel is proved to be in substance correct and the details, etc., which are not justified, produce no different effect on the mind of the reader than the actual truth would do.

Where in a newspaper report the main aspersion of the accused against the complainant is true, the fact that there is some exaggeration or departure from strict truth does not deprive the accused of the protection provided in Exception 3 to section 499, Indian Penal Code.

Mere exaggeration, or even gross exaggeration, does not make a comment unfair. Where the matter is of public interest, the Court ought not to weigh any comment on it in a fine scale and some allowance must be made for even intemperate language, provided, however, that the writer keeps himself within the bounds of substantial truth and does not misrepresent or suppress any facts.

As a rule, a Court of Revision does not interfere with a pending case, but where the real object of the complainant is, not to vindicate his own character or to exact from the defendant the substantive penalty for his own offence, but to subject him to heavy financial loss and very serious and long continued annoyance by the very process of the trial itself, the Court will quash proceedings.

Application for quashing proceedings under section 499, Indian Penal Code, in the Court of the First Class Magistrate, Sukkur.

Mr. *Wadhumal Oodharam*, for the Applicant.

Mr. *Dipchand T. Ojha*, for the Opponent.

Mr. *E. Raymond*, Public Prosecutor, for the Crown.

JUDGMENT.

CROUCH, A. J. C.—This is an application under sections 435, 439, Criminal Procedure Code, to quash the proceedings pending against Mr. Murlidhar under section 499, Indian Penal Code.

In July last, Mr. Narayendas, the present complainant, and Mr. Murlidhar, the accused,

both of whom are Municipal Councillors of Shikarpur, were candidates for the post of Chairman of the Managing Committee.

On the 23rd July a paragraph contributed anonymously by Mr. Narayendas appeared in the *Sind Gazette*, stating that he, Mr. Narayendas, intended to put certain questions set out in detail to certain Municipal Councillors at the next general meeting. These questions were obviously aimed at extracting information that would reflect unfavourably on Mr. Murlidhar and injure his chances of being elected Chairman, and any one perusing the paragraph would be impressed with the idea that statements prejudicial to Mr. Murlidhar's character as a Municipal Councillor would shortly be published.

On the 2nd August there was a General Meeting of the Municipality and, at that meeting, Mr. Narayendas asked permission to put his questions. It is admitted that permission was refused, and that the President suggested that Mr. Narayendas was fishing for scandal, and that the questions were of a scandalous nature and could not be allowed.

On the 7th August there appeared in the *Sind Gazette* a letter signed "One who was present," giving what purports to be a *verbatim* account of the incident. This letter was contributed by Mr. Murlidhar, and forms the subject of the complaint.

On the 14th September Mr. Murlidhar was elected Chairman of the Managing Committee. On the 16th October Mr. Narayendas filed his complaint alleging that the letter contained a very exaggerated and false account of the transaction, and attributed to him conduct unworthy of a Municipal Councillor of the position and respectability of the complainant, that the imputations were calculated to lower the complainant intellectually and morally in the eyes of the public, and were the result of ill-will and malice.

Attached to the complaint was a list of 30 witnesses including a member of the Legislative Council, the Assistant Collectors of Shikarpur and Rohri, the City Magistrates of Shikarpur and Sukkur, two head-munshis, a Municipal Engineer, the Editor or Manager of three newspapers and a large number of Municipal Councillors, Pleaders, etc.

The complaint was lodged befor the District Magistrate, Sukkur, who, after examining the complainant, considered it was necessary to allow the matter to proceed.

Owing to the number of Magistrates summoned as witnesses, considerable difficulty has been experienced in finding a Magistrate to try the case: it is now pending before the Huzur Deputy Collector, Sukkur, who has expressed himself unable to take more than two witnesses a day without unduly encroaching on his revenue duties.

Mr. Murlidhar applies that the proceedidgs be quashed, on the ground that the letter complained of is not defamatory and that, at any rate, the matter is too trivial to be taken notice of by a Court of Law.

The letter consists of about 600 words: no particular passage is relied on in the complaint as being false, and we must consider it as a whole. It refers, *firstly*, to the paragraph of the 23rd July, and points out that, as it contained insinuations against Mr. Murlidhar, the result of Mr. Narayendas' action should also be published. The report is in the form of a conversation between the President and Mr. Narayendas and if the words put into Mr. Narayendas' mouth alone are taken, it will be found that he is reported to have merely asked permission to put his questions and to have urged his right to put them in dignified and moderate language. The President is represented as having become irritated, and as having characterised Mr. Narayendas' conduct as scandalous and his questions as improper, groundless, and scandalous and to have peremptorily ordered him to sit down.

Now, Mr. Narayendas had himself published in the said *Gazette* the questions which he intended to put, with an obvious innuendo defamatory of Mr. Murlidhar, and "where a man appeals to the public by writing to the newspaper to expose what he deems abuses, he cannot complain if the Editor inserts other letters in answer to his own refuting his charges. A man who has commenced a newspaper warfare cannot complain if he gets the worst of it." (Odgers, page 205). The occasion was privileged and where this is so, it is not necessary to justify every detail of the charge, provided that the gist of the libel is proved to be in substance correct, and that the details, etc., which are not justified, produce no different effect on the mind of the reader than the actual truth would do,

MURLIDHAR JERAMDASS v. NARAYENDAS.

On complainant's own admission, I am satisfied that the report was substantially true. Complainant's grievance appears to be that the report is exaggerated and represents him as having been subjected, at the hands of the President, to more indignified treatment than he really was. But if, as is conceded, Mr. Montgomery's letter of the 12th August accurately relates what occurred, I am convinced that the general impression conveyed by the letter was practically the same as would have been conveyed by the strict truth. I am of opinion that on the allegation and admissions of complainant, Mr. Murlidhar could not be properly convicted of defamation.

I should, however, have been unwilling to quash the proceedings on this ground alone. But a deliberate abuse of Criminal Procedure appears to be contemplated. I am convinced that the real object of complainant is not to vindicate his own character or to exact from the defendant the substantive penalty for his offence, but to subject him to heavy financial loss and very serious and long continued annoyance by the very process of the trial itself. The Criminal Procedure is to be used not as a means to a justifiable end, but as an end in itself. I am further influenced by the fact that the trial, if allowed to proceed, would cause serious inconvenience to a very large number of public officers and leading citizens without even a remote probability of any public good resulting.

I would, therefore, quash the proceedings and direct the applicant to be discharged.

FAWCETT, J. C.—I concur in the view taken by my learned brother that the complaint, read with Mr. Montgomery's letter of 12th August 1913, which complainant accepts as a correct statement of what occurred at the meeting in question, discloses no offence of defamation of which applicant, Mr. Murlidhar, could properly be convicted.

The main imputations on Mr. Narayendas contained in the letter to the *Sind Gazette* which forms the subject of the complaint, were made not by the accused, but by Mr. Montgomery, the President of the meeting, and no objection is taken by the complainant to the imputation conveyed in Mr. Montgomery's expression of opinion that the questions proposed to be put by Mr. Narayendas were of a scandalous nature, such as should not be allowed to be put. That being so, it is clear that Mr. Murlidhar, who merely published that opinion, cannot be put in a worse position.

The only basis on which the complaint is made against him is that the account of the meeting contributed by him to the *Sind Gazette* contains some exaggeration and invention: but I entirely agree with my learned colleague that there is nothing in that account which can reasonably be held to be likely to convey to an ordinary reader any imputation affecting the complainant's character and fitness for a Municipal Councillorship, beyond that admittedly made by Mr. Montgomery. It was only by attributing perverse or strained hidden meanings to certain expressions that complainant's Pleader could attempt to show the contrary. For instance, even if the President said, this is scandalous. instead of, this is scandalous *on your part* (as he is reported to have done in Mr. Murlidhar's letter), the addition of the words underlined would not, at any rate to an ordinary reader, make any material difference. Similarly even if it be untrue that Mr. Murlidhar said he wished answers had been given to show the falsity of Mr. Narayendas' insinuations, this does not convey any real imputation on the latter especially in view of his admission that he did not know what was the nature of the promises imputed to Mr. Murlidhar. It is merely a case of one man affirming a certain thing to be a fact and another denying it. Nor does the fact (even if it be untrue) that according to the account complained of Mr. Naraindas did not at once accept the President's ruling and attempted to press his view that the questions should be allowed—which is a common-place feature in Parliamentary, Municipal and other meetings—, in any way convey an imputation injurious to his character as a public man. I should imagine it would, on the contrary, enhance his reputation among his friends. In fact there is nothing in the article which, so far as imputations are concerned, goes beyond what Mr. Montgomery admittedly said, or which (apart from Mr. Montgomery's aspersions) can in any way be said to be likely to harm complainant's reputation.

Again, so far as Mr. Murlidhar, by publishing his account of the matter, may

be taken to have adopted the imputations which he puts into the mouth of Mr. Montgomery, the case, in my opinion, clearly falls under the third exception to section 499, Indian Penal Code, where it is provided that "it is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character, so far as his character appears in that conduct, and no further." The aspersions on Mr. Narayendas' conduct in putting these questions at a Municipal meeting fall within this category, and Mr. Murlidhar's "good faith" is sufficiently shown by the fact that his main aspersion that the President stigmatised the questions as scandalous and disallowed them on that ground is admittedly true. Even if there is some exaggeration or departure from strict truth in the account of the matter given by Mr. Murlidhar, this is immaterial and does not, for the reasons already mentioned, take away this protection given by this 3rd exception to section 499, Indian Penal Code. For this is on the same footing as similar exaggeration in commenting on a public man's conduct. As said in *Merivale* v. *Carson* (1) Lord Esher, M. R.: "Every latitude must be given to opinion and to prejudice, and then an ordinary set of men with ordinary judgment must say whether any fair man would have made such a comment..... Mere exaggeration, or even gross exaggeration, would not make this comment unfair." Again, as laid down in *Edmondson* v. *Birch & Co., Ltd.* (2), the law is that, where a matter is of public interest, the Court ought not to weigh any comment on it in a fine scale, and that some allowance must be made for even intemperate language, provided however that the writer keeps himself within the bounds of substantial truth and, does not misrepresent or suppress any facts. In this case there is no allegation that there has been any suppression of facts which would put complainant's conduct in a more favourable light, and the accused's account of what occurred at the meeting is shown to be substantially true.

The intention of the 3rd exception to section 499, Indian Penal Code, is that "every person ought to be allowed to comment in good faith on the proceedings of (these) volunteer servants of the public with the same freedom which he is allowed to comment on the proceedings of the official servants of the public," see Note R. of the authors of the Code, cited in Ratanlal's Law of Crimes, 4th Edition, page 694.* Complainant should not have been so thin-skinned as to rush off at once to a Criminal Court in this matter, especially as he had himself invited publicity to it; and I agree with my learned colleague in thinking that there is no doubt that his main object is to harrass Mr. Murlidhar, to whom he has been opposed in various Municipal proceedings or elections. Undoubtedly a Court of Revision should be most reluctant to interfere in a pending case, but I am satisfied that this is a case in which such interference is justified and necessary in order to prevent a clear abuse of the right of resort to a Criminal Court. Upon the admitted facts there is no justification for the charge of defamation brought against the accused; and, as was said in the case of *Jagat Chandra Mozumdar* v. *Queen-Empress* (3), "it follows that he should not be left for a moment longer than is necessary in the position of a person accused of an offence and forced to defend himself against a charge for which there is no legal evidence to establish."

We, therefore, in exercise of the wide powers conferred by section 439, Criminal Procedure Code, quash the proceedings upon the complainant against the petitioner and direct that he be at once discharged.

Proceedings quashed.

(1) (1888) 20 Q. B. 275 at pp. 280, 281; 58 L. T. 331; 36 W. R. 231; 52 J. P. 261.

(2) (1907) 1 K. B. 371 at p. 380; 76 L. J. K. B. 346; 96 L. T. 415 23 T. L. R. 234.

(3) 26 C. 786 at p. 791; 3 C. W. N. 491.

* See Note 20, fifth Edition, p. 781—*Ed.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 952 OF 1914

November 26, 1914.

Present:—Mr. Justice Tudball.

EMPEROR—APPLICANT

versus

JIWAN—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 403—

EMPEROR *v.* JIWAN.

Previous trial without sanction—Jurisdiction of Court to try accused on some facts after sanction—Registration Act (XVI of 1908), s. 82.

Where the law requires a previous sanction to be given before a charge can be entertained by a Court, that Court is not a Court of competent jurisdiction until the sanction has been obtained.

An accused was placed upon trial for aiding and abetting forgery in connection with a document presented for registration and was acquitted. He was then placed upon his trial for aiding and abetting cheating in connection with the same transaction. He was convicted by the Magistrate but was acquitted on appeal. The District Registrar thereupon gave sanction for his trial for an offence under section 82 of the Registration Act. He was committed to Sessions and the Sessions Judge made a reference to the High Court suggesting that section 403 of the Criminal Procedure Code was a bar to his trial:

Held, that the former trial of the accused for the offence of aiding and abetting forgery was in no way a bar to his trial for an offence under the Registration Act, nor was his trial and acquittal of the offence of aiding and abetting the cheating a bar by reason of clause 4 of section 403 of the Criminal Procedure Code as at the former trial the Court was not competent to charge with or convict or acquit of the offence with which he was subsequently charged by reason of the want of sanction.

In re Sams-ud-din, 22 B 711, followed

Criminal reference made by the Sessions Judge of Shahjahanpur.

Mr. *R. Malcomson*, Assistant Government Advocate, for the Crown.

JUDGMENT.—This is a reference by the Sessions Judge of Shahjahanpur suggesting that the commitment of one Jiwan Kahar on a charge under section 82 (*a*) of the Registration Act for trial in his Court be quashed. The facts are simple. One *Musammat* Jhabbo died. *Musammat* Mulo forged a lease of certain land in favour of her own sons, signing the name of *Musammat* Jhabbo thereto. She then went to the Registration office and personating *Musammat* Jhabbo presented the document for registration. Jiwan Kahar identified her as being *Musammat* Jhabbo. The document was registered and returned to *Musammat* Mulo. *Musammat* Mulo was placed upon her trial and convicted of the offence of forgery. She was also placed upon her trial and convicted of the offence of cheating the Sub-Registrar. Jiwan was placed upon his trial for aiding and abetting forgery. He was acquitted. He was then placed upon his trial for aiding and abetting cheating. He was convicted by the Magistrate, but acquitted on appeal. Thereupon the District Registrar gave sanction for his trial for an offence under section 82 of the Registration Act. The Magistrate has now committed the case for trial, and hence the present reference. The learned Sessions Judge in a long order of reference suggests that under section 403 the man cannot now be tried on the same facts for this offence under the Registration Act, because this was an offence for which he might have been charged (under section 236 of the Criminal Procedure Code) and convicted (under section 237) at his former trial. One point is quite clear that the former trial and acquittal of Jiwan for the offence of aiding and abetting the forgery is in no way a bar to his trial for an offence under the Registration Act. The question is whether or not his trial and acquittal of the offence of aiding and abetting the cheating is a bar to the present trial. Where the law requires a previous sanction to be given before a charge can be entertained by a Court, that Court is not a Court of competent jurisdiction until the sanction has been obtained. This was held in *In re Sams-ud-din* (1). At the former trial of Jiwan he could not have been charged with or convicted or acquitted of the offence with which he is now charged by reason of the want of sanction. Clause 4 of section 403 lays down that a person acquitted of any offence constituted by any acts may, notwithstanding such acquittal, be subsequently charged with and tried for any other offence constituted by the same acts which he may have committed, if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged. Therefore, it is clear that Jiwan may now be tried for the offence under section 82 of the Registration Act. I, therefore, cannot accept the reference and order the record to be returned. The Sessions Judge will proceed with the trial. He no doubt will take into consideration, if he finds the accused guilty, the fact that the man has already been subjected to two trials and has served a considerable period in jail.

Record returned.

(1) 22 B. 711.

PUNJAB CHIEF COURT.
CRIMINAL APPEAL No. 522 OF 1913.
November 24, 1913.
Present:—Mr. Justice Johnstone.
MOOLA—CONVICT—APPELLANT
versus
EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 256—Accused, right of, to cross-examine prosecution witnesses after charge is framed—Magistrate, duty of—Omission to ask, effect of.

The provisions of section 256, Criminal Procedure Code, are imperative and it is an illegality to ignore them.

It is not until a specific charge has been drawn up and explained to the accused that he is in a position fully to cross-examine the witnesses for the Crown and, therefore, he should in all cases be asked at that time if he wishes to re-call witnesses for cross-examination, for the omission to follow the procedure involves remand and re-trial of the case from the point of drawing up of the charge

Appeal from an order of the District Magistrate of Ferozepore District, dated the 11th June 1913.

Lala *Ram Rattan*, for the Appellant.

ORDER.—In this case the learned District Magistrate of Ferozepore has convicted one Moola under section 411-75, Indian Penal Code, and sentenced him to seven years' transportation. The two bullocks stolen were the property of Manohar Lal, a contractor of Ferozepore. There can be no doubt that they were stolen on the night of 5-6th May 1913, and that a report was made at once. The accused was seen taking these two bullocks early in the next morning by head constable Abdul Ghani, who happened to be on duty in another case, on the *kutcha* road between Ferozepore d Zira near the village of Walur. Something in accused's conduct roused his suspicions and so he followed the accused, deputing one of his companions, Mangu by name, P. W. No. 5, to go and head him off. Mangu shouted to the accused who thereupon ran away, passed through the village of Naju Shah Misri, told the people there that he was on his way to Allah Ditta, *Zaildar*, and so arrived at the village of Saidanwala with the head constable, Shahzada, Anokha and Mangu in hot pursuit. They followed his tracks to Allah Ditta's *haveli*, one or two of the witnesses saying that they actually saw him entering it. Allah Ditta, who was at the door of the house, at first denied that anybody had come there, but ultimately produced the accused, who said then, and says still, that he that morning had been entrusted with the charge of these cattle to take them to Allah Ditta's house. Thereupon the accused was arrested. The case was investigated and he was *chalaned*.

In the judgment of the learned District Magistrate there are two or three slips, which fortunately do not in the circumstances matter very much. For instance, he says that Abdul Ghani, head constable, was out on duty in another case looking for a stolen buffalo. This is not correct, because in tha case the animal missing was a bullock. Again, he talks of Abdul Ghani and his companions pursuing the accused to the Rukan Shahwala village where, he says, the accused entered Alla Ditta's *haveli*. I do not know where he gets the name of Rukan Shahwala from, for the witnesses consistently say that the name of the village is Saidanwala.

There is one section in the Criminal Procedure Code which is not infrequently ignored by Subordinate Courts, though their attention has been drawn to it by many rulings and though the section is in itself quite clear. I allude to section 256, in connection with which it has been frequently held that its provisions are imperative and that it is an illegality to neglect them. The relevant portion of the section runs, "he shall be required to state whether he wishes to cross-examine any, and, if so, which of the witnesses for the prosecution whose evidence has been taken." This was not done in the present case, and it has been made a ground of appeal in arguments before me. I would like to draw the attention of the learned District Magistrate to such rulings as *Nilkanta Singh* v. *Queen-Empress* (1), *Queen-Empress* v. *Henry C. Kaye* (2) and *Zamunia* v. *Ram Tahal* (3). No doubt the accused in this case did in a meagre way cross-examine the witnesses for the prosecution, when they were in the witness-box; but this is no reason whatever why section 256 should be ignored, as it has been laid down more than once that it is not until a

(1) 20 C. 469.
(2) A. W. N. (1902), 5
(3) 27 C. 370, 4 C. W. N. 469.

specific charge has been drawn up and explained to the accused that he is in a position fully to cross-examine the witnesses for the Crown, and it is for this reason that the Legislature enacted the section aforesaid.

It has been usually held that the omission to follow section 256 involves remand and re-trial of the case from the point of the drawing up of the charge, and, therefore, it must be obvious to the District Magistrates of how vital importance it is that the accused should, in all cases, be asked at the appropriate time if he wishes to re-call witnesses for cross-examination. However clear the case may appear to be against the prisoner, the law apparently allows the lower Court no option in this matter, and the result of this sort of carelessness is a great deal of trouble and inconvenience to all concerned.

At the same time I am not inclined to hold at present that Moola has cleared himself of the charge on the record. He certainly ran away when challenged, and the evidence that he offers as to his being employed to transport the cattle to Allah Ditta's house is discrepant. In his favour one point may be here noticed, namely, that he told the villagers of the Naju Shah Misri village that he was going to Allah Ditta *Zaildar's* house and that he did actually go there. Now, a thief would not ordinarily tell people where he really intended to go.

However, it is unnecessary to discuss the case any further at present, for it must be remanded to the District Magistrate in orde that he may give the accused an opportunity to cross-examine the prosecution witnesses. I, therefore, return the papers to the learned District Magistrate in order that this may be done with as little delay as possible, the result being reported to this Court.

Case remanded.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 1156 OF 1914.

August 12, 1914.

Present:—Mr. Justice Sharfuddin and Mr. Justice Teunon.

BIRENDRA NATH DAS GUPTA—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 193—Prosecution, direction of, against a witness—Perjury, order to prosecute for, while case still pending, whether proper.

An order directing the prosecution of a witness under section 193, Indian Penal Code, while the case in connection with which he is said to have made a false statement is still pending in the Sessions Court, is improper.

Criminal revision of an order of the Sub-Divisional Magistrate of Narail.

Babu *Narendra Kumar Bose*, for the Petitioner.

JUDGMENT.—In this case it appears that one Birendra Nath Das Gupta, the petitioner before us, was examined as a witness in the Court of the Sub-Divisional Magistrate of Narail on the prosecution of one Rasiklal Das Gupta and others on charges relating to the death of the petitioner's father, Parbati Nath Das Gupta. The accused in that case were committed to take their trial before the Court of the Sessions Judge. While the case was still pending in the Court of Session, the Sub-Divisional Magistrate of Narail directed the prosecution of the petitioner under section 193, Indian Penal Code, with reference to a certain statement made by him in the course of his deposition. These statements refer to the first information which he had lodged before the Police in the case, and in them he alleged that the Sub-Inspector who took his first information recorded it incorrectly. He thereupon moved this Court and obtained the present Rule calling upon the District Magistrate of Jessore to show cause why the order directing his prosecution should not be set aside. We granted the Rule, mainly on the ground that the case in which he had deposed was still pending in the Sessions Court. No one appears to show cause, but the District Magistrate has submitted an explanation in which he says that the point at issue, namely, whether the substance of the information has been cor-

rectly recorded by the Sub-Inspector, is comparatively so little connected with the charge of causing death now before the Court of Session that it is unnecessary to await the result of the trial. We are unable to take this view. It is clear that the question whether the first information in the case has been correctly recorded is necessarily one of great importance at the trial, and in any case the impropriety of taking proceedings against a witness while the case is still pending cannot be too strongly insisted upon.

For these reasons we make this Rule absolute and set aside the order directing the prosecution of the petitioner. If he repeated the statements alleged to be false before the Sessions Judge, it will be for the Sessions Judge to consider whether or no his prosecution is advisable.

In conclusion we have further to observe with regret that in his explanation in dealing with the 6th ground set out in the petitioner's application the District Magistrate has used language of unnecessary and unbecoming violence, and that his aspersions on the legal advisers of the petitioner obviously made on no material are highly improper. We trust that we shall have no occasion to repeat this censure.

Rule made absolute.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 715 OF 1914.

June 16, 1914.

Present:—Mr. Justice Sharfuddin and Mr. Justice Teunon.

ACHAMBIT MONDAL—COMPLAINANT —PETITIONER

versus

MAHATAB SINGH AND OTHERS—ACCUSED—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s 247—Acquittal on date not fixed for hearing—Nullity—Jurisdiction of Magistrate to ignore acquittal and proceed with case.

An order of acquittal passed under section 247, Criminal Procedure Code, on a date which was not fixed for the hearing, is a nullity and does not debar the Magistrate from taking up the case and trying the accused without an order from a superior Court to revive it.

Criminal revision from an order of the Sessions Judge of Bhagulpur, dated 31st March 1914, reversing that of the Sub-Divisional Magistrate of Modhipura, dated 9th March 1914.

Mr. *K. N. Chaudhuri*, Counsel, with Babu *Durjendra Nath Mukerjee*, for the Petitioner.

Babu *Monmotho Nath Mukerjee*, for the Opposite Party.

JUDGMENT.—The petitioner in this case obtained a Rule from this Court calling upon the District Magistrate of Bhagalpur and also on the opposite party to show cause why the order of the Magistrate, dated the 10th January 1914, and the order of the Sessions Judge, dated the 31st March 1914, should not be set aside and such other order made as to this Court may seem fit, on the ground that the order of the Magistrate, dated the 10th January 1914, was so irregular as to amount to no trial at all.

The facts of the case are these. on the 12th December 1913 a complaint was made by the petitioner against a certain number of persons. The date for the hearing as fixed by the Magistrate was the 16th January 1914, but it so happened that through some mistake or oversight on the part of the Magistate's *peshkar* the case was called on for hearing on the 10th of January, *i.e.*, six days before the date actually fixed for hearing. Of course on that date the complainant was absent. The Magistrate thereupon passed an order acquitting the accused under section 247, Criminal Procedure Code. On the 16th of January the case was again called on and then the mistake that was made on the 10th January was discovered for the first time. The trying Magistrate ignored the order of acquittal passed on the 10th January and went on with the case. The case was taken up from time to time from the 16th January to the 9th March, witnesses were examined, arguments on both sides heard, and on the 9th of March 1914 the Magistrate convicted the accused and sentenced them each to one month's rigorous imprisonment and to pay a fine of Rs. 20 each. Thereupon the accused preferred an appeal to the Sessions Court. The learned Sessions Judge on the 31st March passed the following order: "Learned Sub-Divisional Officer by his order of acquittal dated the 10th January 1914 debarred himself from trying the accused. The case reported in

Suresh Chandra v. *Banku* (1) is exactly parallel. The whole of the trial was, therefore, illegal, as no superior Court was moved to revive the case. I set aside the conviction and sentence and order that the accused be acquitted. The fine, if paid, will be refunded to appellant."

On the above facts the first question that arises is whether the order of acquittal passed by the Sub-Divisional Officer professedly under section 247, Criminal Procedure Code, on the 10th January 1914 was a legal order or a mere nullity. If it was a mere nullity, then the trying Magistrate could ignore that order, and ignoring that order could go on with the case which was fixed originally for the 16th and which was also called on for hearing on the 16th when the parties were present. As a matter of fact the trying Magistrate ignoring that order went on with the case, recorded evidence, heard the arguments and then convicted the accused on the 9th March. If it was a nullity, then the order of the learned Sessions Judge, dated the 31st March 1914, cannot stand, because the learned Sessions Judge seems to be of opinion that so long as the order of acquittal passed by the Sub-Divisional Magistrate on the 10th January is not set aside, it is a bar against the re-opening of the case by the Sub-Divisional Magistrate.

There is a case reported as *High Court Proceedings, 17th August* 1875. *No.* 1793 (2), the facts of which are similar to the facts of the present case. The reported case was fixed for hearing on the 17th August, on which date both the parties failed to appear. The Magistrate being at the time on circuit postponed the case on his own motion for the 18th, 19th and 20th August without any intimation being given to the parties. The parties having failed to appear on either of these days, the Magistrate on the 20th August dismissed the complaint for default on the part of the complainant. On the 9th December following, the District Magistrate directed the Magistrate who dismissed the complaint to restore the case to the file and dispose of it in due course. The mater went up to the Madras High Court. It appeared to that High Court that the proceedings of the trying Magistrate were so substantially irregular as to amount to no trial at all, and it was held that in this view the dismissal of the complaint could not be held to operate as an acquittal. This is a clear authority on the point that an order passed on a date which was not fixed for the hearing and on which date the complainant was necessarily absent is no order at all. If it is a nullity, the trying Magistrate had jurisdiction to go on with the case and to come to the finding which he did. The Sessions Judge relies upon the case of *Suresh Chandra* v. *Banku* (1). The fact of that case are quite different from the facts of the present case. In this reported case, the complainant was absent on the date fixed for hearing and the Magistrate acquitted the accused under section 247, Criminal Procedure Code. He strictly followed the law. In such a case the order cannot be treated as a nullity.

This being our view, we are of opinion that order of the learned Sessions Judge dated the 31st March 1914 should be set aside, and we set it aside accordingly and direct that the appeal be re-heard on the merits.

Rule made absolute.

(1) 2 C. L. J. 622; 3 Cr. L. J. 115.
(2) 2 Weir. 307.

CALCUTTA HIGH COURT.
CRIMINAL APPEAL No. 2 OF 1914.
June 8, 1914.
Present:—Mr. Justice Holmwood and Mr. Justice Chapman.

THE DEPUTY SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL—APPELLANT

versus

SITAL CHANDRA PAL AND OTHERS—RESPONDENTS.

Provident Insurance Societies Act (V of 1912)—Insurance Company, whether corporate or share-capital divided into shares—Registration under the Act necessary before carrying on business

An Insurance Society, whether it is a corporate company before or whether its share-capital is divided into shares or not, cannot carry on the business of life insurance unless and until it is registered under the Provident Insurance Societies Act (V of 1912).

Oriental Government Security Life Assurance Co. Ltd. v. *Oriental Assurance Co. Ltd.*, 21 Ind. Cas. 258; 40 C. 570, explained.

DY. SUPT. AND REMEMBRANCER OF LEGAL AFFAIRS *v.* SITAL CHANDRA PAL.

Criminal appeal by Government against the order of acquittal of the Chief Presidency Magistrate of Calcutta, dated the 20th September 1913.

Mr. *B. C. Mitter*, Standing Counsel, for the Appellant.

Mr. *N. C. Sen*, Counsel, and Babu *Hem Chandra Sen*, for the Respondents.

JUDGMENT.—This is an appeal preferred by the Government against an order passed by the Chief Presidency Magistrate, Calcutta, on the 20th September 1913, acquitting the respondents Sital Chandra Pal, Surendra Nath Chowdhury, B. P. Ghosh and Purna Chandra Ghosh of an offence punishable under section 21 of the Provident Insurance Societies Act, V of 1912. That section provides that any Provident Insurance Society which makes default in complying with any of the requirements of this Act and every Director, Manager or Secretary or other officer or agent of the Society who is knowingly a party to the default shall be punished with fine which may extend to five hundred rupees, etc.

The learned Presidency Magistrate, on an apparent misreading of the judgment of Mr. Justice Fletcher in the case of *Oriental Government Security Life Assurance Co. Ltd.* v. *Oriental Assurance Co., Ltd.* (1), thought that the Company in question, called the New King Insurance Company, Ld., was not amenable to Act V of 1912, inasmuch as it was a Company which had share-capital divided into shares. But this is obviously untenable upon the construction of the plain wording of the Act in section 2, sub-clause (8), where it is stated that a Provident Insurance Society means any person or body of persons, whether corporate or unincorporate, which receives premiums or contributions for insuring money, etc. That clearly lays down that whether the society already in existence is a corporate company before or whether its share capital is divided into shares or not, registration under the Provident Insurance Societies Act is necessary before business can be carried on under the conditions laid down in that ct. There is nothing in Mr. Justice Fletcher's judgment to the contrary. It appears that the legal advisers of the company were misled, *firstly*, by a remark which Fletcher, J., made in the course of the argument, and, *secondly*, by a passage in his judgment at page 578. The remark was that the defendant company cannot be a Provident Insurance Society, as a Provident Society is not incorporated under the Companies Act, but registered or inscribed under the Provident Insurance Societies Act. That is against the view taken by the Chief Presidency Magistrate for what Fletcher, J., says is that a company incorporated under the Companies Act cannot be a Provident Insurance Society by reason of its registration under the Companies Act, not that any society may not be both a Company and a Provident Insurance Society; and again in the passage in his judgment at page 578 what he says is that the company he was dealing with considered that by issuing policies not exceeding Rs. 500 they can bring themselves under the heading of a Provident Insurance Company and were entitled to carry on business untrammelled by the provisions of the law. This is not so, because under the Provident Insurance Societies Act registration has to be made subject to certain conditions which are set out in the Act and which have to be approved of by the Registrar, and these provisions do not apply to a company which has a share capital divided into shares. In saying this he does not say that a company which wishes to carry on the business of a Provident Insurance Company need not be registered under the Act, but he says that the conditions which are set out in the Act obviously do not apply to a company which has already complied with those conditions in its published prospectus under another Act, and what he is referring to is the form of the policy and he holds that so far from having complied with law they have simply tried to avoid the provisions of another Act, namely, the Indian Life Insurance Act of 1912, which were intended to prevent a company from embarking in the business of life insurance, unless and until they had the amount of cash that was necessary for them to deposit with the Govenor-General in Council in order to meet their obligations. So in this case the Act V of 1912 which is before us was intended to prevent the company from embarking in the business of life insurance unless and until it had been registered under the Act. There seems to have been a misunderstanding, and the learned Standing Counsel who appears for the Government does not press for anyting more than a nominal penalty. But a mistake of law cannot take the defend-

(1) 31 Ind. Cas. 268; 40 C. 570.

ants out of the word "knowingly" in the section.

The order of acquittal must, therefore, be set aside and in lieu thereof the respondents Nos. 1 to 3 will each be fined Rs. 5. The respondent No. 4, Purna Chandra Ghosh, against whom proceedings do not seem to have been pressed in the Court below, will be exempted from this order.

We understand that the Society has already applied for registration, but that the Government has not yet made rules necessary to carry out the purposes of the Act, and in the circumstances we are of opinion that this conviction should make no difference whatever to the result of any such application.

Appeal allowed.

CALCUTTA HIGH COURT.

IN THE MATTER OF SECTION 115, CIVIL PROCEDURE CODE.

IN THE MATTER OF SANCTION TO PROSECUTE UNDER SECTION 195, CRIMINAL PROCEDURE CODE.

June 19, 1914.

Present:—Mr. Justice Chaudhuri.

BAL CHAND AND ANOTHER—PETITIONERS

versus

TARAK NATH SADHU—OPPOSITE PARTY.

Judicial proceedings—Registrar of Presidency Small Cause Court, inquiry by, as to service of summons, whether judicial proceeding—Power to grant sanction—Oaths Act (X of 1873), s. 13—Omission to administer oath or affirmation, effect of.

As the Registrar of the Presidency Small Cause Court is authorized to decide the question of service of summons and is, therefore, entitled to take evidence, the proceedings before him in such matters are in the nature of judicial proceedings and he is competent to grant sanction for prosecution.

An omission to administer an oath or affirmation to a deponent is an irregularity which is cured by section 13 of the Oaths Act.

Queen-Empress v. *Sewa Bhogta*, 24 B. L. R. (F. B.) 294; 23 W. R. Cr. 12. *Nundo Lal Bose* v. *Nistarini Dassee*, 27 C. 428 at p. 434, 4 C. W. N. 169; *Queen-Empress* v. *Shava*, 16 B. 359, referred to.

Application under section 115, Civil Procedure Code, from an order of the Registrar of the Court of Small Causes at Calcutta, dated 13th January 1914.

Messrs. *Jackson* and *K. N. Chaudhuri*, Counsel, for the Petitioner.

Mr. *B. C. Mitter*, Public Prosecutor, for the Opposite Party.

JUDGMENT.—I have taken some time to consider this matter, having regard to the way in which the matter was placed before me by the accused persons. Under the rules of the Small Cause Court the Registrar of that Court is the officer who is entitled to decide the question of service of summons, and in so doing he is entitled to take evidence, and these proceedings are certainly in the nature of judicial proceedings and, therefore, the matter strictly arises within his jurisdiction. It cannot be said that he was acting in a ministerial capacity, and I find from the petition itself that, so far as the proceedings relating to the services of summons are concerned, the whole of such proceedings were carried on before him. He makes out a list after the service is ready and the cases then go before the Judges.

In this matter he granted the sanction upon an application made by the Public Prosecutor, who was apparently moved by the Chief Judge of the Court to make such an application. An objection was taken that in granting such sanction the persons upon whose statements the Registrar relied were not examined on oath. No doubt the statements as taken down do not show that they were examined on oath. The words "S.O." or "S. A." are not to be found there, but yet under the Indian Oaths Act, section 13, if there was an omission to administer the oath or affirmation, the irregularity, if any, is cured. There is ample authority for that proposition, amongst others see *Queen-Empress* v. *Sewa Bhogta* (1), which was referred to in *Nundo Lal Bose* v. *Nistarinee Dassee* (2) but the point was not dealt with, and *Queen-Empress* v. *Shava* (3), it having been held that accidental or negligent omission in taking oath is saved by section 13 of the Oaths Act. It seems to me that there was no irregularity in granting such sanction, and, under the circumstances, I must discharge the Rule in each matter. The application being of a *quasi* criminal nature, I discharge the Rule, but do not make any order for costs as against the applicants.

Rule discharged.

(1) 14 B. L. R. F. B. 294; 23 W. R. Cr. 12.
(2) 27 C. 428 at p. 434; 4 C. W. N. 169
(3) 16 B. 359.

LACHHMAN DAS v. EMPEROR.

PUNJAB CHIEF COURT.
CRIMINAL APPEAL No. 481 OF 1914.
July 27, 1914.
Present:—Mr. Justice Johnstone and
Mr. Justice Scott-Smith.
LACHHMAN DAS—CONVICT—APPELLANT
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 302, 307—Murder—Evidence—Prosecution, duty of, to prove their own story—Weakness of defence, effect of—Right of private defence—Benefit of doubt—Practice.

The prosecution are bound to prove their own story independently and cannot rely upon the weakness of that put forward by the defence.

The tenants of a *sahukar zemindar* went to his house in a body to make some sort of demonstration against him and perhaps to seize their cotton crop which the *zemindar* had taken possession of and stored in his house. Probably some of the tenants had weapons and the *zemindar*, apprehending that some hurt would be caused to him, fired off his gun in the direction of the crowd of villagers without any intention of killing any one or of doing more harm than was necessary for his own protection:

Held, that what the *sahukar* did was done in the exercise of his right of private defence and that he was, therefore, entitled to the benefit of any doubt which existed.

Appeal from the order of the Sessions Judge, Lahore, dated the 21st of May 1914, convicting the appellant.

Mr. *Beechey*, for the Appellant.

Mr. *Herbert*, for the Assistant Legal Remembrancer, for the Respondent.

JUDGMENT.—Lachhman Das, *Khatri*, and Bogha, *Biloch*, have been convicted by the Sessions Judge of Lahore of the murder and abetment of murder respectively of Fateh Din and have been sentenced to death.

They have appealed to this Court through Counsel and their case is also before us for confirmation of the sentence under section 374, Criminal Procedure Code. Lachhman Das has also been convicted of attempting to murder Kabira, and Bogha has been convicted of abetment of the same offence. For these offences they have been sentenced to ten years' rigorous imprisonment.

Fateh Din's death resulted from a gunshot wound, which was admittedly inflicted by Lachhman Das. The occurrence took place in Kot Mathra Das on the 12th of January 1914 at *digarwala*, as alleged by the witnesses for the prosecution. This would be at about 5 P.M. The stories for the prosecution and the defence are fully set forth in the judgment of the learned Sessions Judge and we need not repeat them at length.

Briefly, the prosecution story is that on the day of occurrence Lachhman Das, who was sitting outside in front of his house, sent Bogha, who had recently become his tenant, to bring Sohna (P. W. No. 6) before him. Sohna refused to come and Bogha then proceeded to drag him towards Lachhman Das. During the struggle the deceased Fateh Din, younger brother of Sohna and Kabir (P. W. No. 7), came up and began to rescue Sohna, abusing Bogha. In the scuffle Bogha's *pagri* was knocked off, and he then called out to Lachhman Das and urged him to fire his gun. Upon this Lachhman Das fired both the barrels of his gun in succession from a distance of about 30 feet and both Fateh Din and Kabir were hit and fell to the ground. Lachhman Das' companions then carried Fateh Din into Lachhman Das' house. while Kabir was removed to his own house by his own friends.

The defence story is that Sohna, Fateh Din and others came to Lachhman Das' house in order to rob him and that in the panic he accidentally fired off his gun.

The learned Sessions Judge has begun by remarking that the case is a difficult one, and we agree with him. It is especially difficult because all the prosecution witnesses, who deposed to the actual occurrence, are hostile to Lachhman Das. It is admitted on both sides that Lachhman Das had for some time past been oppressing, his Mussalman tenants who include Sohna, Fateh Din, Kabir and other prosecution witnesses. He used to take from them as his share ⅓rd of the produce, but had recently enhanced his demand to one-half and had admittedly taken possession of the whole of the tenants' previous *kharif* cotton crop, which he kept in his house. Under the circumstances, it is necessary to receive with caution the evidence of the prosecution witnesses.

We have considered the case very carefully, and our conclusion is that the story told by the prosecution witnesses cannot be accepted as a whole. In the first place, we would point out that the allegation as to Bogha instigating Lachhman Das to fire

his gun was not contained in the first information report which was made at the *thana* at 9 P.M. on the night of the occurrence. Sohna made the report, and what he said was that during his struggle with Bogha, Lachhman Das, who was sitting close by, came up with the loaded gun and fired twice. He said nothing, whatever, about Bogha calling out to Lachhman Das to fire. Again, in Fateh Din's dying declaration recorded by a first Class Magistrate on the 13th of January he stated :—

"Finding that Bogha was taking away my brother, named Sohna, I put the bundle of fodder on the wall of my compound and myself ran after him. From the front my brother met me running. When he met me, we both stopped. Other persons had also collected. On this Babu Lachhman Das stood up with the gun. Lachhman Das fired his gun at me. The shot struck me at my belly, right arm and right thigh."

From this it will be seen that Fateh Din also never said that Bogha had instigated Lachhman Das to fire. His account also differs from that of the prosecution witnesses, inasmuch as he says that Sohna had escaped from Bogha and no struggle was going on between them at the time when Lachhman Das fired his gun. From the above facts we think there can be no doubt at all that, in any case, the story of the prosecution has been improved so as to implicate Bogha as an abettor of what Lachhman Das did. The story in itself appears to us to be an improbable one. Even according to the prosecution witnesses, no hurt was being caused to Bogha and there was no immediate fear of any being caused. He himself was the aggressor and all that the villagers were doing was to rescue Sohna from his grasp. There was, therefore, no necessity for Lachhman Das to take the extreme step of deliberately firing his gun, not merely once but twice, at the villagers. Lachhman Das is a *Khatri* and does not belong to a class which is usually given to deeds of violence, and there is no evidence on the record to show that he is a man of particularly violent character. The action attributed to him by the prosecution witnesses is, we consider, very improbable. Fateh Din was admittedly found inside the house of Lachhman Das by the Sub-Inspector when he reached the village after midnight. This fact, if anything, supports the story of the defence that Fateh Din himself along with others entered the house of Lachhman Das and was shot while inside the house. According to the prosecution, Lachhman Das was standing outside his house when he fired the gun and the villagers were at a distance of some 30 feet. A number of Fateh Din's companions were admittedly present, some six eye-witnesses have been produced, and according to the first information report others also were present. Kabira, who was injured at the same time as Fateh Din, was carried away by his companions. We see no reason why Fateh Din also should not have been carried away to his house if he had been injured at the place where the prosecution witnesses say he was injured. We think it improbable that Fateh Din's companions would have allowed Lachhman Das' people to carry him into his house. Lachhman Das had fired off both barrels of his gun, and the villagers, therefore, could have had no immediate fear of his firing again. They would have hardly run off, leaving Fateh Din lying on the spot and at the mercy of Lachhman Das and his party.

The occurrence took place, according to the prosecution evidence, at about 5 o'clock in the afternoon, but the report was not made at the Police Station, which is only four miles distant, until 9 P.M. Considering how near the Police Station was there was nothing to prevent the reporter from reaching there between 6 and 7 P.M. The delay in making the report has not been explained. The learned Sessions Judge says he has no doubt that some sort of discussion took place before the party went to the *thana*.

Mr. Beechey for the appellant, Lachhman Das, urges that the delay shows that the reporter and his party did not go to the *thana* at once, because they knew they were in the wrong and they had to consult together first as to what course they should pursue. The reporter and his friends certainly had time for a lengthened consultation before they went to the Police Station, and the delay in going is suspicious. Lachhman Das did not go to the Police Station at all, but instead went to Kot Radha Kishen Railway Station from where

at 10-30 P.M. he despatched telegrams giving his version of the occurrence to the Lieutenant-Governor and other high officials. Kot Radha Kishen is five miles from the scene of the occurrence, and we have no doubt that Lachhman Das did not leave his village until after the villagers had started for the *thana*. We do not consider that any inference unfavourable to him should be drawn from this fact. We have no doubt that he was afraid to come out of his house while Fateh Din's friends were still in the village. The learned Sessions Judge has criticized severely the substance of the telegrams and Lachhman Das' story, and we agree with him that a great part of them is no doubt false, but the prosecution story is not thereby proved to be true. The prosecution were bound to prove their own story independently and cannot rely upon the weakness of that put forward by the defence. We are ourselves inclined to accept the view of Ujagar Singh, assessor, and to think that the truth lies somewhere between the two stories. We reject altogether the theory of a dacoity, but we see nothing improbable in the theory that Sohna and others, the tenants of Lachhman Das, went to his house in a body to make some sort of demonstration against him and perhaps to seize their cotton crop which he had admittedly taken possession of and stored in his house. Probably some of them had weapons and Lachhman Das might very reasonably have apprehended that some hurt would be caused to him. What actually happened it is impossible to say. Lachhman Das probably fired off his gun in the direction of the crowd of villagers without any intention of killing any one or of doing more harm than was necessary for his own protection. It is possible, of course, that he may have exceeded his right of private defence, but the matter is very doubtful; and he is entitled to the benefit of any doubt which exists. We hold, therefore, that anything which was done by him was done in the exercise of his right of private defence and he is, therefore, entitled to an acquittal.

We, therefore, accept the appeals of both Lachhman Das and Bogha, and setting aside their convictions and sentences, acquit them. We have already, by our order of the 23rd of July, directed that they be set at liberty

Appeal accepted.

LOWER BURMA CHIEF COURT.

CIVIL REVISION No. 194 OF 1913.

December 8, 1914.

Present:—Mr. Justice Ormond.

SUBRAMANIA PILLAY—DEFENDANT—APPLICANT

versus

V. T. A. L. NACHIAPPA CHETTY—PLAINTIFF—RESPONDENT.

Sanction to prosecute—Suing wrong person on genuine pro-note—Penal Code (Act XLV of 1860), ss. 193, 209.

Where on a genuine promissory note a plaintiff sues a wrong person of the same name, but not dishonestly and intentionally, a sanction to prosecute him under sections 193 and 209, Indian Penal Code, cannot be granted.

Mr. *Compagnac*, for the Applicant.

Mr. *Woodham*, for the Respondent.

JUDGMENT.—The respondent became the agent of the Chetty firm after the death of the former agent and sued the petitioner upon a promissory note, which was signed in the name of Avanna S. Subramania Pillay in the Small Cause Court. The defendant is one Ana S. Subramania Pillay, a clerk in the Accountant-General's Office. The defendant denied execution and the plaintiff applied for permission to examine the Chetty in India to prove the execution; he subsequently withdrew that application as the Chetty was expected to be in Rangoon shortly, and then withdrew the case as he could not procure the Chetty; and the suit was, therefore, dismissed. The petitioner thereupon applied for sanction to prosecute the respondent for giving false evidence, that is to say, for verifying the plaint in which he stated that the defendant executed the promissory note to his knowledge and by falsely saying that the plaintiff had made demands upon the defendant, under section 93, Indian Penal Code, and also under section 209, Indian Penal Code, of dishonestly making a false claim. The defendant apparently was not maker of the promissory note, and the learned Judge has found that the respondent did not dishonestly sue the wrong person and that

as to stating that plaintiff had made demands upon the defendant there was the oath of the plaintiff against the oath of the defendant. Looking at the probabilities of the case it is extremely unlikely that the plaintiff would intentionally sue a wrong person on a genuine promissory note executed by another person and there is nothing to show that the plaintiff had any motive for doing the defendant an injury. The order of the learned Judge refusing to sanction was, in my opinion, correct and there would be no likelihood of the respondent being convicted of the offence either under section 193 or 209, Indian Penal Code.

This application is, therefore, dismissed with costs two gold *mohurs*

Application dismissed.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 754 OF 1914.

November 20, 1914.

Present:—Mr. Justice Chevis and Mr. Justice Shadi Lal.

AHMAD—CONVICT—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Evidence—Accused absconding after occurrence—Identification of accused.

The accused was convicted of murder. It was found proved that the deceased was shot by the accused at night by a gun or a pistol while he was sleeping on the roof of the house adjoining his own The principal witness was the wife of the deceased who was sleeping close by She stated that when the shot was fired she awoke, opened her eyes and by the flash of the fire-arm recognized the accused who ran away. She at once raised her cries to the effect that the accused had killed her husband. The husband of a sister of the deceased, who was sleeping on his roof on the other side of the lane, stated that he heard a shot and then cries of deceased's wife and then going down from the roof of his house, he recognized the accused. Another witness who lived at a distance of 500 *karams*, deposed that having heard the cries he was going to the spot when he met the accused on the way. Other evidence was to the effect that after the occurrence the accused absconded from the village:

Held, that the evidence as to identification was insufficient and the fact of accused's absconding was not inconsistent with his innocence, as he might have run away in fear knowing that an incorrect accusation had been brought against him.

Appeal from the order of the Sessions Judge. Rawalpindi, dated the 31st August 1914, convicting the appellant.

Mr. *Nand Lal*, for the Appellant.

Mr. *A. B. Broadway*, Assistant Legal Remembrancer, for the Opposite Party.

JUDGMENT.—The appellant, Ahmad, has been convicted of the murder of Ghazan and sentenced to death. The case is before us on appeal and also under section 374, Criminal Procedure Code, for orders as to confirmation of the death sentence.

Ghazan was shot on the night of the 26th of June 1914] by some one armed with a gun or a pistol. He was then sleeping on the roof of the house adjoining his own. Close by was sleeping his wife, *Musammat* Niaz Bibi, who is the principal witness in this case. According to the evidence when the shot was fired, she awoke, opened her eyes and by the flash of the fire-arm recognised the appellant, who then ran away. She also says that she saw another man run away whom she suspected to be one Kutab. She at once raised cries to the effect that Ahmad had killed her husband and that she had recognized him. Fazal Ahmad, who is married to a sister of the deceased, was sleeping on his roof on the other side of the lane. His evidence is that he first heard a shot and then heard Niaz Bibi's cries and then going down from his roof, recognized the appellant as the latter was getting down off the roof of Karamatullah's house. A third witness Jafar, who lives at a Dhok about 500 *karams* distant, deposes that having heard the outcries he was going to the spot when he met the appellant in the way. Other evidence proves that the appellant, who is employed in a battery stationed at Risalpur, went off to Rawalpindi and was followed and brought back by Fazal Dad, *lambardar*. The motive for the offence alleged by the prosecution is that the deceased had an intrigue with the wife of the appellant. There is also certain evidence to the effect that a dog, which the deceased had obtained from a neighbour of the appellant about a month before the murder, was missing on the night of the murder, and on the next day was found at the house of his previous master. Jafar says that this dog was with the appellant when he met him on his way to the scene of the murder.

The case rests on the evidence of *Musammat* Niaz Bibi, Faxal Ahmad and Jafar. It is said that the night was starlit, but that there was no moon. Considering the short time that the flash of a fire-arm gives any light, we have grave doubt whether *Musammat* Niaz Bibi could have recognized the offender in the manner alleged. The shot was fired at close quarters and whoever fired the shot must have rushed away immediately. As to the evidence of Faxal Ahmad it is obvious that, if his story be true, the appellant after firing the shot must have run over the adjoining roof to the north-east of the spot where the deceased was sleeping and escaped from the village by the lane to the east; this is not at all what we should have expected from anybody living in a westerly direction. The learned Sessions Judge remarks that if the case was fabricated, there is no reason why the witnesses should not say that they had seen the appellant running straight towards his home. But the obvious answer to this is that any one going by the direct road from the scene of the murder to the appellant's house, would not pass anywhere near the house where Faxal Ahmad was sleeping. As to Jafar's evidence, if it be true that he started for the scene of the murder as soon as he heard the cries, he must have got a good distance on the way before any one leaving the village by the road to the east and then making a *detour* would have rejoined the road which leads from the village to Jafar's Dhok, and it is not easy to understand why any one who had bolted out of the village and wanted to escape observation should so quickly rejoin a public thoroughfare instead of making his way home through the fields. The evidence as to the dog is meagre and the learned Government Advocate states that he does not lay stress on this part of the case. That the appellant went off to Rawalpindi and was brought back by the *lambardar* is not denied, but this conduct is not inconsistent with that of an innocent man who had run away in fear knowing that an incorrect accusation had been brought against him. The alleged intrigue with the wife of the appellant is said to have been an old one. Assuming the story of the intrigue to be true and that the appellant and the deceased were on bad terms in consequence, it is easy to understand that *Musammat* Niaz Bibi, awaking on hearing a shot and finding that her husband had been murdered, at once jumped to the conclusion that it was the work of the appellant and so shouted out his name. As to the evidence of Jafar we note that his statement was not recorded by the Police until the third day of the investigation, and his explanation that he had gone off with the corpse to Rawalpindi is not very satisfactory, as there is no reason apparent why he should not have told the Police before he went that he had seen and recognized the appellant.

After carefully considering all the circumstances we are of opinion that the evidence as to identification of the appellant is unreliable, and that though there are, no doubt, grave suspicions against the appellant, the evidence is not strong enough to warrant his conviction. We, therefore, accept the appeal, reverse the conviction and sentence and acquit the appellant and order him to be released.

Appeal accepted.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 177 OF 1914
CRIMINAL REVISION PETITION No. 148 OF 1914.

August 21, 1914.

Present:—Mr. Justice Tyabji.

DUGGIRALA VENKATAPPAYA—PETITIONER

versus

MULPURI VENKATRAMANAYYA—COUNTER-PETITIONER—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 540—Witness—Examination of witnesses—Magistrate, whether can exercise discretion in selection of witnesses—Practice.

Magistrates should always be chary of taking upon themselves the duties of deciding on behalf of the parties which witnesses should be examined.

Petition, under section 15 of the Letters Patent, praying the High Court to revise the order of the Court of the Head-quarters Deputy Magistrate of Guntur, in Criminal Miscellaneous Petition No. 32 of 1913.

Messrs. *S. Venkatachariar* and *E. V. R. Sarma*, for the Petitioner.

Mr. *N. Grant*, Acting Public Prosecutor, for the Crown.

Mr. *A. Venkatrayaliah*, for the Respondent.

MUHAMMAD v. EMPEROR.

ORDER.—I cannot say that the procedure followed by the Magistrate in this case is altogether satisfactory. The petitioner before me complains that he tendered 15 witnesses, out of whom only two were arbitrarily examined by the Magistrate. At the instance of the petitioner I called for a report from the Magistrate. His report is explicit on the point that he did not refuse to examine any witnesses that were tendered. Had this stood by itself, there would have been a clear and satisfactory answer to the petitioner's complaint. The Magistrate, however, indicates that he was aware of there being other witnesses present on behalf of the petitioner. These witnesses were not examined.

It is not as clear to me as I should have liked whether the petitioner's omission to examine the other witnesses was entirely uninfluenced by anything that fell from the Magistrate. If the petitioner in his own discretion changed his opinion and did not examine witnesses who had been summoned, of course there can arise no question as to the propriety of the Magistrate's proceedings. On the other hand it may be that, in accordance with the decision of *Samir Sheikh* v. *Jahed Sheikh* (1), under certain circumstances the Magistrate may take upon himself to refuse to examine witnesses that are in Court. The grounds for refusal are alluded to in that case in two places: (1) from the second paragraph of the judgment it would appear that the parties in that case agreed to let the Magistrate exercise a discretion in the selection of the witnesses; (2) in the penultimate paragraph the Judges refer to the Magistrate's refusal to examine witnesses, on the ground that the case of the petitioner had broken down and that to examine more witnesses would be waste of time. With reference to the first of these I can only say that the Magistrates should always be chary of taking upon themselves the duties of deciding on behalf of the parties which witnesses should be examined. At the same time it might occasionally be difficult in practice to draw the line between such an expression of opinion for the guidance of the parties, as may well be expected from the Magistrate, and an arbitrary interference with the mode in which the parties are entitled to present their case for adjudication.

With reference to the second of the remarks of the learned Judges deciding *Samir Sheikh* v. *Jahed Sheikh* (1), I respectfully desire to express no opinion on them. Had it been necessary to do so I should have desired the question to be considered by a Bench.

The Magistrate's report, as I understand it, is to the effect that there was no refusal on his part to examine witnesses, though it may be that the decision of the petitioner to call no other witnesses may have been influenced by what transpired in the Court and possibly what fell from the Magistrate: I am not prepared, therefore, to say that the Magistrate acted in such a manner as to require interference in revision.

The question as to the order of costs under section 148 (3) has given me more anxiety. Had the point been brought to my notice when I called for a report from the Magistrate as to whether he had refused to examine any witnesses, I should certainly have called also for an explanation as to the mode in which the Magistrate arrived at the figure, see *Rajendra Narain Roy* v. *Mohammad Arrumand Khan Chowdhury* (2), but the point was not then brought to my notice. I cannot on the materials before me consider that it would be proper for me to interfere in revision on this question either.

The petition will, therefore, be dismissed.

Petition dismissed.

(1) 8 C. L. J. 478; 8 Cr. L. J. 423.

(2) 1 C. L. J. 331 at p. 334, 9 C. W. N. 287; 2 Cr. L. J. 408.

PUNJAB CHIEF COURT.

CRIMINAL APPEALS NOS. 544 AND 545 OF 1914

November 21, 1914.

Present:—Mr. Justice Chevis and Mr. Justice Shadi Lal.

MUHAMMAD—CONVICT—APPELLANT

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Evidence Act (I of 1872), s. 30—Retracted confession of co-accused, value of—Corroboration necessary for conviction.

A retracted confession of a co-accused is admissible under section 30 of the Evidence Act and may be taken into consideration against him, but a conviction cannot be based on it unless it is corroborated in material particulars by other evidence.

MUHAMMAD *v.* EMPEROR.

Appeals from the orders of the Sessions Judge, Rawalpindi Division, dated the 26th May 1914, convicting the appellant.

Mr. *Nand Lal*, for the Appellant.

Mr. *A. B. Broadway* (Assistant Legal Remembrancer), for the Respondent.

JUDGMENT.—Three persons, Muhammad, Surab and *Musammat* Khatun, have been found guilty of having murdered Sahib on the night of the 15th and 16th March 1914, and each has been sentenced to transportation for life. The convicts have preferred to this Court two appeals: Muhammad, Appeal No. 544 of 1914 and Surab and *Musammat* Khatun, a joint Appeal No. 545 of 1914. Both the appeals being closely connected will be disposed of by this judgment.

The learned Sessions Judge has stated the facts in sufficient detail, and after hearing Mr. Nand Lal we think that there is no doubt as to the guilt of Muhammad. Against him, there is his own statement made before the Committing Magistrate incriminating himself and the two co-accused, which amounts to a confession of murder and is clearly admissible against him. In the Sessions Court Muhammad retracted his confession, but the reason given by him for making it before the Committing Magistrate does not appear to us to be convincing. In corroboration of the confession, we have the fact that the accused gave information which led to the discovery of an axe and a *chadar* from the house of his brother, Madad. Both these articles are the property of the accused, and the report of the Chemical Examiner shows that blood colouring matter was found on them. Then we have the testimony of two persons, Shah Nawaz (P. W. No. 6) and Gheba (P. W. No. 7), who saw, on the evening of the 15th March 1914, the three accused going together with the deceased on the road which leads from their village, Parhal, to Miswal where the murder took place. It is true that the witnesses made their statements before the Police on the 19th of March 1914, but this delay is not a sufficient reason for thinking that they are not telling the truth.

The confession of Muhammad, coupled with the discovery of the property in consequence of the information given by him and with the evidence of the above two witnesses, makes out a sufficiently strong case against them. He has, in our opinion, been rightly convicted and his conviction must, therefore, be affirmed.

The case against Surab and *Musammat* Khatun, however, stands on a different footing. The retracted confession of Muhammad co-accused is admissible under section 30 of the Indian Evidence Act and may be taken into consideration against them. But it is a well-established principle of law that the confession of a co-accused cannot be regarded as sufficient to support a conviction, unless it is corroborated in material particulars by other evidence. This remark applies with greater force to this case, because Muhammad in his confession assigned the leading part in the commission of the murder to his co-accused and tried to make out that he himself took a minor part. Now, the only corroborative evidence, on which the learned Counsel for the Crown has relied, is the testimony of Shah Nawaz and Gheba which has been already mentioned. The exact distance of the place, where these witnesses met the accused, from their village is not known, but probably it is not more than two miles. It is, therefore, possible that Surab and *Musammat* Khatun, after meeting the witnesses returned to their own village and did not continue their journey and were not present at the time and the place of the commission of the crime. The evidence is altogether inconclusive and does not shew that these accused participated in the crime. The material on the record in support of a liasion between Surab and *Musammat* Khatun, which is alleged to be the motive for the murder, is meagre and relates to a general rumour. The learned Sessions Judge was inclined to hold that the intrigue had not been proved, and we think the evidence for the prosecution does not establish the fact.

After a careful consideration of the case, we think that as against Surab and *Musammat* Khatun, there is no sufficient corroboration of the confession of Muhammad and that their guilt has not been established. Their convictions must, therefore, be set aside. The appeal of Muhammad is dismissed.

Appeal No. 544 dismissed;
Appeal No. 545 accepted.

GUR BAKSH SINGH v. KASHI RAM.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION No. 1027 OF 1914.
November 26, 1914.
Present:—Mr. Justice Chamier and
Mr. Justice Piggott.
GUR BAKSH SINGH—APPLICANT
versus
KASHI RAM AND OTHERS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 537—Penal Code (Act XLV of 1860), ss. 182, 211—Trial for an offence under s. 182—Facts alleged showing offence under s. 211—Conviction, whether to be set aside—Prosecution for minor offence, whether legal.

A Sessions Judge is not justified in ignoring the provisions of section 537, clause (*b*), of the Criminal Procedure Code in setting aside on appeal, without going into the merits of the case, a conviction for an offence under section 182, Indian Penal Code, on the ground that the facts alleged disclosed the commission of an offence punishable under section 211 of the Indian Penal Code, for which no sanction as required by the Code was taken.

It is perfectly legal to prosecute for the minor offence under section 182, Indian Penal Code, when it is doubtful whether the facts alleged constitute a graver offence under section 211, Indian Penal Code.

Criminal revision from an order of the Sessions Judge of Farrukhabad.

Mr. *D. R. Sawhny*, for the Applicant.

Mr. *E. A. Howard*, for the Opposite Party.

JUDGMENT.—This is an application for revision filed under somewhat peculiar circumstances. In the course of an inquiry in a case of dacoity, a statement was made to the investigating Police Officer implicating one Gur Baksh Singh. It appears that Gur Baksh Singh was arrested and remained for some period in custody. He was eventually released by the Police Officer concerned, on the ground that the investigation did not disclose evidence warranting his prosecution. Several persons implicated in the same dacoity were prosecuted to conviction. Gur Baksh Singh subsequently applied to the Superintendent of Police for sanction to prosecute Kashi Ram and Baldeo for having given false information to the investigating Police Officer to his injury and thereby committed an offence punishable under section 182 of the Indian Penal Code. Sanction was given by the Superintendent of Police and Kashi Ram and Baldeo were prosecuted to conviction in the Court of a Magistrate of the first Class. They appealed to the Sessions Judge. The learned Sessions Judge formed an opinion that the facts alleged by Gur Baksh Singh disclosed the commission of an offence punishable under section 211 of the Indian Penal Code, and presumably also held that, this being the case, it was not legal to prosecute Kashi Ram and Baldeo for the lesser offence. He held that there could be no conviction under section 211 of the Indian Penal Code for want of sanction from the Court in which, or in relation to some proceedings in which, the offence, if any, had been committed. He accordingly set aside the conviction and sentence against the appellants before him, without going into the merits of the case or discussing the evidence in any way. An application for revision of this order has been filed by Gur Baksh Singh and we have entertained it. We treat this case as an exception to the general rule of practice by which this Court declines to entertain an application for revision against an order of acquittal presented by a private person.

The complaint made by Gur Baksh Singh is that Kashi Ram and Baldeo, the persons accused by him, have been acquitted and released without any trial of their appeals on the merits, and in reality without any finding that they either have or have not committed the offence under section 182 of the Indian Penal Code, of which they had been convicted by the trying Magistrate. We are both of opinion that the Sessions Judge was not justified in ignoring the provisions of section 537, clause (*b*), of the Code of Criminal Procedure. There had been a conviction by a Court of competent jurisdiction and, if there was any question as to sanction, the provisions of section 537 could have met the case. Apart from this, the conviction had actually been obtained in respect of an offence under section 182 of the Indian Penal Code upon a prosecution based on a sanction granted by a competent authority. The Sessions Judge has in fact held that Gur Baksh Singh was not entitled to institute the prosecution for an offence under section 182 of the Indian Penal Code upon facts which might perhaps also constitute a graver offence punishable by section 211 of the Indian Penal Code. The question of the relation of these two sections *inter se* has been much debated. In the opinion of

one of us, at any rate, Gur Baksh Singh was perfectly entitled to institute a prosecution for the minor offence only, more particularly as it is at least open to doubt whether the facts alleged would constitute an offence under section 211 of the Indian Penal Code, whereas there can be no doubt that they fall within the purview of section 182.

On these grounds we set aside the order of the Sessions Judge and send the record back to his Court, directing him to re-admit the appeals of Kashi Ram and Baldeo to the file of pending appeals and dispose of the same on the merits. We understand that the accused Kashi Ram and Baldeo have been released on bail. They should continue at large on the same security until the appeal itself has been properly disposed of.

Application allowed.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 51 OF 1914.

April 16, 1914.

Present:—Mr. Justice Sharfuddin and Mr. Justice Teunon.

BHAGAT PERSHAD AND OTHERS—PETITIONERS

versus

RAMRUP KARMOKAR AND ANOTHER—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 133—Removal of encroachment—No finding as to extent of encroachment or bona fides *of claim—Order, whether proper—Encroachment, extent of, how ascertained.*

Where in a proceeding taken under section 133 of the Criminal Procedure Code, an order was passed for the removal of a house which was said to represent an encroachment or obstruction on a public way, but without any finding as to the extent of the encroachment or as to the claim not being made in good faith:

Held, that the order could not be sustained.

The extent of encroachment should be ascertained by re-laying the map on the ground or otherwise.

Criminal revision against an order of the Sub-Divisional Magistrate of Sewan, District Saran, dated the 6th Februray 1914.

Babu *Rajendra Prosad*, for the Petitioner.

Babu *Chandra Sekhar Prosad Singh*, for the Opposite Party.

JUDGMENT.—In this case, at the instance of one Bhagwat Prosad proceedings were taken by the Sub-Divisional Magistrate of Sewan under section 133 of the Code of Criminal Procedure for the removal of a house, which was said to represent an encroachment or obstruction on a public way, namely, plot No. 4257 of the Cadastral Survey Map of the village. The persons to whom the conditional order was directed in showing cause alleged that the house had been built on the site of their pre-existing house and on their own land, being plot No. 4278 of the same Cadastral Survey Map.

Both parties produced certified copies of the village map. These copies were found to disagree in respect of plot No. 4257, but on a copy made by the Vandyke Process having been obtained from the drawing office it was ascertained that the certified copy produced by the complainant was correct.

Thereupon, on the 6th February 1914, the Sub-Divisional Officer made the conditional order absolute and directed the removal of the house in so far as it represented an encroachment on plot No. 4257.

This order clearly cannot be supported. In the first place, there is no finding as to the extent to which the house in question encroaches upon plot No. 4257. The extent of the encroachment should have been ascertained by re-laying the map on the ground or otherwise and should have been definitely specified in the order.

In the second place, there is no finding that the claim made by the petitioners before us was not made and put forward in good faith.

In this connection we may refer the Sub-Divisional Magistrate, *inter alia*, to the cases of *Luckhee Narain Banerjee* v. *Ram Kumar Mukherjee*(1), *Queen-Empress* v. *Bisseswar Sahu* (2) and *Belat Ali* v. *Abdur Rahim* (3).

We, therefore, set aside the Sub-Divisional Magistrate's order of the 6th February 1914 and direct that he do proceed in the manner provided in section 137 of the Criminal Procedure Code and dispose of the case in accordance with law.

Order set aside; Case sent back.

(1) 15 C. 564.
(2) 17 C. 562.
(3) 8 C. W. N. 143; 1 Cr. L. J. 70

JUGOL KISHORE *v.* CHINTAMONEY.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 125 OF 1913.
April 14, 1914.
Present:—Mr. Justice Fletcher and
Mr. Justice Richardson.

JUGOL KISHORE AND OTHERS—DECREE-HOLDERS—APPELLANTS
versus
CHINTAMONEY AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 182, cls. (5) and (6)—Step-in-aid of execution—Decree-holder accompanying peon to identify judgment-debtor—Ex parte decree, effect of—Judgment-debtor, not having notice, right of.

The mere fact that one of the decree-holders went along with the serving peon to identify the judgment-debtors, is not itself a step-in-aid of execution within the meaning of either clause (5) or clause (6) of Article 182 of the Limitation Act.

An *ex parte* decree passed by a Court is a good decree; but, if the decree is made in the absence of and without notice to the other party, that decree does not bind the other party or does not stand in his way of showing what were the true facts of the case.

Therefore, a judgment-debtor, not having any notice of an order of the Court admitting a previous application for execution as not time-barred, is entitled to show that the application was barred on that date.

Appeal against an order of the Sub-Judge of Hooghly, dated the 8th January 1913, reversing that of the Munsif of Amta, dated the 21st June 1912.

Babu *Atul Krishna Roy*, for the Appellant.

Babu *Jadu Nath Kanjilal*, for the Respondent.

JUDGMENT.

FLETCHER, J.—This is an appeal against an order of the learned Subordinate Judge of Hooghly dated the 8th January 1913. The sole question raised by the appellants in this case is whether the application for execution of a certain decree is barred by limitation. The learned Judge of the lower Appellate Court has held that it is barred, and the present appeal has been preferred by the decree-holders against that order.

The decree-holders obtained the decree as long ago as the 14th April 1903 in the Court of the Munsif of Gobindpur in the district of Manbhum for Rs. 500. The first application for execution was made as long ago as the 23rd July 1903. That application was dismissed for default on the 5th September 1903.

The next application for execution was dated the 9th July 1906. Notice of that application was ordered to be issued on the 21st July 1906; and according to the appellants, the notice was actually served on the 27th July 1906, one of the decree-holders identifying the judgment-debtors to the serving peon. It is essential for the appellants in the present case to show that what took place on the 27th July 1906 comes under either clause 5 or clause 6 of Article 182 of the Indian Limitation Act. How the appellants can say that the mere fact that one of them went along with the serving peon to identify the judgment-debtors was itself a step-in-aid of execution, I do not understand. If a person goes along with the serving peon to identify a party, that would not be a step-in-aid of execution, but is one of the necessary preliminaries to enable the Court to deal with the matter when the party, if served, comes before it. In the present case, the learned Subordinate Judge came to the conclusion that the 21st July 1906, when notice was directed to be issued, was the proper date from which he should calculate the time from which the period of limitation commenced to run. I think the learned Judge rightly rejected the 27th July 1906 as being that date, on the ground that one of the decree-holders went along with the serving peon to identify the judgment-debtors. That application was also dismissed for default on the 4th August 1906.

Then the third application was made on the 27th July 1909. The office reported on the next day that the application was barred by limitation. The learned Judge, on the 9th August 1909, without any notice to the judgment-debtors, held that the application for execution of the decree was not barred and directed notice to issue. On the same day the application was registered and nothing else having been done, on the 4th September 1909 the application was dismissed for default.

Then the present application was made on the 24th April 1911 and the decree was transferred to the Court of the Munsif at Amta in the district of Hooghly for execution, and the learned Judge of the lower Appellate Court held that the decree became incapable of execution, because no steps-in-aid of execution had been taken between the

21st July 1906 and the 27th July 1909. It is said that the order of the Court dated the 9th August 1909 holding that the decree was not barred is binding on the judgment-debtors until it is set aside. But this is not so. It is quite true that an *ex parte* decree passed by a Court is a good decree; but, if the decree is made in the absence of and without notice to the other party, of course that decree does not bind the other party or does not stand in his way of showing what were the true facts of the case, and it seems to me that the judgment-debtors, not having had any notice of the order of the 9th August 1909, are entitled to show that the decree has become barred by limitation by reason of no steps having been taken between the 21st July 1906 and the 27th July 1909. I think the learned Judge of the lower Appellate Court came to a correct conclusion when he held that this decree was not capable of being executed. That being so, the present appeal fails and must be dismissed. Having regard to the fact that the judgment-debtors have got rid of the liability under the decree, I think there ought not to be any order as to the costs of this appeal.

RICHARDSON, J.—I agree.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 473 OF 1911.

March 13, 1914.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice Woodroffe.

SURJA KANTA RAI CHOWDHURY—DEFENDANT No. 2—APPELLANT

versus

FANI BHUSHAN BANERJEE—PLAINTIFF AND ANOTHER—DEFENDANT No. 1—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Suit by reversioner against purchaser—Legal necessity, issue of, determination of—Suit failing for portion of property—Second suit for that portion—Issue of legal necessity—Decision in former suit, whether res judicata—"Litigating under the same title."

Where in a former suit between a reversioner to the estate of a widow and a purchaser from her, an issue was raised as to whether there was legal necessity for the widow's alienation and it was decided adversely to the purchaser, but the reversioner's suit failed for a moiety of the property because it was not found that that moiety had passed to him then, and he filed the present suit after that moiety had passed to him:

Held, that the decision on the issue of legal necessity in the former suit, was *res judicata* between the parties in the present suit as in both the suits the plaintiff litigated as the owner of the reversion and the defendant as the purchaser from the widow.

Second appeal against the decree of the District Judge of 24-Pergannas, dated 14th November 1910, affirming that of the Munsif, Second Court, Basirhat, dated 14th April 1910.

Babus *Nilmadhab Bose* and *Sarat Chandra Ghose*, for the Appellant.

Babus *Sarat Chandra Roy Chowdhury* and *Anilendra Nath Roy Chowdhury*, for the Respondent.

JUDGMENT.

JENKINS, C. J.—This appeal arises out of a suit by one claiming to be entitled to a reversion for recovery of possession of a moiety of a property, after setting aside an alienation purporting to have been made by the original owner's widow. Prior to the present suit, another had been instituted by the same plaintiff against the same defendant for the purpose of recovering the property of which that now in suit forms a part. The issue was raised in that case as to whether there was legal necessity for the widow's alienation, and it was held adversely to the present defendant that there was no legal necessity for the purported alienation to him. But it was further held that the plaintiff's suit must fail as to a moiety, because it was not shown that more than a moiety of the reversion had passed to him. The present suit was commenced in 1909 at a time when this moiety had passed to the plaintiff so that he was in the position of a reversioner in regard to it, and in this suit he claims the moiety which he failed to recover in the former suit. He brings this suit against the same defendant, seeking to recover the moiety that was included in the former suit and impugns the same transaction as was successfully impugned in the former suit. In these circumstances it has been contended on behalf of the plaintiff that the determination by the Court of the former suit as to the existence of the legal necessity concluded the matter. That view has been accepted by both the Courts,

It has been argued before us that the provisions of section 11 of the Code of Civil Procedure do not cover the present case, for it is urged that it cannot be said that the parties are *litigating under the same title*. The learned Vakils have not been able to bring to our notice any decision which defines with precision what the meaning is of the phrase "litigating under the same title." But in my opinion these words cannot exclude application of the rule of *res judicata* to the issue of legal necessity which has been raised. That issue was tried and determined between the present litigants in the former suit, and in that suit as in this the plaintiff has litigated as the owner of the reversion and the defendant as the purchaser from the widow. This, therefore, is eminently a case where the doctrine of *res judicata* should apply.

We must, therefore, uphold the decree of the lower Appellate Court and dismiss the appeal with costs.

WOODROFFE, J.—I agree.

Appeal dismissed.

CALCUTTA HIGH COURT.

CIVIL RULE No. 444 OF 1914.

May 5, 1914.

Present:—Justice Sir Harry Stephens, KT., and Mr. Justice Mullick.

DAMODAR MISRA AND ANOTHER—PLAINTIFFS—PETITIONERS

versus

HIRNASHI NAIK AND OTHERS—DEFENDANTS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. IX, r. 13—Decree based on compromise—Compromise made by unauthorised persons—Ex parte decree.

A decree based on a compromise cannot be treated as an *ex parte* decree and set aside as such simply because some of the parties had no authority to compromise on behalf of others.

Civil Revision under section 115, Civil Procedure Code, in the matter of Miscellaneous Case No. 3 of 1914, arising out of Title Suit No. 82 of 1913, in the first Court of the Munsif at Cuttack.

FACTS.—On 7th January 1913, the petitioners instituted the Title Suit No. 82 of 1913 in the first Munsif's Court at Cuttack for declaration of title and for possession of land against 5 persons—the opposite party—being defendants Nos. 1, 2 and 3 and two other defendants Nos. 4 and 5. On 10th February 1913 service of summons was proved against all the five defendants and defendants Nos. 4 and 5 appeared and filed written statements and on that day issues were framed. On 9th April 1914 a petition of compromise was filed by defendants Nos. 4 and 5 for themselves and for the other defendants. The Court, however, directed fresh summons to issue on defendants Nos. 1, 2 and 3. On 7th May 1913 a petition of compromise was filed by persons who represented them to be defendants Nos. 1, 2 and 3 and who were identified by a *Mukhtear*. The petition also contained thumb impressions purporting to be those of defendants Nos. 1, 2 and 3. On that day the Munsif passed a decree on that compromise petition. On 9th January 1914 the opposite party made an application under Order IX, rule 13, praying that the decree might be set aside and alleging that there was in fact no compromise, the petition of compromise was a a forgery and the decree was obtained by false personation and forgery and that as a matter of fact they did not receive any summons at all. The Munsif thereupon took evidence and had the thumb impressions o the defendants examined by an expert, who found that the thumb impressions did not tally with those on the petition of compromise. The Munsif then found the petition of compromise a forgery and the decree as obtained by fraud and in the absence of the opposite party, who were absent and did not receive the summons, and on the 28th February set aside the decree and restored the suit for hearing. Against that order this Rule was obtained. The opposite party opposed the Rule and contended that even if. Order IX, rule 13, did not apply the Court had inherent powers to set aside a decree obtained by fraud.

Babus *Provash Chandra Mitter* and *Debendra Narain Bhattacharjee*, for the Petitioners.

Babu *Sushil Madhab Mullick*, for the Opposite Party.

GAJADHAR AHIR *v.* BHIKARI LAL.

JUDGMENT.—In this case the petitioners before us instituted a suit for declaration of their title to and for possession of certain lands. The suit was instituted on the 7th of January 1913 against five defendants. On the 9th of April in the same year, defendants Nos. 4 and 5 filed a petition of compromise and asked for a decree so far as they were concerned on that compromise and an *ex parte* decree against the other defendants. Fresh service, however, was ordered on the other defendants; and, on the 7th of May, defendants Nos. 4 and 5 appeared in Court with a petition of compromise purporting to be executed by defendants Nos. 1 to 3 as well as by themselves. On this petition a decree was made in terms of the compromise. Afterwards defendants Nos. 1 to 3 put in a petition to the Court stating that defendants Nos. 4 and 5 had no authority to present the petition of compromise on their behalf, that no summons had ever been served on them as had been ordered and that the petition was fraudulently represented as being made by them. On this the Court, acting under Order IX, rule 13, Code of Civil Procedure, set aside the decree that had been passed and ordered the case to be set down for trial in the usual way. A Rule has now been granted to the plaintiffs calling upon the opposite parties to show cause why the order setting aside the decree should not be set aside.

The Rule must be made absolute, for the reason that the decree in this case cannot be treated as an *ex parte* one and that consequently Order IX, rule 13, Code of Civil Procedure, does not apply. It is argued before us that, on the evidence that has been given, it appears that the petition of compromise was not the petition of defendants Nos. 1 to 3 and that consequently they cannot be considered to have appeared before the Court and that the decree was *ex parte*. We cannot dispose of the case from this point of view. The Judge, when he made his order, was under the impression that all the parties in the case were before him and that the petition was the petition of all the parties. Consequently in granting the petition he did not intend to make it *ex parte* and it does not appear that he did so on the face of the record. We cannot go behind the record to decide whether the defendants Nos. 1 to 3 were properly represented or not. That would be begging the question which was sought to be raised before the Court.

The Rule is made absolute with costs, two gold *mohurs*.

Rule made absolute.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2146 OF 1911.

January 19, 1914.

Present:—Mr. Justice Coxe and Mr. Justice D. Chatterjee.

GAJADHAR AHIR AND OTHERS—DEFENDANTS—APPELLANTS

versus

Munshi BHIKARI LAL—PLAINTIFF—RESPONDENT.

Suit for recovery of possession—Person entitled to half share, whether can eject one from whole—Decree, nature of—Partition, right of.

A person entitled to an undivided half share of a piece of land cannot sue to eject anybody from the whole of it.

Where the proprietor of an eight-annas share sued the proprietors of the other eight-annas share and joined the tenants admitted by the latter to the whole land as parties and prayed for joint possession with the tenants, if joint possession with the other proprietors could not be granted.

Held, that the plaintiff was entitled to a decree against all the defendants for recovery of joint possession of the eight-annas share and that he was entitled to enforce his right by a suit for partition, if he was not satisfied with delivery of possession of an undivided half share.

Second appeal from a decision of the Sub-Judge, Second Court of Saran, dated 14th July 1911, reversing that of the Munsif of Gopalganj, dated 31st March 1911.

Babu *Debendra Nath Bhattacharjee*, for the Appellants.

Babu *Rajendra Prosad*, for the Respondents.

JUDGMENT.—This was a suit for recovery of possession of a plot of land to the extent of an 8-annas share. The plaintiff appears to be the proprietor of the land to the extent of 8-annas and defendants Nos. 5 and 6 to be proprietors to the extent of the other 8-annas. Defendants Nos. 1 to 3 claim to be tenants on the land and they are supported by defendants Nos. 5 and 6;

The Munsif gave the plaintiff a decree for *khas* possession to the extent of an 8-annas share jointly with defendants Nos. 1 to 3, but not so as to entitle the plaintiff to remove certain cattle troughs and pegs fixed by defendants Nos. 1 to 3 thereon. The plaintiff was not satisfied with this success and appealed to the Subordinate Judge, who held that the title of defendants Nos. 1 to 3 had not been proved and that the plaintiff should recover possession of a moiety share in the disputed land jointly with defendants Nos. 5 and 6 after removal of the *nads* and pegs. Defendants Nos. 1 to 3 have appealed to this Court. On their behalf it is first urged that as the plaintiff asked in the alternative for joint possession with defendants Nos. 1 to 3 or with defendants Nos. 5 and 6 and obtained a decree for joint possession with defendants Nos. 1 to 3, he could not subsequently appeal for joint possession with defendants Nos. 5 and 6. In the *first* place, it is clear that the plaintiff only asked for joint possession with defendants Nos. 1 to 3, if joint possession with defendants Nos. 5 and 6 could not be granted. But it appears to us that that matter does not really arise in this case. All that the plaintiff could ask for was joint possession of an 8-annas share. He could not in this suit ask the Court to decide who was entitled to possession of the other 8-annas share of the land with which he had no concern.

Secondly, it is argued that as defendants Nos. 1 to 3 had been recognised as tenants by the co-sharer landlords Nos. 5 and 6, they could not be ejected from the whole of the land nor could the cattle troughs and pegs be removed. We have not been shown any authority for holding that a person entitled to an undivided half share of the land can sue to eject anybody from the whole of it.

This contention, therefore, must succeed. Accordingly the decree of the lower Appellate Court will be modified; the plaintiff will be entitled to a decree against all the defendants for recovery of joint possession of an 8-annas share of the disputed property. He will be entitled to enforce this right by a suit for partition, if he is not satisfied with the delivery of possession of an undivided half share. Until the land is partitioned the cattle troughs and pegs will not be removed.

The appeal will be decreed in thes terms.

Appeal allowed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 2903 OF 1911 AND 31 OF 1912.

August 21, 1913.

Present:—Mr. Justice Newbould and Mr. Justice Ray.

GULAB KUER AND OTHERS—PLAINTIFFS—APPELLANTS IN BOTH

versus

IN No. 2903 OF 1911

RAM RATAN PANDEY—DEFENDANT—RESPONDENT

AND

IN No. 31 OF 1912

BHALER PANDEY AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 103A—Record of Rights—Presumption of correctness—Draft Record of Rights, whether admissible in evidence.

It is not until a Record of Rights is finally published that the presumption of its correctness arises. Therefore, entries in a draft Record of Rights, published under section 103A of the Bengal Tenancy Act, are not admissible in evidence.

Appeals against the decrees of the District Judge, Shahabad, dated the 8th August 1911, modifying that of the first Court, at Arrah, dated the 10th of November 1910.

Babu *Rajendra Prashad*, for Babu *Chandra Sekhar Prasad Singh*, for the Appellants.

Babu *Raghunath Singh*, for the Respondents.

JUDGMENT.—These two appeals are second appeals from the decision of two rent-suits. The Munsif granted decrees for the whole amount claimed in both the suits. These decrees have been modified by the lower Appellate Court and the plaintiffs have preferred these second appeals. The learned District Judge has based his decision as to the amount of rent and cesses payable by the defendants on certain entries in a draft Record of Rights which was published under section 103A of the Bengal Tenancy Act. In our opinion these entries were not admissible in evidence. It is not until the Record of Rights is finally published, that the presumption of its correctness arises.

AKHIL PRODHAN v. MANMOTHA NATH KAR.

We accordingly decree this appeal and modify the decree of the lower Appellate Court: the amount of rent and cesses payable in each suit will be the amount found payable by the first Court. To this amount will be added damages at the rate of 12½ per cent., the rate allowed by the District Judge.

The appellants will get their costs in all Courts.

Appeal decreed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2910 OF 1909.

May 16, 1913.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

AKHIL PRODHAN—PLAINTIFF—APPELLANT

versus

MANMOTHA NATH KAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Fraudulent transfer—Suit for declaration—Fictitious proceedings—Equity—Fraudulent confederate, when entitled to retain property fraudulently transferred to him—Suit, if for specific performance—Limitation—Civil Procedure Code (Act XIV of 1882), s. 317, applicability of.

To enable a fraudulent confederate to retain property transferred to him in order to effect a fraud, the contemplated fraud must be effected, then and then alone does the fraudulent grantor or giver lose the right to claim the aid of the law to recover the property he has parted with.

The plaintiff, in order to protect himself from a fictitious deed executed by him in favour of a third person, induced his landlord to institute a fictitious suit for rent. The suit was instituted and decreed and the property was sold and purchased by the landlord and formal possession was also given to him, but actually the plaintiff remained in possession. The landlord thereafter forcibly took away the crop. The plaintiff then sued for a declaration that the entire proceedings in the rent-suit were fictitious:

Held, that the plaintiff is not disentitled to protection in a Court of Equity and that as the suit is not for the specific performance of a contract, no question of limitation arises in it.

Section 317 of the Civil Procedure Code, 1882, contemplates a real sale in execution of a real decree in a real suit and does not bar a suit for possession of a property purchased in a fictitious sale held in execution of a fictitious decree in a fictitious suit.

Appeal against the decree of the District Judge of Midnapore, dated the 3rd of September 1909, reversing that of the Subordinate Judge, first Court of that District, dated the 31st of July 1908.

Babus *Ram Chandra Majumdar* and *Manmatha Nath Mukherjee*, for the Appellant.

Babus *Dwarka Nath Chakrabarty*, *Surendra Nath Das Gupta* and *Sasadhar Roy*, for Babu *Surendra Nath Roy*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff in a suit for declaration that the proceedings in a rent-suit brought against him by the first and second defendants were fictitious and have not affected his title to the lands mentioned in the schedule to the plaint, and also for confirmation of possession of those lands. The circumstances under which the plaintiff seeks relief are not in controversy. The subject-matter of litigation was held by the plaintiff under the Kar defendants as a tenant. In 1894 his landlord sued to eject him on the allegation that he was a trespasser. This suit was dismissed by the Court of first instance and that decree was ultimately affirmed on appeal by this Court on the 20th July 1897. In this litigation, the plaintiff was assisted by the Jana defendants. Accordingly in 1898 he executed fictitious conveyances in their favour with a view to protect himself from further aggression on the part of the Kars. In 1899 he found that the Janas were unfaithful and so to protect himself against the Janas, he induced his landlord to institute a fictitious suit for rent. That suit was decreed on the 7th November 1899. The Kars took out execution of this decree. The Janas thereupon preferred a claim which was disallowed on the 20th January 1900. The decree was subsequently executed and at the sale which followed, the Kars purchased the holding on the 19th March 1900. The plaintiff alleges that possession was formally delivered to the Kars on the 5th June 1900, as a matter of fact he himself has ever since continued in occupation of the land. On the 10th April 1900, the Janas sued the plaintiff and the Kars for declaration of their title on the basis of their conveyances; but on the 23rd July 1900 this suit was withdrawn. In 1906 the Kars turned against the plaintiff, and with the

help of the Police took away by force the crops raised by him. On the 15th March 1907 the plaintiff commenced this suit for declaration that the entire proceedings in the rent-suit of 1899 were fictitious and that the Kars did not acquire any title on the basis of their purchase at the execution sale. The Court of first instance found in favour of the plaintiff and made a decree in accordance with the prayer in the plaint. Upon appeal that decree has been set aside by the District Judge, on the ground that as the plaintiff entered into this fraudulent arrangement with the Kars with a view to defraud the Janas he is not entitled to any relief in a Court of Equity. The District Judge has further found that the suit is in essence a suit for specific performance of a contract and is consequently barred by limitation. On the present appeal the decision of the Distric Judge has been assailed on two grounds namely, *first*, that the suit is not barred by limitation and *secondly*, that the conduct of the plaintiff has not been such as to disentitle him to relief in a Court of Equity. These points have been controverted on behalf of the Kar defendants, who have further urged that the suit is barred under section 317 of the Code of Civil Procedure of 1882. In our opinion, the decree of the District Judge cannot be supported.

In so far as the first ground is concerned, no question of limitation arises in this case. The suit is not one for specific performance of a contract No doubt the plaintiff alleged that the Kar defendants had agreed to execute a release and in the prayer clause of the plaint he asked for a decree for execution of such release by the Kars. But the suit is in essence one for declaration of title to land and for confirmation of possession. The plaintiff seeks a declaration that the proceedings in the rent-suit were fictitious and did not operate to affect his title in any manner, he also prays for confirmation of possession. As the Kars turned against the plaintiff and took away the crops grown by him in November 1906 and the suit was commenced on the 15th March 1907, it is amply in time. We hold accordingly that the suit is not barred by limitation.

In so far as the second ground is concerned, it is clear that the plaintiff is not disentitled to relief in a Court of Equity. It may be conceded that the fictitious suit for rent was instituted against him by the Kars at his instance with a view to make it impossible for the Janas to assert their claim under the conveyances. But the Janas cannot be said to have been defrauded unless it is established that they had a valid title. Upon this point, the Court of first instance found that the Janas, who are said to have been defrauded, paid no consideration for the conveyances in their favour; in other words, that the conveyances were fictitious documents which had been executed by the plaintiff with a view to protect himself from any invasion of his right by the Kars. Under these circumstances, it is impossible to maintain the view that the Janas were defrauded. On behalf of the Kars, we have been pressed to remand the case for consideration of the question whether the Janas had any subsisting title; but we cannot accede to this request. It is plain from the grounds of appeal taken by the Kars before the District Judge that the findings of the Court of first instance upon this question were not specifically assailed and it is clear that if the point had been argued before the District Judge, there would have been a discussion of the evidence on this point in the judgment. It appears to have been assumed before the District Judge that the Janas were defrauded, because the effect of the execution sale was to make it impossible for the Janas to assert their title. But it appears to have been overlooked that if they had no real title to the property, they could not be defrauded. The case thus falls within the principle of the decision of this Court in *Jadu Nath Poddar* v. *Bup Lal Poddar* (1) and of the Judicial Committee in *Petherpermal Chetty* v. *Muniandi Servai* (2), namely that to enable a fraudulent confederate to retain property transferred to him in order to effect a fraud, the contemplated fraud must be effected, when and when alone does the fraudulent grantor or giver lose the

(1) 33 C. 967 at p. 978; 10 C. W. N. 650; 4 C. L. J. 22.

(2) 35 C. 551 (P. C.); 12 C. W. N. 562; 7 C. L. J. 528; 5 A. L. J. 290; 14 Bur. L. R. 108; 10 Bom. L. R. 590; 18 M. L. J. 277; 4 M. L. T. 12; 4 L. B. R. 206; 35 I. A. 98.

right to claim the aid of the law to recover the property he has parted with. The plaintiff is consequensly not disentitled to protection in a Court of Equity.

The only other point which requires consideration is whether the suit is barred under the provisions of section 317 of the Code of 1882. That section provides that no suit shall be maintained against a certified purchaser on the ground that the purchase was made on behalf of any other person or on behalf of a man through whom such other person claims. The case before us is not a suit of this description. Section 317 contemplates a real sale in execution of a real decree in a real suit. Here, we find a fictitious suit for rent in which there was no controversy between the parties. In that fictitious suit a fictitious decree was made and the sale held in execution of that decree was equally fictitious. To a suit of this description the observation of Lord Brougham in *Earl of Bandon* v. *Henry Becher*(3) applies: "A sentence is a judicial determination of a cause agitated between real parties, upon which a real interest has been settled;—in order to make a sentence there must be a real interest, a real argument, a real prosecution, a real defence, a real decision. Of all these qualities not one takes place in the case of a fraudulent and collusive suit; there is no Judge, but a person invested with the ensigns of a Judicial Office, is mis-employed in listening to a fictitious cause proposed to him; there is no party litigating, there is no party defendant, no real interest brought into question." [See *Radha Madhab* v. *Kalpataru Roy*(4)]. To a suit of this description section 317 cannot possibly have any application.

The result is that this appeal is allowed, the decree of the District Judge set aside, and the suit decreed with costs in all the Courts in the manner following. The decree will declare that the suit for rent (No. 369 of 1899) instituted against the plaintiff by the Kar defendants in 1899 and all proceedings based thereon were fictitious and have not affected his title in any manner; his possession will further be confirmed, or if he has meanwhile been dispossessed, he will be restored to possession in execution of this decree.

Appeal allowed.

(3) 8 Cl. & F. 479; 9 Bligh. (N.S.) 532; 6 Eng. Rep. 1517.

(4) 16 Ind Cas. 811; 17 C. L. J. 209 at p. 212.

CALCUTTA HIGH COURT.

CIVIL RULE No. 284 OF 1914.

May 28, 1914.

Present:—Mr. Justice Coxe and Mr. Justice Beachcroft.

RATAN CHAND DHARAM CHAND—PLAINTIFF—PETITIONER

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND ANOTHER—DEFENDANTS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), ss. 20, 80, O. VII, r. 11 (d)—Notice, whether necessary in all suits against Secretary of State for India in Council—Jurisdiction—District, meaning of—Acquiescence in jurisdiction, whether presumed from defendant's failure to apply for transfer.

Notice under section 80 of the Civil Procedure Code, 1908, is necessary in every case instituted against the Secretary of State for India in Council. The term "district" in that section must mean the district in which the suit is instituted, and the notice required under section 80 must be served on the Collector or on one of the Collectors of that district.

A suit instituted at Sealdah based on a notice to the Collector of Purneah under section 80 of the Civil Procedure Code and on a cause of action arising mainly at Howrah against defendants, one of whom carries on business at Howrah, is wholly untenable.

Order VII, rule 11 (*d*), does not apply where there is no statement in the plaint which suggests that the suit is barred.

Secretary of State v *Rajlucki Debi*, 25 C. 239 referred to

A defendant who objects to the jurisdiction of a Court cannot be said to have acquiesced in the trial of the suit if he does not apply for a transfer.

Petition in the matter of Suit No. 3808 of 1913 of the Court of Small Causes at Sealdah.

Babu *Probodh Chandra Roy*, for the Petitioner.

Babus *Ram Chandra Mitter*, *Mohendra Nath Roy* and *Ambikapada Chowdhury*, for the Opposite Parties.

JUDGMENT.

COXE, J.—The plaintiff in this case sued for damages, on the allegation that he had booked 44 bales of cotton at a station in the

Eastern Bengal State Railway in the Purneah District for transmission to Howrah and that 40 bales only were delivered. He made the Secretary of State the first defendant, as representative of the Eastern Bengal State Railway, and the East Indian Railway Company the second defendant. The suit has been dismissed and the plaintiff has obtained this Rule on the defendants to show cause why the order of dismissal should not be set aside.

The Rule must, I think, be discharged. The suit was brought at Sealdah, though the cause of action arose partly in Purneah, but mainly at Howrah; and the place of business of the second defendant is at Howrah. The Small Cause Court Judge has held that the suit must fail against the first defendant, because no notice was served in accordance with section 80 of the Code. A notice was served on the Collector of Purneah, but the suit was not instituted at Purneah and reading section 80 as a whole, I think the term 'district' must mean the district in which the suit is instituted and that the notice must be served on the Collector or on one of the Collectors of that district.

It has been argued that no notice is necessary in cases arising out of contract, and reference has been made to the case of *Manindra Nath Nandi* v. *Secretary of State for India* (1).

The terms of the section, however, as they stand, seem to me to show that notice is necessary in every case, and this is the view taken in *Secretary of State* v. *Baj Lucki Debi* (2) from which the decision in *Manindra Nath Nandi* v. *Secretary of State for India* (1) does not dissent.

Finally, it was argued that the suit ought not to have been dismissed, but the plaint should have been rejected under Order VII, rule 11 (*d*). That rule obviously has no application, for there was no statement in the plaint which suggested that the suit was barred. On the contrary it was specifically stated that notice under section 80 had been served on "the Collector" without specifying the district. The defect was not discovered till after the defendants had entered appearance and it was then too late to reject the plaint.

(1) 5 C. L. J. 148; 34 C. 257.
(2) 25 C. 230.

As against the second defendant, the suit has been dismissed on the ground that the Court had no jurisdiction. This view is evidently right. The 2nd defendant objected at once to the jurisdiction. It is argued that as he did not apply for a transfer he must be taken to have acquiesced in the trial of the suit at Sealdah. I dissent altogether from this contention. It was the duty of the plaintiff when this substantial objection was taken to take the necessary steps to meet it, and the defendant was not in any way bound to have the defect, that he had pointed out, cured for the plaintiff's benefit.

A suit at Sealdah based on a notice to the Collector of Purneah and on a cause of action arising mainly at Howrah against defendants one of whom carries on business at Howrah, seems to me wholly untenable. I think that this suit was rightly dismissed and would discharge the Rule with costs. I assess the hearing fee at one gold *mohur* for each defendant.

BEACHCROFT, J.—I agree.

Rule discharged.

CALCUTTA HIGH COURT.

ORIGINAL CIVIL SUIT No. 656 OF 1912.

July 8, 1914.

Present:—Mr. Justice Chitty.

SRI LAL—PLAINTIFF

versus

ARJUN DAS AND OTHERS—DEFENDANTS.

Arbitration—Award—Order to file award before certain date—Award made in Hindi *on that day but filed with its English translation two days later, validity of—Use of word "file" instead of "make" in order, effect of—Civil Procedure Code Act V of* 1908), *Sch. II, paras.* 8, 15.

Where a Court allowed the arbitrators to make their award within a certain time, but instead of using the word "make" used the word "file", and the award was made in *Hindi* and signed within that day but was filed two days later, as the arbitrators decided to have it translated into English, and where the arbitrators also before filing it took an agreement from the parties not to raise any objection to this being done:

Held, that the award was made within time and was valid and that the use of the word "file" instead of "make" was immaterial.

Shib Krishna Daw and Co. v. *Satish Chunder Dutt*, 12 Ind. Cas. 13; 38 C. 522, doubted.

Raja Har Narain Singh v. *Chaudhrain Bhagwant Kuar*, 13 A. 300; 18 I. A. 55; 6 Sar. P. C. J. 14; 15 Ind Jur. 283, distinguished.

SRI LAL v. ARJUN DAS.

Application to set aside an award in Suit No. 656 of 1912, filed on 2nd March 1912.

Messrs. *N. Sarkar* and *S. Ghosh*, for the Plaintiff.

Messrs. *H. D. Bose* and *A. N. Chaudhri*, for the Defendnts.

JUDGMENT.—This suit was filed by Sri Lal on the 26th June 1912 against Arjun Das and his brothers for a declaration that he was entitled to a half share in several businesses, that the businesses should be dissolved, and accounts taken. On 14th July 1913 all matters in dispute in the suit were referred to the arbitration of Daulatram Chokhani and Siv Prosad Goradia, and they were directed to make their award within ten weeks from the date of the delivery to them of the said order. The arbitrators were unable to proceed with the matter at once and so the ten weeks elapsed without an award being made.

On 5th January 1914 I made an order allowing the arbitrators until 28th February 1914 within which to make their award. By a slip in the said order, instead of the word "make" the word "file" was used, but that appears to me to be a matter of little importance. The order purported to be one under Schedule II, paragraph 8, of the Civil Procedure Code, 1908, and the word should undoubtedly have been "make." The arbitrators held numerous meetings and eventually on 28th February 1914, the last day for making their award, they drew up and signed an award in Hindi. The 28th was a Saturday, and the award could not be filed on that afternoon. Accordingly on the Sunday the arbitrators saw Babu Debi Prosad Khaitan and asked him whether it would not be better that the award should be submitted to the Court in English. Babu Debi Prosad Khaitan accordingly put into formal English the Hindi award, which was read out to him by Siv Prosad Garodia. He did this partly on the Sunday and partly on Monday, 2nd March 1914. Though not a literal translation, the English award reproduces the Hindi award clause for clause and term for term. On 2nd March 1914 the arbitrators and the parties were all present in Babu Debi Prosad Khaitan's office when the English award prepared by Babu Debi Prosad Khaitan was signed by the arbitrators, as was also the letter from the arbitrators to the Registrar forwarding the award. In that letter they stated: "We met and signed our award on the said 28th day of February, but the same could not be filed in Court on the said day, being a Saturday. We understand that the time to file the award having thus expired, the parties are going to apply to the Court for leave to file the same." On the advice of Babu Debi Prosad Khaitan an agreement was drawn up on an eight-anna stamp paper and signed by the parties on that day. It was to this effect:—"We agree on and to the terms set forth in the award made by Babus Daulatram Chokhani and Siv Prosad Garodia, which has been fully explained to us, and further agree not to raise any objections thereto as to its validity whether on the ground of expiry of time or otherwise howsoever." The plaintiff Sri Lal, being dissatisfied with the award, at first took up the position that he signed that agreement without knowing its contents and without understanding to what he was putting his name. That contention has been expressly withdrawn by his Counsel and the plaintiff now admits that when he signed that document, which was explained to him by Babu Debi Prosad Khaitan, he knew its contents and understood what he was doing. That, however, did not prevent him from taking steps at once to object to the award as having been filed out of time. I have now before me three matters: (1) a petition by the plaintiff that the award may be set aside as having been filed out of time; (2) a petition by the defendants that, if necessary, the time may be extended and that the plaintiff may be at liberty to file the award; and (3) the defendant's application that judgment be passed in accordance with the award. Plaintiff's Counsel admits that there are no merits whatsoever in his client's contention. He could hardly do otherwise, as a more shameless attempt to get out of his agreement on a highly technical point can hardly be conceived. The plaintiff relies upon the case of *Shib Krishna Dawn and Co.* v. *Satish Chunder Dutt* (1), in which Mr. Justice Harington held that the Court had no power to extend the time for filing an award which had already been made before the application was presented. The learned Judge relied upon the

(1) 12 Ind. Cas. 18; 38 C. 522.

case of *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar* (2), but that was a case decided under the Civil Procedure Code of 1882. Their Lordships of the Privy Council held that an award made out of time was invalid and that the arbitrators by such effluxion of time were *functus officio*. In so doing they followed the express words of section 521, which ran that "no award shall be valid unless made within the period allowed by the Court." With all respect to the learned Judge who decided the case in *Shib Krishna Daun and Co.* v. *Satish Chunder Dutt* (1), it appears to me that he did not give sufficient weight to the change which was made in the wording of section 521 of the Code of Civil Procedure, 1882 in enacting paragraph 15 of the second Schedule to the Code of Civil Procedure, 1908. As paragraph 15 runs, it appears to me to have a discretion to the Court in deciding whether an award shall be set aside on the ground of its having been made after the expiration of the period allowed by the Court. I feel some doubt, therefore, whether the decision in *Shib Krishna Daun and Co.* v. *Satish Chunder Dutt* (1) is correct in law. Section 148 of the present Code is in no way restricted, nor indeed is paragraph 8 of the second Schedule. It might, therefore, be argued not without reason that they ought not to be restricted in the manner there held. It is, however, unnecessary to decide that point, because I am unable to see how in the face of his agreement of 2nd March 1914 the plaintiff can possibly contend that he is not bound by this award. His objection is highly technical and it may be met in various ways. It may be said that that agreement operated as a fresh submission to arbitration, and acceptance of the award as signed on that day by the arbitrators. It might also be said that it was a lawful adjustment of the suit which might be enforced by a decree against the plaintiff under the provisions of Order XXIII, rule 3. It might further be said that the plaintiff is precluded from putting forward his present objection by the concluding words of his agreement not to raise any objection to the award or to its validity, whether on the ground of expiry of time or otherwise howsoever. The difficulty might again be got over by directing that not the English award, but the Hindi award, which is in identically the same terms though not in the same language, should be filed as the award of the arbitrators. It appears to me quite unnecessary to go through these formalities. It is abundantly clear that an award was made within time. The arbitrators decided to have the award drawn up in English, but before doing so they took an agreement from the parties not to raise any objection to this being done. I must, therefore, dismiss the application of the plaintiff Sri Lal with costs and pass a decree in terms of the award.

Application dismissed.

(2) 13 A. 300; 18 I. A. 55; 6 Sar. P. C. J. 14; 15 Ind. Jur. 283.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2740 OF 1911.

January 30, 1914.

Present:—Mr. Justice Mookerjee and Mr. Justice Beachcroft.

AMULYA RATAN SARKAR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

TARINI NATH DEY AND OTHERS—DEFENDANTS—RESPONDENTS.

Occupancy holding, right of—Testamentary disposition of occupancy holding, validity of—Statute, construction of—Right, whether conferred by mere implication—Estoppel—Testator and legatee—Heir-at-law of raiyat, whether estopped from questioning validity of gift by raiyat—Bengal Tenancy Act (VIII of 1885), ss. 26, 178 (3) (d).

In the absence of proof of any local usage to the contrary a *raiyat* is not competent to make a testamentary disposition of his right of occupancy.

A right cannot be conferred by mere implication from the language used in a Statute; there must be a clear and unequivocal enactment to confer the right.

Arnold v. *Gravesend Borough*, 2 K. & J. 574 at p. 591; 110 R. R. 372; 25 L. J. Ch. 776; 2 Jur. (N. S.) 703; 4 W. R. 478; 99 E. R. 911, referred to.

As between the testator on the one hand and the legatee or the executor on the other, there is not estoppel; therefore the heir-at-law of a testator *raiyat* is estopped from questioning the transfer of a holding made by a Will.

Hari Das v. *Udoy Chandra*, 8 C.L.J. 261; 12 C. W. N. 1066, not followed.

In every case of gift, the doctrine of estoppel does not apply as between donor and donee.

AMULYA RATAN SARKAR *v.* TARINI NATH DEY.

Second appeal against the decree of the Additional District Judge of 24-Parganas, dated the 26th July 1911, reversing that of the Munsif, first Court, Alipore, dated 30th September 1910.

Babu *Girija Prosunna Roy Chowdhury*, for the Appellants.

Babu *Jyotish Chandra Hazra*, for the Respondents.

JUDGMENT.—The subject-matter of the litigation, which has culminated in this appeal, is one-half share of an occupancy holding, which admittedly belonged at one time to Tarapada Chatterjee. The right to this one-half share is claimed on the one hand by the transferee from the heir-at-law, who is the plaintiff-appellant, and on the other hand by the transfrees from the executor, who are the defendants-respondents. The occupancy holding, it is not disputed, is not transferable by custom or local usage. In so far as the plaintiff is concerned, his transfer from the heir-at-law has been recognised by the landlord, and no question can arise as to its validity on that ground. The substantial question in controversy is, whether the testamentary disposition was valid and operative so as to exclude the heir-at-law, because if there was a valid testamentary devise, the property passed to the executor and the heir-at-law consequently took nothing. On behalf of the defendants-respondents, it has been contended that the occupancy holding, though not transferable by custom or local usage, may be the subject of a valid testamentary disposition. The Bengal Tenancy Act admittedly does not contain any provision expressly applicable to this subject. But our attention has been drawn to section 26 which regulates the devolution of occupancy right when a *raiyat* dies intestate, and it has been argued that the Legislature has herein, by implication, indicated that a *raiyat* is competent to make a testamentary disposition of his occupancy right. There is clearly no force in this contention. In the *first* place, if we were to accept the mode of interpretation of section 26 suggested by the respondents, we would have to contravene the elementary rule of construction that right cannot be conferred by mere implication from the language used in a Statute; there must be a clear and unequivocal enactment [*Arnold* v. *Gravesend Borough* (1)]. In the *second* place, full effect would be given to the implication contained in section 26, if it were shown that a *raiyat* is competent to make a testamentary disposition of his right of occupancy in certain events. Now, section 178, sub-section (3), clause (*d*), indicates that in this respect the right of an occupancy *raiyat* stands on the same footing as his right to transfer his holding. Clause (*d*) provides that nothing in any contract made between a landlord and a tenant after the passing of the Act shall take away the right of a *raiyat* to transfer or bequeath his holding in accordance with local usage. In the case before us, no local usage has been proved and the respondents are not in a position to support the validity of the bequest as made in accordance with a local usage. The respondents have consequently been driven to take up a different position. Their contention is that the heir-at-law is estopped from questioning the validity of the devise made by the testator, and in support of this view reliance has been placed upon the judgment of Mr. Justice Doss in the case of *Hari Das* v. *Udoy Chandra* (2). It may be conceded that the view taken by that learned Judge does support the argument for the respondents. But it is worthy of note that when an appeal was preferred under the Letters Patent against the decision of Mr. Justice Doss, the decree was affirmed on a different ground: *Udoy Chandra Das* v. *Hari Das Bairagi* (3). It is consequently impossible for us to treat the matter as concluded by authority, although the opinion expressed by Mr. Justice Doss must be deemed entitled to the highest consideration. On behalf of the appellant, the correctness of the view taken by Mr. Justice Doss has, however, been controverted: and we have been invited to examine the grounds upon which that opinion is based.

Mr. Justice Doss points out, in the first place, that a transfer of an occupancy holding is not a void transaction, that it is binding between the parties, namely, the transferor and the transferee and all persons claiming through them, and that it is voidable only

(1) 2 K. & J. 574 at p. 591; 110 R.R. 372; 25 L. J. Ch. 776; 2 Jur. (N. S.) 703; 4 W. R. 474; 69 Eng. Rep. 911.
(2) 8 C. L. J. 261; 12 C. W. N. 986.
(3) 8 Ind. Cas. 417; 10 C. L. J. 606; 13 C. W. N. 937.

at the option of the landlord or his representative-in-interest. This view is founded on the doctrine of estoppel, which was clearly recognised by Phear, J., when he observed in *Bibee Suhodra* v. *Maxwell Smith* (4) that the *raiyat* "certainly could not himself recover it (the holding) from the stranger to whom he had transferred it for valuable consideration," and by Couch, C. J., when he remarked in *Narendra Narayan Roy* v. *Ishan Chandra Sen* (5) that "the *raiyat* could not recover possession from the transferee as he would be bound by his act of transfer." To the same effect is the express decision in *Bhagirath Changa* v. *Hafizuddin* (6) where Stevens, J., pointed out that when the occupancy *raiyat* has transferred his holding on the representation that he had a transferable interest therein, he cannot, on principles of equity and good conscience, be permitted to prove against the transferee, who had paid consideration for the transfer, that he had no transferable interest to convey. This is an intelligible principle recognised so long and so firmly established that its soundness cannot now be successfully challenged. Mr. Justice Doss then concludes that if this is the character of the transaction, namely, the character of a voidable transfer, "it seems to follow that the heir of an occupancy *raiyat* ought to be held bound by a transfer of the holding made by a Will." The learned Judge then proceeds to state the reasons for this inference, namely, that if the heir is bound by a transfer for valuable consideration or by a gift, there does not seem to be any reason why he ought not to be held bound by a transfer made by a Will. Before we test this reasoning, it is necessary to observe that the broad proposition that the heir of an occupancy *raiyat* is bound by a gift made by the *raiyat* himself may, when occasion arises, require examination. Cases are, no doubt, conceivable where the donee may, by the acceptance of the gift, have altered his position and may in such circumstances be entitled to rely upon the doctrine of estoppel in support of his title. To take a concrete illustration: *A* is offered two gifts by two of his relations, on the condition that if he accepts one, he must renounce the other; he makes his election in favour of one of the gifts. His position would be altered if that donor were permitted thereafter to prove against him that the donor had no transferable title to convey. But, on the arguments addressed to us, we are not prepared at present to accept it as an invariable principle of law that, in every case of gift, the doctrine of estoppel may be applied as between donor and donee. Let it be assumed, however, for the purposes of the present argument—and for that purpose alone—that in all cases of transfer for valuable consideration as also in all cases of gift, the heir is bound by the same estoppel as the transferor or the donor himself, does it follow that this principle is applicable to cases of testamentary devise? In the case of transfer *inter vivos*, with or without consideration, there is, on the assumption made, an estoppel in favour of the transferee as against the transferor, and that estoppel is binding upon the heir of the transferor. In the case of a testamentary devise, is there any estoppel as between the testator and the intended legatee or the executor? It cannot be disputed that it is open to the testator, up to the very last moment of his life, to change his mind, and to revoke the disposition made by him. His testament does not come into operation till the moment after his death. Consequently, as between the testator on the one hand and the legatee or executor on the other, there is no room for any possible application of the doctrine of estoppel. The position becomes plain when we recall to mind the nature of the estoppel applicable to cases of transfer for consideration. The principle is stated lucidly by Lord Denman in *Pickard* v. *Sears* (7) in the following terms:—"Where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." The principle was amplified and re-stated by Lord Selborne in *Citizen's Bank of Louisiana* v. *The First National Bank of New Orleans* (8) in these

(4) 20 W. R. 139.
(5) 13 B. L. R. 274; 22 W. R. 22 at p. 26.
(6) 4 C. W. N. 679.
(7) 6 A. & E. 469, 45 R. R. 538; 2 N. and P. 488; 112 E. R. 179.
(8) 6 H.L. 352 at p. 360, 43 L.J.Ch 269; 22 W.R. 194.

terms :—"The foundation of that doctrine, which is a very important one, and certainly not one likely to be departed from, is this, that if a man dealing with another for value makes statements to him as to existing facts, which being stated would affect the contract and without reliance upon which, or without the statement of which, the party would not enter into the contract, and which being otherwise than as they were stated, would leave the situation after the contract different from what it would have been if the representations had not been made; then the person making those representations shall, so far as the powers of a Court of Equity extend, be treated as if the representations were true, and shall be compelled to make them good." Lord Selborne then proceeded to add a very important qualification, "but those must be representations concerning existing facts," and thereby emphasised the statement of Lord Cranworth in the case of *Jordan* v. *Money* (9) to the effect that in order to found an estoppel the representation must be of existing facts and not of mere intentions. It is clear, therefore, that as between the testator on the one hand and the executor or legatee on the other, there is no estoppel. Consequently, so far as the heir-at-law is concerned, he cannot be deemed bound by any derivative estoppel traceable to an estoppel which bound his ancestor. If he is to be bound by any estoppel, it must be an independent estoppel against him; but on behalf of the respondents no intelligible principle of justice, equity or good conscience has been suggested upon which any such independent estoppel can be reasonably founded. The truth is that the testament, if it takes effect, comes into operation immediately after the death of the testator; at the same moment, precisely, the statutory right of inheritance comes into operation, and there is no reason why an estoppel should be applied against the heir-at-law so as to deprive him of what he is entitled to take under the Statute. We are thus constrained to hold that the view taken by Mr. Justice Doss cannot be supported on principle and that in the case of a testamentary devise of a non-transferable occupancy holding, the heir-at-law is not debarred by the doctrine of estoppel from questioning its validity. In the case before us, the result follows that there was no valid disposition in favour of the executors. The plaintiff, as the transferee from the heir-at-law by successive devolution, is consequently entitled to the property claimed, in respect whereof the defendants are trespassers in the eye of the law.

The result is that this appeal is allowed, the decree of the District Judge set aside and that of the Court of first instance restored with costs both here and in the Court of Appeal below.

Appeal allowed.

(9) 5 H. L. C. 185; 10 E. R. 869; 101 R. R. 116; 23 L. J. Ch. 865.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 217 OF 1913.

July 22, 1914.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Beaman.

CHIMNA SADASHIV—PLAINTIFF —APPELLANT

versus

RAMDAYAL PRAYAGDAS—DEFENDANT —RESPONDENT.

Civil Procedure Code (Act XIV of 1882), ss. 282, 283—Decree—Property sold subject to mortgage lien—Mortgage lien, order for, not contested within a year—Suit by mortgagee—Defence—Fraud—Purchaser, whether entitled to contest mortgage as fraudulent—Evidence Act (I of 1872), s. 44.

A claimed to be the holder of a mortgage upon certain property which had passed to *B* on a sale in execution of a decree. In the execution proceedings under that decree *A*'s claim was recognized under section 282 of the Civil Procedure Code, 1882 but *B* did not challenge that claim under section 283 of the Code. The property was sold subject to the charge. *A* then sued to assert his mortgage. *B* set up that the mortgage was fraudulent. *A* contended that the order under section 282 was conclusive, as it was not set aside in a suit filed under section 283 within a year from its date:

Held, that section 283 of the Civil Procedure Code, 1882, can only contemplate a suit based upon facts known to the party against whom an order was passed under section 282 within a year from the date of the order and that if *B* was not aware of the fraud within a year and became aware of it afterwards, he could, under section 44 of the Evidence Act, assert the fraudulent nature of *A*'s application and the consequent invalidity of the order passed upon it in any proceeding instituted by *A* on the strength of such order.

NISTARINI DEBYA *v.* BEHARI LAL MOKHOPADHYA.

Second appeal from the decision of the District Judge of Khandesh, in Appeal No. 39 of 1909, reversing the decree passed by the Joint Subordinate Judge at Dhulia, in Civil Suit No. 406 of 1907.

Mr. *Setlur* (with him Mr. *T. R. Desai*), for the Appellant.

Messrs. *G. S. Rao* and *P. D. Bhide*, for the Respondent.

JUDGMENT.—The present plaintiff claims to be the holder of a mortgage for Rs. 3,000 and interest upon certain property which has passed to the 5th defendant, the respondent, on a sale in execution of a decree. In the execution proceedings under that decree the present plaintiff intervened and asserted his claim as a mortgagee and prayed that the auction-sale should be held after reserving the mortgage lien of the amount of Rs. 3,580 with future interest, and that the said sum should be awarded to the plaintiff. The executing Court ordered notices to issue to the opponents, namely, the plaintiff and the defendant in the suit in which the execution proceedings had been instituted, and on the returnable date of the notices the order was made that "the mortgage is admitted, I grant the application with all costs on the opponents." That, we think, was clearly an order under section 282 of the Civil Procedure Code of 1882, and it was an order against both the opponents and, therefore, the plaintiff (the present respondent and defendant No. 5) was bound, if he wished to challenge the order, to institute a suit to establish the right that he claimed within the year prescribed by the Limitation Act. That suit was not instituted. The property was sold and in the proclamation it was stated to be subject to mortgage liens to the extent of upwards of Rs. 9,000, and it is not contended that that sum did not include the mortgage alleged by the present plaintiff. The present respondent was a purchaser through the Court and remained in possession of the property for some years. Then the plaintiff took steps to assert the alleged mortgage which was operative, as he said, not only against the property held by the present respondent but against the property held by defendants Nos. 2 to 4 in this suit, and they set up that the mortgage was fraudulent. The lower Appellate Court has allowed the present respondent to set up the same defence, and it has been held in the lower Courts that the mortgage was fraudulent. The plaintiff-appellant contends that the order under section 282 was conclusive, not having been set aside in a suit filed within a year from its date. It appears to us that section 283 can only contemplate a suit based upon facts known to the party against whom an order was passed under section 282 within a year from the date of the order. If he was aware of the fraudulent nature of the mortgage, it was part of the cause of action he would have to allege in such a suit filed within a year; if, however, he was not aware of the fraud and became aware of it afterwards, he could under section 44 of the Evidence Act assert the fraudulent nature of the plaintiff's application and the consequent invalidity of the order passed upon it in any proceeding instituted by the plaintiff on the strength of such order. The question, therefore, we must have decided in this case before we can deal with it in appeal, is whether the defendant No. 5 was aware of the fraudulent nature of the plaintiff's mortgage transaction within a year of the date of the order of the 6th of March 1897. We remand the case to the lower Appellate Court for a finding upon that issue, the finding to be returned within three months. The onus of proof will be upon the 5th defendant.

Case remanded.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 219 OF 1912.

June 24, 1914.

Present:—Mr. Justice Fletcher and Mr. Justice Richardson.

NISTARINI DEBYA—DEFENDANT No. 1—APPELLANT

versus

BEHARI LAL MOKHOPADHYA—PLAINTIFF—RESPONDENT.

Will—Construction—Disposition with power to sell—Absolute interest—Absolute gift to legatee with a gift over simpliciter on contingency of death refers only to period of distribution—Succession Act (X of 1865), s. 111—Statutory rule of construction must be followed.

NISTARINI DEBYA v. BEHARI LAL MOKHOPADHYA.

Where property is given to a person with power to sell, make a gift or *hiba*, etc., he takes thereby an absolute interest in the property.

The ordinary rule of construction where the testator has given an absolute gift to a legatee and then has made a gift over *simpliciter* on a contingency of death is that he was referring to death before the period of distribution.

The rule laid down in section 111 of the Indian Succession Act (X of 1865) is a statutory rule of construction which the Courts are bound to follow.

Appeal against the order of the Officiating Additional Subordinate Judge, Birbhum, dated the 15th of February 1912, reversing that of the Munsif, first Court, at Bolpur, dated the 22nd of December 1910.

Babu *Sarat Chandra Mukerjee*, for the Appellant.

Babu *Karunamoy Bose*, for Babu *Khetra Mohun Sen*, for the Respondent.

JUDGMENT.

FLETCHER, J. – This is an appeal from a judgment of the learned Officiating Additional Subordinate Judge of Birbhum, dated the 15th February 1912, reversing the decision of the Munsif, first Court, of Bolpur. This suit was brought by the plaintiff claiming through one Srimati Sindhubala Debi, who was the widow of one Mohesh Chunder Mukherjee, for an one-half share of the estate of Mohesh Chunder and the sole question that we have got to decide in this case is what is the true construction of the Will of Mohesh Chunder. Mohesh Chunder made his Will on the 30th August 1884. There are first the usual recitals and then the Will runs in the following terms: – "I bequeath to both of you" that is, his widow Srimati Sindhubala and Srimati Nistarini, the daughter of his late brother, "by this Will the rest of the properties and also the properties that will exist after the death of my neice (brother's daughter), Srimati Tincouri Debya, out of the properties given to her." Then follow these words: "You will become entitled to sell or make a gift or *hiba*, etc., in respect of the said properties and hold and enjoy the same." Now, pausing here for a moment, let us see what is the nature of the interest that Sindhubala and Nistarini, the present appellant before us, took under the terms of that gift. It seems to me that it is impossible to say that a person to whom a property is given with power to sell, make a gift or *hiba*, etc., and, I presume, to do anything else he likes with, has an interest less than an absolute interest in the property. Those words in the Will cannot be given effect to except by holding that Sindhubala Debi and the defendant Nistarini Debi took an absolute interest in the property. Then comes the clause that has given rise to this litigation: "If, by the will of God, one of you should die before the other." Now what was the testator contemplating when he said, "if one of you should die before the other"? What the testator was contemplating when he provided that if one of them should die before the other, must have been some period which he had in view. The only period that is possible to give effect to on this Will is the period of distribution, that is if one should die before the estate is liable to be divided between the two ladies. So far as I can see, on the wording of this Will, it is impossible to hold that the testator had in view the contingency of one of the ladies dying before the other, which obviously must happen at some time. Then the testator provided that in that event, "whoever will survive will hold and enjoy the whole of the property as *malik*." The learned Subordinate Judge in the Court below has held that that clause applies only in the case of the death of one of the residuary legatees in the life-time of the testator, that is, before the period of distribution. That is clearly provided for in section 111 of the Indian Succession Act which applies to Hindu Wills, and that rule in section 111 of the Indian Succession Act is an absolute rule of construction. It is not a rule of construction like the rule in *Home* v. *Pillans* (1), which may be contradicated by other evidence appearing on the face of the Will. The rule laid down in section 111 of the Indian Succession Act is a statutory rule of constructions which the Courts are bound to follow. It is quite true that in this case, if one applies the rule laid down in *Home* v. *Pillans* (1) one arrives at the same result. There is nothing in this Will to show that the testator meant death after the period of distribution. The ordinary rules of construction where the testator has given an absolute gift to a legatee and then has made

(1) 2 Myl. & K. 15; Coop. t. Brough. 98; 4 L. J. Ch. 2; 39 E. R. 850; 39 R. R. 116.

a gift over *simpliciter* on a contingency of death is that he was referring to death before the period of distribution. That rule has been established and, in spite of the elaborate arguments addressed to us by the learned Vakil for the appellant, I still remain unconvinced that the rule has been departed from in this country. This case falls within section 111 of the Indian Succession Act and the widow Sindhubala not having predeceased her husband and having survived the period of distribution, in my opinion, took an absolute interest under the Will. I, therefore, agree with the judgment of the learned Subordinate Judge in the Court below and think that the present appeal ought to be dismissed with costs. We assess the hearing fee at one gold *mohur*.

RICHARDSON, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 190 OF 1913.

August 11, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

IYAPPA NAINAR—PETITIONER—APPELLANT

versus

MANIKKA ASARI—RESPONDENT.

Provincial Insolvency Act (III of 1907), ss. 43 (2) (b), 46 (1)—Order refusing to take action against insolvent—Creditor, whether an aggrieved person—Appeal.

A creditor is not a person aggrieved, within the meaning of section 46 (1) of the Provincial Insolvency Act, by an order refusing to take action against an insolvent under section 43 (2) (*b*) and he has, therefore, no right of appeal.

Kadir Bakhsh v. *Bhawani Prasad*, 14 A. 145; A. W. N. (1892) 6, distinguished.

In the matter of Rash Behary Roy v. *Bhagwan Chander Roy*, 17 C. 209, followed.

Appeal against the order of the District Court of South Arcot, dated 25th February 1913, in Insolvency Appeal No. 421 of 1912, in Insolvency Proceeding No. 7 of 1911.

Mr. *T. M. Krishnasami Aiyar*, for the Appellant.

Mr. *N. S. Rangasami Aiyangar*, for the Respondent.

JUDGMENT.—This is an appeal under section 46, clause (2), of the Provincial Insolvency Act from an order of the District Judge of South Arcot, dismissing a petition put in by a creditor asking the Court to take action against an insolvent under section 43, clause 2 (*b*), of the Act. A preliminary objection is taken that a creditor has no right of appeal, in that he is not a person aggrieved by the order within the meaning of section 46 (1). In a case reported in *Kadir Bakhsh* v. *Bhawani Prasad* (1) a Judge of a Small Cause Court refused to take action under section 359 of the Code of Civil Procedure against an insolvent, and a revision petition was entertained by the High Court against the order at the instance of a creditor. This, however, does not assist the appellant, as in revision the Court acts *suo motu*. It has been held in *In the matter of Rash Behary Roy* v. *Bhagwan Chander Roy* (2) under the Insolvent Act, 11 and 12 Victoria, Chapter 21, that section 50 should be administered as the criminal law is administered and specific charges framed, and this has been the practice of this Court. What the Court has done in effect is that it has taken cognizance inquired into an allegation of a criminal offence and refused to frame a charge. Under no principle of criminal law is a complainant entitled to appeal against such refusal, as in all criminal proceedings the Crown is in theory the prosecutor and we see no reason why a different principle should prevail where the criminal jurisdiction is exercised by a Civil Court. Under the Bankruptcy Act, 1883, the Court has power to commit. *Vide* section 165. Section 104 (2) gives an appeal in bankruptcy matters "at the instance of any person aggrieved." Section 73 of the Indian Insolvency Act gave an appeal by way of petition to the Supreme Court from any proceeding of the Commissioner at the instance of any person "who shall think himself aggrieved." We have not been referred to any case under either of these Acts or earlier Bankruptcy Acts in England where a creditor has been held a person aggrieved by the refusal of the Court, nor can I find any such case. The absence must be attributable to the principle above stated; and in that view the preliminary objection must be upheld and the appeal dismissed with costs.

Appeal dismissed.

(1) 14 A. 145; A. W. N. (1892) 6.
(2) 17 C. 209.

GOBIND CHANDRA *v.* BHAGABAT SARDAR.

CALCUTTA HIGH COURT.

CIVIL APPEAL FROM ORDER No. 377 OF 1910.

January 7, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

GOBIND CHANDRA SARDAR AND OTHERS —PLAINTIFFS—APPELLANTS

versus

BHAGABAT SARDAR AND OTHERS — DEFENDANTS—RESPONDENTS.

Partition—Compromise by some of the parties—Consent decree, validity of—Appeal against consent decree, when maintainable—Suit to declare such consent decree inoperative, unnecessary—Dismissal for default, effect of.

In a partition suit the defendants, who were not parties to the compromise effected between the plaintiffs and the other defendants, will not be bound by the terms of the compromise, and the decree based thereon would not have greater validity than the contract upon which it is based.

A partition of joint property cannot be effected on a compromise which binds only some of the co-owners, and, therefore, a consent decree based upon such a compromise cannot bind any of the parties to the suit.

Ordinarily an appeal does not lie against a decree made by consent, but an appeal may be preferred by persons who were not parties to the consent decree.

Nityánand Dasi v. *Gokul Chandra Sen*, 9 Ind. Cas. 210; 13 C. L. J. 16, referred to.

The dismissal for default of a suit for declaration that the consent decree was not operative cannot give greater efficacy to the consent decree than it really possesses. It is unnecessary for persons who are not parties to a consent decree to institute a suit for such a declaration.

Appeal against the order of the Subordinate Judge, Second Court of 24-Parganas, dated the 13th of July 1910, reversing that of the Munsif, Third Court, Diamond Harbour, dated the 13th of December 1909, and remanding the case to his Court for trying it *de novo*.

Babu *Surendra Nath Ghosal*, for the Appellants.

Babus *Sunil Madhab Mullick*, *Provash Chandra Mitra*, *Trailokya Nath Chakravarty* and *Prabodh Chandra Mukherjee*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiffs in a suit for partition of joint property, which was commenced so far back as the 29th October 1897. The suit was dismissed by the Court of first instance on the 13th March 1899. Upon appeal, the case was remanded by the Subordinate Judge on the 11th July 1899. The case was re-tried after remand and a preliminary decree was made on the 16th August 1900. The result of the preliminary decree was that the suit was dismissed in so far as the property comprised in schedule *ka* was concerned, but it was decreed in so far as the pond and tank mentioned in schedules *kha* and *ga* were concerned. The plaintiffs were not satisfied with this preliminary decree and preferred an appeal. They joined as respondents to their appeal all the eleven defendants who were parties to the suit. A compromise was arrived at as between the plaintiffs on the one hand and some of the defendants on the other hand; namely, defendants Nos. 1, 3, 4, 7 and 11. The other defendants, namely, Nos. 2, 5, 6 and 8 to 10 were not represented at the hearing of the appeal before the Subordinate Judge. The fact was apparently not brought to his notice that all the defendants had not consented to the compromise. The result was that the Subordinate Judge accepted the compromise as if it was binding upon all the defendants and proceeded to modify on the basis thereof the preliminary decree made by the Court of first instance. The case then went back to the original Court, and an attempt was made to effect a partition by metes and bounds. The defendants, who were not parties to the petition of compromise and the consent decree, protested against the adoption of this course. Their contention was that they were in no way bound by the consent decree which had been made by the lower Appellate Court. This objection was overruled and partition was effected. These defendants then appealed to the Subordinate Judge and on the 13th July 1910 he held that the consent decree could not be made the foundation for the final decree in the suit, inasmuch as it was not binding upon all the parties to the litigation. He, therefore, set aside the final decree made by the Court of first instance and remanded the case for trial *de novo*. The Subordinate Judge, however, proceeded to add that nothing in his judgment should be construed to mean that the compromise decree of the Appellate Court was not binding on the parties to the compromise so far as the same related to the suit.

The plaintiffs have now appealed against this decree, and on their behalf it has been contended that the defendants were not at liberty to challenge the consent decree

because *first*, their remedy was by way of an appeal to this Court; and, *secondly*, because they had failed in a regular suit instituted for a declaration that the consent decree was not operative in so far as they were concerned. In our opinion, there is no force in either of these contentions.

In so far as the first ground is concerned, it is plain that the defendants who were not parties to the petition of compromise are not bound by its terms and the decree based on that compromise cannot have greater validity than the contract upon which it was based [*Huddersfield Banking Company* v. *Lister* (1), *Rajlakshmi Dassee* v. *Katayayani Dasee* (2), *Keshab Panda* v. *Bhobain Panda* (3), *Wentworth* v. *Bullen* (4)]. No doubt, it might have been open to the defendants to prefer an appeal against the consent decree, because it has been held that although ordinarily an appeal does not lie against a decree made by consent, an appeal may be preferred by persons who are not parties to the consent decree [*Nityamoni Dasi* v. *Gokul Chandra Sen* (5)]. In so far as the appeal preferred by the plaintiffs against the decree of the Court of first instance was concerned, the appeal had never been heard on the merits as against these defendants and no decree had been made which could be legally binding upon them. The first ground, on which the appeal is sought to be supported, fails.

In so far as the second ground is concerned, it appears that the suit instituted by these defendants for a declaration that the consent decree was not operative against them was dismissed for default and was never tried on the merits. If, then, the consent decree was not operative against them, as we have held it was not, it was clearly unnecessary for them to institute a suit for declaration that the decree was not operative, and the fact that the suit was never tried on the merits but dismissed for default could not give greater efficacy to the consent decree than it really possessed. We are clearly of opinion that in so far as the merits of the case are concerned, the consent decree made by the Subordinate Judge on the 29th March 1901 cannot be made the foundation for the final decree in the partition suit.

The question remains, what course should be adopted at this stage. As the consent decree is not binding upon some of the defendants, obviously it cannot bind any of the parties to the suit, because the property which has to be partitioned is joint property and a partition thereof cannot be effected on a compromise which binds only some of the co-owners. The proper course to follow is to ignore completely the compromise and the decree based thereon. The parties must consequently be relegated to the position which they occupied before the consent decree was made on the 27th March 1901.

The result is that this appeal is allowed, the order of the Subordinate Judge set aside and the case remanded to him in order that he may now, on the materials on the record, hear the appeal which was preferred by the plaintiffs against the decree of the Court of first instance dated the 16th August 1900. If that appeal fails on the merits, the result will be that the preliminary decree made by the Court of first instance will stand confirmed and partition will be effected by metes and bounds on the basis of such decree. On the other hand, if the appeal by the plaintiffs against the preliminary decree of the Court of first instance is allowed in whole, or in part, a new preliminary decree will be made by the Subordinate Judge, and partition must be effected on the basis of such preliminary decree. The effect of this judgment is to set aside the consent decree of the 29th March 1901 as also all orders in the suit made thereafter, whether by the Court of first instance or by the lower Appellate Court; the appeal preferred by the plaintiffs against the preliminary decree of the 16th August 1908 will stand restored, to be heard on the merits. The appellants must pay the respondents, who have entered appearance, their costs throughout these proceedings. We assess the hearing fee in this Court at two gold *mohurs*.

Decree set aside,

(1) (1895) 2 Ch. 273; 64 L. J. Ch. 523; 12 R. 331; 72 L. T. 703; 43 W. R. 567

(2) 12 Ind. Cas. 464; 38 C. 639 at p. 674.

(3) 21 Ind. Cas. 538; 18 C. L. J. 187.

(4) 9 B. & C. 840; 9 L. J. (o. s.) K. B. 33; 109 Eng. Rep. 313; 33 R. R. 353.

(5) 9 Ind. Cas. 310; 13 C. L. J. 16.

CALCUTTA HIGH COURT.

APPEALS FROM ORIGINAL DECREES NOS. 314 AND 340 OF 1912.

August 26, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

IN No. 314 OF 1912

RAMJAS AGARWALA—DEFENDANT No. 5—APPELLANT

versus

Kumar BRAJO MOHAN SINGH—PLAINTIFF AND OTHERS—REMAINING DEFENDANTS—RESPONDENTS.

IN No. 340 OF 1912

Kumar BRAJO MOHAN SINGH—PLAINTIFF—APPELLANT

versus

RAMJAS AGARWALA AND OTHERS—DEFENDANTS—RESPONDENTS.

Injunction, suit for—Plaintiff what has to show to succeed in such a case—Purchaser of lessee's right in coal mine, rights of, to take entire coal—Barrier to pen back water, right of—"Instroke and outstroke", meaning of—Instroke, right of, when exercised—Fraud, ground for injunction—Support, right of.

A man who seeks the aid of a Court by an injunction must show that the act complained of is in fact a violation of his right or at least is an act which, if carried into effect, will necessarily result in a violation of the right The mere prospect or apprehension of injury or the mere belief that the act complained of may or will be done is not sufficient.

In order to succeed in such an action the plaintiff must show a strong case of probability that the apprehended mischief will, in fact, arise.

The plaintiff must show the existence of an intention on the part of the defendant to do the act complained of; but direct evidence of such intention may be unnecessary, if a man insists on his right to do or begins to do or threatens to do or gives notice of his intention to do an act which must, if completed, give a ground of action.

Where, therefore, a purchaser of the rights of a lessee of a coal mine claims the right to take away the entire coal, the Court is competent to grant an injunction if it is established that what the purchaser asserts he has a right to do, would constitute a breach of contract between the lessor and the lessee.

An owner of a lower mine must, if he wishes to guard against the natural flow of water from the mines of his neighbours, have a barrier in the upper part of his mine to pen back the water and the lessee of such a mine may be held liable for any damage done by breaking down the barrier between the mines.

It is, however, not obligatory upon the lessee to leave a barrier of coal merely to prevent communication with adjoining mines and, therefore, where the object of a plaintiff is only to prevent communication an injunction cannot be issued.

The right of instroke is the right of conveying minerals leased to the surface through a pit or shaft in an adjoining mine, it is the converse right to that of outstroke, which is the right of conveying minerals from an adjoining mine to the surface through a pit or shaft in the mine leased.

A lessee is *prima facie* entitled to work by instroke, but not by outstroke.

Where it can be assumed that the lessee has the right to work by instroke, he cannot be permitted to exercise that right fraudulently to the detriment of his lessor but where no fraud is established, an injunction cannot be granted.

Prima facie the owner of the surface has a right of support and the lessee is not entitled to work the mine so as to cause a subsidence, and an injunction will be granted if the Court is satisfied that injury is imminent and certain to result from the defendant's acts or where the defendant claims the right to do acts which must inevitably cause subsidence.

Appeals against the decrees of the Subordinate Judge, Purulia and Sambalpur, dated the 4th of June 1912.

Babus *Dwarka Nath Chuckerbutty*, *Bepin Behari Ghose* and *Bankim Chandra Mookerjee*, for Defendant No. 5.

Babus *Jogesh Chandra Roy*, *Baranasibasi Mookerjee* and *Hem Chandra Mookerjee*, for the Plaintiff.

JUDGMENT.—These appeals are directed against the decree in a suit for a perpetual injunction to restrain the lessee of a coal mine in three respects. On the 14th December 1906 the plaintiff granted a lease of the disputed mine for a term of 999 years to one Ghanasyam Das Agarwala, the father of the first four defendants in this litigation. On the 3rd July 1911 and 15th February 1912 these defendants transferred their interest in the mine by two conveyances executed in favour of the fifth defendant, Ramjas Agarwala, who had mines in the immediate vicinity towards the east and north-west. On the 2nd August 1911 the plaintiff instituted the present suit for a perpetual injunction to restrain the purchaser-defendant in three respects, namely, *first*, that he may not connect the disputed mine with the adjacent mines, *secondly*, that he may not raise the coal from the demised mine through the pits of his mines, and *thirdly*, that he may not ever cut off or change the form or diminish the thickness of the pillars of coal delineated in the working plan of the demised mine. The plaintiff alleged in the plaint that the conveyances had been executed by the first four defendants in favour of the fifth defendant with a view to enable the latter to injure him by an improper working of the mine; he further

asserted that there was a conspiracy amongst the defendants, who had threatened to cause him loss. The defendants denied the truth of these allegations. With regard to the three grounds specified for the grant of an injunction, the fifth defendant in particular stated that he was not bound to leave a boundary wall of coal between the demised mine and the adjoining mines owned by him, that he had never intended to raise the coal of the demised mine through the pit of another colliery and that it would, as a matter of fact, be very costly and inconvenient for him to raise the coal except through the pits of the colliery in suit, and, finally, that he was not bound to maintain the pillars in their present condition, but that it was his interest to keep them strong enough so that the surface might not sink and damage the works. The Subordinate Judge has granted an injunction on the first two grounds and has refused an injunction on the third ground. This decree has been assailed both by the plaintiff and the defendant. On behalf of the plaintiff it has been argued that an injunction should have been granted with regard to the maintenance of the pillars. On behalf of the defendant, it has been contended that no injunction should have been granted, as the suit is premature and as the lessee is not bound to leave a boundary wall of coal to separate the demised mine from the adjacent mines and is also entitled to carry the coal from the demised mine in any manner he chooses. The questions which emerge for consideration may consequently be enumerated as follows:—namely, *first*, is the claim for perpetual injunction premature and, if so, to what extent and *secondly*, if the suit is not premature, what are the respective rights and obligations of the lessor and lessee in respect of the maintenance of a boundary wall of coal, the preservation of pillars of coal for the protection of the surface, and the mode in which coal may be raised out of the demised mine? Before we examine these questions, it is necessary to state that no oral evidence was given by the parties and no attempt was made by the plaintiff to establish the allegation of conspiracy amongst the defendants or of the threats held out to damage the property. We must consequently proceed on the facts admitted in the pleadings.

The first question for consideration is whether as alleged by the defendant the suit is premature. It is well settled that a man who seeks the aid of the Court by an injunction must show that the act complained of is in fact a violation of his right or is at least an act which, if carried into effect, will necessarily result in a violation of the right. The mere prospect or apprehension of injury or the mere belief that the act complained of may or will be done is not sufficient. As Lord Brougham said in *Earl of Ripon* v. *Hobart* (1). proceeding upon practical views of human affairs, the law will guard against risks which are so imminent that no prudent person would incur them, although they do not amount to absolute certainty of damage; it will go further according to the same practical and rational view and balancing the magnitude of the evil against the chances of its occurrence, it will even provide against a somewhat less imminent probability in cases where the mischief, should it be done, would be vast and overwhelming. To succeed in such an action, the plaintiff must show a strong case of probability that the apprehended mischief will in fact arise [*Attorney-General* v. *Manchester Corporation*(2)] or in the words of Fitz Gibbon, L. J., in *Attorney-General* v. *Bathmines* (3), the law requires proof by the plaintiff of a well-founded apprehension of injury, proof of actual and real danger [*Attorney-General* v. *Nottingham Corporation* (4)]. The plaintiff must show the existence of an intention on the part of the defendant to do the act complained of, but direct evidence of such intention may be unnecessary, if a man insists on his right to do or begins to do or threatens to do or gives notice of his intention to do an act which must, if completed, give a ground of action. As was observed by Wood, V. C., in *Tipping* v. *Eckersley* (5), the Court may interfere by injunction whether the defendant has or has not actually committed the breach in

(1) 3 My. & K. 169; 41 R. R. 40; Coop. Tempt Brougham 338; 3 L. J. Ch. 45; 40 E. R. 65.

(2) (1893) 2 Ch. 87 at p 91; 62 L J. Ch. 459; 3 R. 427; 68 L. T. 608; 41 W. R. 459; 57 J. P. 343.

(3) (1904) 1 Ir. R. 161; 7 Irish Law Report 679.

(4) (1904) 1 Ch. 673, 73 L. J. Ch. 512; 68 J. P. 125; 52 W.R. 281; 90 L.T. 306; 20 T.L.R. 257; 2 L.G.R. 608.

(5) 2 K. & J. 264 at p. 270; 69 E.R. 779; 110 R.R. 216.

respect of which the interference of the Court is sought, for in a case of contract it is enough if the defendant claims and insists on a right to do the act, although he has not already done it *modo et forma*, as alleged. To the same effect is the observation of Jessel, M. R., in *Cooper* v. *Whittingham* (6): wherever an act is illegal and is threatened, the Court will interfere and prevent the act being done, and as regards the mode of granting an injunction, the Court will grant it either when the illegal act is threatened but has not been actually done, or when it has been done and seemingly is intended to be repeated. Of similar import is the observation of Mellish, L. J., in *Hext* v. *Gill* (7) which arose in connection with the exercise of mining rights: where persons claim to have the right to do a thing, even though saying they have no present intention of doing it, it is idle for them to say that they do not threaten to do the thing and to contend that they are not proper parties to a bill for a declaration of right and for an injunction. The same principle has been affirmed in numerous judicial decisions, amongst which may be mentioned *Attorney-General* v. *Forbes* (8), *Shafto* v. *Bolckow, Vaughan & Co.* (9), *Carlton Illustrators* v. *Coleman* (10), *Thornhill* v. *Weeks* (11), *Pots* v. *Levy* (12). Tested in the light of these principles, it is plain that as the defendant claims right to take away the entire coal, the Court is competent to grant an injunction if it is established that what the defendant asserts he has a right to do, would constitute a breach of contract between the lessor and the lessee. As regards the mode of removal of the coal, however, the defendant asserts that he never intended to take it out of the mine through a pit in his own colliery, and that it would, indeed, be needlessly expensive and inconvenient to do so. The plaintiff has, therefore, failed to prove that he has any ground for an injunction in this respect. The suit cannot consequently be deemed premature in respect of all the reliefs claimed, though the objection may hold good with regard to one of them.

As regards the first ground on which an injunction is sought, the Subordinate Judge has held that the defendant is bound to leave a barrier of coal between the demised mine and the adjoining mines, on the principle that a lessee who removes a barrier between the demised mine and an adjoining mine is, as was ruled in *Marker* v. *Kenrick* (13), *prima facie* guilty of waste. That doctrine has no application to the circumstances of the present case. No doubt, the owner of a lower mine must, if he wishes to guard against the natural flow of water from the mines of his neighbours, have a barrier in the upper part of his mine to pen back the water, *Marker* v. *Kenrick* (13), *Earl of Mexborough* v. *Power* (14), *Baird* v. *Williamson* (15), and the lessee may be held liable for damage done by breaking down the barrier between the mines, *Llynvi Coal Co.* v. *Brogden* (16). In the present case, the lessee entitled, under the lease, to remove all the coal of the demised mine; but he undertook to manage the work according to the prevailing practice with special care and expertness. It has not been suggested that the defendant has acted in breach of this covenant. It is not necessary for our present purpose to determine whether a lease of all the coals in certain lands without any stipulation as to barriers entitles the lessee to work the minerals, so as not to leave a barrier to prevent the invasion of water from an adjacent mine, but there is authority for the proposition that in such a case the lessee is relieved by implication from an obligation to leave a barrier as protection against the invasion of water, *Wemyss* v. *Hopes* (17), *Wark* v. *Bargaddie Coal Company* (18), *Mundy* v. *Duke of Rutland* (19). It is plain that, in any view,

(6) 15 Ch. D. 501; 49 L. J. Ch. 752; 43 L. T. 16; 28 W. R. 720.

(7) L. R. 7 Ch. App. 699 at p. 711; 41 L. J. Ch. 761; 27 L. T. 291; 20 W. R. 957.

(8) 2 Myl. & Cr. 123; 45 R. R. 15; 40 E. R. 587.

(9) 34 Ch. D. 725; 56 L. J. Ch. 735; 56 L. T. 606; 35 W. R. 562.

(10) (1911) 1 K. B. 771; 80 L. J. K. B. 510; 104 L. 413.

(11) (1913) 1 Ch. 438 at p. 444; 82 L. J. Ch. 299; 108 L. T. 892; 77 J. P. 231; 11 L. G. R. 362; 57 S. J. 477.

(12) 2 Drewry 272 at p. 279; 100 R. R. 131; 61 Eng. Rep. 723.

(13) 13 C. B. 188; 22 L. J. C. P. 129; 17 Jur. 44; 188 E. R. 1169, 93 R. R. 488.

(14) 7 Beav. 127; Affd. 2 L. T. 205; 64 R. R. R. 34; 49 E. R. 1011.

(15) 15 C. B. (N. S.) 376; 33 L. J. C. P. 10; 10 Jur. (N. S.) 152; 9 L. T. 412; 12 W. R. 150; 137 R. R. 561; 143 E. R. 831.

(16) L. R. 11 Eq. 188 at p. 192; 40 L. J. Ch. 46; 23 L. T. 518; 19 W. R. 196.

(17) (1809) Fac. Col. 161.

(18) 18 Dunlop 772; 3 Macqeen H. L. C. 467.

(19) 23 Ch. D. 81; 8 W. R. 510.

it is not obligatory upon the lessee to leave a barrier of coal merely to prevent communication with adjoining mines; and this is the sole object with which the plaintiff seeks an injunction against the defendants. Reference may, in the connection, be made to the tenth paragraph of the lease, by which the lessee undertook not to cut the coal so as to overleap the boundaries of the land settled with him; obviously no question of trespass into the mine of an adjoining owner could arise unless the parties contemplated that the lessee was entitled under the lease to work the mineral right up to the extremity of the boundary of the demised mine. We hold accordingly that the injunction granted by the Subordinate Judge which restrains the defendant from breaking through the existing barrier of coal cannot be supported.

As regards the second ground on which the injunction is sought, the Subordinate Judge has held that the defendant is not entitled to raise coal from the demised mine through the pits of his own mine. The question has turned out to be of practical importance to the plaintiff under somewhat exceptional and possibly unforeseen circumstances. The lessee of the demised mine is bound under the lease to pay the lessor a royalty of 5 annas per ton on all coal raised from the mine and despatched by railway or sold at the mouth of the pit, subject to the payment of a minimum annual royalty of Rs. 960. The original lessee has no other land in the neighbourhood and could work the mine only through the pits sunk therein. The defendant transferee, however, holds other mines in the vicinity, on the condition of payment of only a fixed dead rent, without royalty on the output of the coal. The position consequently is that if the defendant raises, through the pit of his own colliery, coal from the demised mine, separate accounts must be kept of the coal raised from the different sources. The plaintiff apprehends that the defendant will pass off the coal raised from the demised mine as coal from his own colliery and thus deprive the plaintiff of his legitimate royalty. The plaintiff contends that in these circumstances, the defendant should not be allowed to raise coal from the demised mine through the pit of his adjacent mine or, in other words, to work the demised mine by instroke, as it is technically called. The question raised is by no means free from difficulty and is not covered by any authority precisely in point. The right of instroke is the right of conveying minerals leased to the surface through a pit or shaft in an adjoining mine; it is the converse right to that of outstroke, which is the right of conveying minerals from an adjoining mine to the surface through a pit or shaft in the mine leased. As regards these rights it has been held that a lessee is *prima facie* entitled to work by instroke but not by outstroke, *Whalley* v. *Ramage* (20), *Lewis* v. *Fothergill* (21), *Jegon* v. *Vivian* (22), *Duke of Hamilton* v. *Graham* (23), *Ramsay Blair* (21), *Mangle* v. *Young* (25). This doctrine is defended on the principle that by instroke working the lessee puts his own property to a legitimate use as a roadway by conveying through it the minerals leased, and it matters not to the lessor how the minerals in the mine leased are excavated, provided, as a well-known author adds, the royalty accounts of the two mines are kept separate (Stewart on Mines, page 115). The question, however, has arisen, as the reports show, only in connection with the right of the lessor to compel the lessee to sink a pit or shaft in the demised mine, and it has been ruled that if the lessor desires to deprive the lessee of his right of instroke working, he must do so by clear and unambiguous provision, making it obligatory on the lessee to sink pits or shafts, *James* v. *Cochrane* (26), and the obligation to sink a pit, where not expressly laid on the lessee, is one readily inferred, *Wheatley* v. *Westminster Brymbo Coal & Coke Co.* (27). The question of the exercise of the right of instroke has not been, so far as we have been able to discover, raised and considered under circumstances similar to those of the present case, *viz.*, where there are pits on the mine demised and the lessee holds adjacent mines

(20) 10 W. R. 315; 125 R. R. 953.
(21) L. R. 5 Ch App. 103.
(22) L. R. 6 Ch. App. 742; 40 L. J. Ch. 389, 19 W. R. 365.
(23) L. R. 2 H. L. (s. c.) 166
(24) 1 App. Cas. 701.
(25) 10 Mac. 901; 6 Scottish Law Reporter 217.
(26) 7 Ex. 170, 21 L J. Ex. 29, affirmed 8 Ex. 556; 22 L. J. Ex. 201, 1 W. R. 232.
(27) L. R. 9 Eq. 538, 39 L. J. Ch. 175, 22 L. T. 18 W. R. 162.

under conditions substantially different from those on which the demised mine has been transferred to him. It may be a question of some nicety whether in circumstances like these, the Court should assume that the parties intended that the lessee should possess the right to work by instroke. It is perfectly plain that, in the present case, the original parties to the lease did not contemplate the contingency which has happened and did not make provision therefor, in the contract. There would consequently be a presumption of right in the lessee to work in the most advantageous way, subject to his not committing a fraud on the lessor. One position is thus obvious, *viz.*, that if it be assumed that the lessee has the right to work by instroke, he cannot be permitted to exercise that right fraudulently to the detriment of his lessor, and if it were established that he has fraudulently passed off coal raised from the demised mine by instroke as coal of his own colliery, the Court would not hesitate to grant an injunction to restrain him from a repetition of the fraudulent act. No such attempt at fraud has even been sought to be proved. On the other hand, the defendant in the ninth paragraph of his written statement distinctly stated that the apprehension of the plaintiff was entirely unfounded, that he had no intention to work by instroke, and that it would, as a matter of fact, be needlessly expensive and inconvenient for him to carry the coal out of the demised mine through the pits of the adjoining mines. In these circumstances, we are of opinion that the injunction granted by the Subordinate Judge to restrain the defendant from working the mine by instroke cannot be sustained.

As regards the third ground on which the injunction is sought, the Subordinate Judge has held that the defendant cannot be directed to maintain the pillars in their present shape and size. The plaintiff contends that the injunction in this respect has been improperly refused. We are of opinion that there is no foundation for this contention. *Prima facie* the owner of the surface has a right of support, and the lessee is not entitled to work the mines so as to cause a subsidence, *Bugdale* v. *Robertson* (28), *Eadon* v. *Jeffcock* (29), *Hunt* v. *Peake* (30), *Davis* v. *Treharne* (31), *Butterknowle Colliery Co.* v. *Bishop Auckland Industrial Co-operative Society* (32), *New Moss Colliery Ltd.* v. *Manchester Corporation* (33), *Howley Park Coal Co.* v. *London & N. W. Ry. Co.* (34), *Butterley Co.* v. *New Hucknall Colliery Co.* (35), *Rowbotham* v. *Wilson* (36). This right to support will be protected by an injunction, if the Court is satisfied that injury is imminent and certain to result from the defendant's acts, *Darley Main Colliery Co.* v. *Mitchell* (37), *Birmingham Corporation* v. *Allen* (38), *Siddon* v. *Short* (39). The Court will also interfere by injunction when the defendant claims the right to do acts which must inevitably cause a subsidence, *Proud* v. *Bates* (40), *Heat* v. *Gill* (7), *Attorney General* v. *Conduit Colliery Co.* (41), *Hilton* v. *Granville* (42). In the case before us there are no materials to show that the plaintiff has the right to the surface and till such right has been established, he would have no right to claim protection against subsidence of the surface. Assuming, however, that the plaintiff has rights in the surface, there is no evidence to show that the pillars need be maintained in their present size and numbers to prevent a subsidence, and in view of the statutory rules for the working of mines, it is extremely improbable that the defendant could alter the pillars in such a way as to endanger the surface. The defendant further protested in the twelfth and

(28) (1857) 3 K. & J. 695; 112 R. R. 349; 6 Jur. (N. S.) 687, 69 R. R. 1230.

(29) (1872) L. R. 7 Ex. 379; 42 L. J. Ex. 36; 28 L. T. 273; 20 W. R. 1033.

(30) (1860) 1 Johns. 705; 29 L. J. Ch. 785; 6 Jur. (N. S.) 107.

(31) 6 A. C. 460; 50 L. J. Q. B. 665; 29 W. R. 869.

(32) (1906) A. C. 305; 75 L. J. Ch. 541; 94 L. T. 795; 70 J. P. 361; 22 T. L. R. 516.

(33) (1908) A. C. 117; 77 L. J. Ch. 392; 98 L. T. 497; 72 J. P. 169; 6 L. G. R. 809; 24 T. L. R. 386.

(34) (1913) A. C. 11, 82 L. J. Ch. 76; 107 L. T. 625; 57 S. J. 42; 29 T. L. R. 35.

(35) (1910) A. C. 381; 79 L. J. Ch. 411; 102 L. T. 609; 26 T. L. R. 415.

(36) 8 H. L. C. 348 at p. 360; 20 L. J. Q. B. 49; 6 Jur. (N. S.) 965; 2 L.T. 642; 11 E.R. 463; 125 R. R. 192.

(37) 11 App. Cas. 127; 55 L. J. Q. B. 529, 54 L. T. 882; 51 J. P. 148.

(38) 6 Ch. D. 284 at p. 287; 46 L. J. Ch. 673; 37 L. T. 207; 25 W. R. 810.

(39) 2 C. P. D. 572 at p. 577; 46 L. J. Ch. 795; 37 L. T. 280.

(40) 34 L. J. Ch. 406 at p. 412; 6 N. R. 92; 11 Jur. 441; 13 L. T. 61.

(41) (1899) 1 Q. B. 301 at p. 314; 64 L. J. Q. B. 207; 15 R. 267; 71 L. T. 777; 48 W. R. 366; 59 J. P. 70.

(42) Cr. & Ph. 286; 10 L. J. Ch. 396; 4 Beav. 180; 41 R. R. 408.

thirteenth paragraphs of his written statement that he has no intention to alter the pillars in such a way as to cause a subsidence of the surface, for the obvious reason that the subsidence would mean destruction of his works. We are of opinion that the Subordinate Judge has rightly refused to grant an injunction in this respect.

The result is that the appeal by the plaintiff (No. 340 of 1912) must be dismissed the appeal by the fifth defendant (No. 314 of 1912) allowed and the decree of the Subordinate Judge discharged. The suit will stand dismissed with costs in both Courts payable by the plaintiff to the fifth defendant alone. We assess the hearing fee in this Court at five gold *mohurs* in each appeal.

Appeal No. 314 *allowed;*
Appeal No. 340 *dismissed.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 261 OF 1913.

July 31, 1914.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Beaman.

RAMA TULSA MAHAR—PLAINTIFF—APPELLANT

versus

BHAGCHAND MOTIRAM—DEFENDANT—RESPONDENT.

Mortgage—Foreclosure suit—Preliminary decree—Mortgagor failing to redeem—Mortgagee failing to obtain decree absolute—Fresh suit for redemption—Civil Procedure Code (Act V of 1908), ss. 11, 47.

If a mortgagee does not apply in a foreclosure suit for a decree absolute, he does not get rid of the relationship of mortgagor and mortgagee.

Therefore, in such a case a mortgagor or his representative who was allowed in the suit six months' time to pay the decretal amount, is not barred by reason of section 47, Civil Procedure Code, from filing a fresh suit for redemption, nor is his suit barred by section 11 of the Code, but he cannot go behind the decree in the mortgagee's suit in so far as it settles the amount of the mortgage-debt up to the date of that decree.

Obiter dictum:—A dismissal for want of prosecution of a mortgagor's action for redemption does not prevent the mortgagor from bringing a fresh suit for redemption.

Second appeal from the decision of the Additional First Class Subordinate Judge, Nasik, in Appeal No. 195 of 1912, confirming the decree passed by the Joint Subordinate Judge at Nasik, in Civil Suit No. 297 of 1911.

Mr. *K. N. Koyajee*, for the Appellant.

Mr. *W. B. Pradhan*, for the Respondent.

JUDGMENT.—The plaintiff claims to be the assignee of the equity of redemption of a certain mortgagor, named Chima, Chima's mortgage having been created on the 17th of June 1890 in favour of the first defendant. The assignment of the plaintiff is dated the 2nd April 1902. Subsequent to that assignment the Court under a money-decree obtained against Chima in Suit No. 229 of 1902 at a Court-sale held in July 1906 put up to sale, the right, title and interest of Chima in this property which was attached by the decree-holder in that suit, and at that sale the defendant-mortgagee was declared to be the purchaser.

Prior to that purchase the defendant No. 1 had brought a suit upon Chima's mortgage for sale of the mortgaged property in 1905, and the plaintiff's father, who was Chima's assignee, was joined as a party to that suit. A decree was passed by which the defendants, including the plaintiff's father, were allowed six months time to pay the money due under the mortgage, and in default the plaintiff was to recover the amount decreed by sale by applying for decree absolute. He never applied for sale but rested content with the title that he was supposed to have acquired as purchaser at the Court sale held under the decree in the money suit of 1902.

The plaintiff now brings this suit for redemption of the mortgaged property, but the learned Judge has dismissed his claim on the ground that the time of six months allowed by the decree for making payment of the mortgage claim had long expired, and that this was an application in execution which should have been brought under section 47 of the Civil Procedure Code and that a separate redemption suit could not lie. We are of opinion that the defendant in a suit for sale under a mortgage who is given six months' time to pay the decretal debt, is not in the position of a decree-holder who has a decree to execute. His right of payment within six months is a right which he has in mitigation of his liabilities under the decree. The contention of the defendant would result in this anomalous position that having the right to apply for sale and for decree absolute he abstains from exercising that right, yet nevertheless after three years have elapsed, though he

can no longer enforce the decree, he is put in the position of absolute owner of the property by reason of the defendant in the suit not having elected to pay off the mortgage. We think that if he does not apply for decree absolute he does not get rid of the relationship of mortgagor and mortgagee, and there is nothing to prevent the mortgagor or his representative from filing a suit for redemption. It has been held in England in *Hansard* v. *Hardy* (1) that a dismissal for want of prosecution of a mortgagor's action for redemption does not prevent him from bringing a fresh suit for redemption. *A fortiori* we think that his failure to pay the amount of the decretal debt within the six months allowed to him cannot, so long as the relationship of mortgagor and mortgagee subsists, prevent him from filing a fresh suit for redemption, subject, however, to this that he cannot go behind the decree in the mortgagee's suit in so far as it settles the amount of the mortgage-debt up to the date of that decree. But it is not contended by the plaintiff in this suit that the mortgage-debt at that time was less than it is found to be by the Court, and, therefore, in permitting the present suit, there would be no violation of the provisions of section 11 of the Civil Procedure Code. We reverse the decree and remand the case for disposal on the merits. The plaintiff must have the costs of the two appeals against the opposing defendants.

Decree reversed.

(1) (1812) 18 Ves. 455 at p. 460; 34 Eng. Rep. 380.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 11 OF 1913.

April 2, 1914.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice N. Chatterjea.

SACHINDRA KISHORE DEY—DEFENDANT—APPELLANT

versus

RAJANI KANT CHUCKERBUTTY—PLAINTIFF—RESPONDENT.

Hindu Law — Dayabhaga *School* — *Daughters* — *Survivorship*—*Limitation Act* (*IX of* 1908), *s.* 28, *Sch. I, Art.* 141—*Applicability of s.* 28—*Adverse possession* —*Extinguishment of title.*

A Hindu governed by the *Dayabhaga* school at his death left two daughters (his heirs) and a daughter-in-law, widow of a pre-deceased son. The daughter-in-law took possession of the estate to the exclusion of the daughters, who were living at their husbands' houses. The possession continued for more than 12 years:

Held, that the possession of the daughter-in-law was adverse and that under section 28 of the Limitation Act it extinguished the right of the daughters; and that the survivor of the two daughters became in on the death of her sister within 12 years of the suit, not by way of inheritance as reversioner, but by right of survivorship, and consequently Article 141 of the first Schedule of the Limitation Act would not apply.

Letters Patent Appeal from the order of Mr. Justice D. Chatterjee printed as 27 Ind. Cas. 83.

Babu *Gobinda Chandra Dey Roy*, for the Appellant.

Babu *Sasankajibon Ray*, for the Respondent.

JUDGMENT.—This is a suit brought to recover possession of land, and to understand the legal question at issue it is necessary to state briefly what the facts of the case are. There was a Hindu father governed by the *Dayabhaga* school of law who at his death left two daughters, Kasiswari and Harasundari, and a daughter-in-law, Umatara, the wife of a predeceased son. Kasiswari had two sons. On the death of the father, Kirti Narain, the daughters who were his heirs did not obtain possession, but Umatara, his daughter-in-law, did. She purported to alienate the estate to the predecessor of the plaintiff, and the possession of Umatara and those who claim under her by purchase was for more than twelve years. Not only was this possession for more than twelve years, but this possession was adverse to Kasiswari and Harasundari. The result was that section 28 of the Indian Limitation Act operated, with the consequence that the right of the daughters became extinguished. By some means, which are not disclosed, Kasiswari, defendant No. 3, and her sons, defendants Nos. 1 and 2, afterwards got into possession of the property, and the present suit is to recover possession from them. Defendants Nos. 1 and 2 have no present title. That would have been with Kasiswari, defendant No. 3, had it not been extinguished. So far as the original title to a moiety is concerned, it is not suggested before us that the claim of the plaintiff could be resisted, but it is said that inasmuch

as Harasundari died in 1306, the plea of adverse possession and the consequent extinguishment cannot prevail as to the 8-annas that originally survived to Kasiswari on Harasundari's death. So the problem that arises in this case is, what was the effect of adverse possession against the two daughters who succeeded on the death of their father under the *Dayabhaga* system of law.

The nature of the right acquired by these two daughters is made apparent by the decision of the Privy Council in *Asmritolall Bose* v. *Rajaneekanto Mitter* (1) : and, it is abundantly clear from that case that the survivor of the two daughters came in on the death of her sister, not by way of inheritance as reversioner, but by right of survivorship. It necessarily follows from this that Article 141 does not apply and that the surviving daughter cannot now claim that she acquired a title, on the death of Harasundari, of the nature described in Article 141.

The result appears to me to be that so far as Kasiswari is concerned, her right was extinguished, not only in the original 8-annas that devolved on her, but in respect of the whole 16-annas which passed to her and her sister as a single inheritance on the death of their father.

It is unnecessary for us now to express any opinion as to what will be the position of defendants Nos. 1 and 2 on the death of Kasiswari. That depends on considerations which are outside the problem with which we have to deal. It is sufficient for our purpose to say that there was twelve years' adverse possession as against Kasiswari and Harasundari, and as against them and the survivor of them there was, by virtue of section 28, an extinguishment of their right in favour of the plaintiff or those under whom the plaintiff claims.

This in effect is the view taken by Mr. Justice D. Chatterjee, and we must, therefore, dismiss this appeal with costs.

Appeal dismissed.

(1) 2 I. A. 113; 23 W. R. 214; 15 B. L. R. 10.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 1181 OF 1911.

April 30, 1912.

Present:—Mr. Justice Kensington.

THE SINGER MANUFACTURING COMPANY OF LAHORE—PLAINTIFFS—PETITIONERS

versus

MUHAMMAD DIN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. IX, r. 13—Ex parte decree against several defendants—Application to set aside made by some—Power of Court to set aside decree against non-applying defendants—Principal and surety—Liability of surety.

The plaintiff sued *M* as principal and *N* as surety. A decree was passed against both, but *ex parte* against *M*. On the application of *M* alone the Court set aside the decree against both *M* and *N*, and eventually released *N* from liability, holding that he was not liable as a surety and that he had signed the contract, the basis of the suit, as a witness only. On application for revision by plaintiff:

Held, that the Court was wrong in setting aside the decree passed against *N*, as the contract clearly showed that *N* was liable as surety, and the Court was not justified in finding that *N* had signed the contract as a witness only.

Petition, under section 25 of Act IX of 1887, for revision of the order of the Judge of the Small Cause Court, Lahore, dated 21st March 1911, decreeing claim in the plaintiffs' favour with proportionate costs against defendant No. 1 alone.

Messrs. *Broadway* and *Obedulla*, for the Petitioners.

JUDGMENT.—The plaintiffs-petitioners sued Muhammad Din, principal, and Nathu, as surety, for Rs. 160 on the 15th August 1910. A decree was passed against both defendants for Rs. 130, *ex parte* against Muhammad Din only.

On the 16th December 1910 the *ex parte* decree was set aside on an application by Muhammad Din alone, but the case was re-heard as if the decree against Nathu was still open.

On the 21st March 1911, the Court released Nathu from liability and gave a decree for Rs. 78 against Muhammad Din.

The plaintiffs have applied for revision both as to the amount of the decree and more particularly as to the release of Nathu from liability.

Neither defendants have appeared in this Court. There is no explanation of Muhammad Din's absence. Notice reached Nathu, but he declined to receive it on the ground that

there was an omission of the words : "Mistri" in the description of his father's name. There appears to me no doubt that he was properly served, and that his refusal to accept notice was contumacious. The revision is accordingly heard *ex parte* against both defendants.

The Small Cause Court was clearly in error in setting aside the original decree against Nathu, and after examining the contract note in question, I consider that the Court was also wrong in eventually holding that Nathu did not sign as a guarantor. The latter finding that he signed as a witness only is not justified, especially as neither of the defendants ventured into the witness-box to deny the plaintiffs' clear allegations.

Counsel for plaintiffs does not press the question that a larger sum than Rs. 78 is strictly speaking due. The plaintiff is satisfied with the establishment of Nathu's joint liability and waives any further demand.

The revision is accordingly allowed *ex parte*. The lower Court's decree is altered to one for Rs. 78 and costs against both the defendants, Muhammad Din and Nathu.

The decree will carry costs to the plaintiffs in this Court also.

Revision accepted.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 345 OF 1910.

July 28, 1914.

Present:—Sir Alfred Kensington, KT., Chief Judge, and Mr. Justice Shah Din.

Diwan DAYA KISHEN KAUL—DEFENDANT—APPELLANT

versus

FRANK B. POOL—PLAINTIFF—RESPONDENT.

Promissory note—Principal and agent—Partnership—Money deposited with manager of business not in course of business—Liability of proprietor—Estoppel.

The plaintiff sued the defendant, on a document which purported to be a receipt in favour of the plaintiff, for a certain sum of money as a deposit bearing interest. The amount was stated to be on account of plaintiff's one-third share deposited by his grandfather for the plaintiff during his minority. It was not signed by the defendant, but by a person who was alleged by the plaintiff to be the partner of the defendant in a business and who was admittedly acting as its manager. It was not shown that he had received the money and signed the document in the course of the business, but on the contrary, it was found that the money was advanced to the executant to buy up the business from the defendant who was its sole proprietor. It was urged on behalf of the plaintiff (1) that the document was a promissory note and (2) that the defendant had in correspondence described himself as part proprietor of the business:

Held, that the document could not be treated as a promissary note, that the plaintiff had no cause of action against the defendant and that the defendant was in no way estopped by merely describing himself as a part proprietor from showing the true nature of the transaction.

Second appeal from the decree of the Addition Divisional Judge, Lahore, dated 21st February 1910, affirming that of the Subordinate Judge, Lahore, dated the 26th July 1909, decreeing the claim.

Messrs. *Pestonjee Dadabhoy* and *A. B. Broadway*, for the Appellant.

Messrs. *H. A. Herbert* and *A. Brandon*, for the Respondent.

JUDGMENT.

SHAH DIN, J.—(*February 13th*, 1914.)—This appeal has arisen out of a suit brought by the plaintiff-respondent, Frank B. Pool, against the defendant-appellant, Diwan Daya Kishen Kaul, to recover Rs. 3,766-10-4, principal and interest, alleged to be due on a document dated the 17th September 1906 (Exhibit P1). Both the Courts below have concurred in decreeing the plaintiff's claim, and the defendant has preferred a further appeal to this Court.

Exhibit P1, on the strength of which the suit has been brought, is in the following terms :—

"Symons and Co., Pharmaceutical Chemists, the Charing Cross Dispensary, Lahore, dated the 17th September 1906.

"Received from Mr. Frank B. Pool the sum of Rs. 3,333-5-4 (three thousand three hundred and thirty-three, annas five and piés four only) as a deposit bearing interest at 6 per cent. per annum from 1st September 1906. This being one-third share of Rs. 10,000 (ten thousand only) deposited by his grandfather and guardian on his behalf during his minority and which minority ceases from 1st September 1906. (Signed) Symons and Co." Stamp one anna.

To elucidate the circumstances under which this document was executed, it is necessary to state a few facts and refer to certain letters on the record in chronological order. Some time before December 1898, a Mrs. Pollard of Simla, who was carrying on

the business of Chemists, Druggists and Manufacturers of Ærated Waters at Lahore under the name and style of Symons and Company, sold the said business, including the stock-in-trade, book-debts, furniture, etc., to one Mr. Robert Dean O'Dell, it being agreed between the parties that the business may be carried on in future under the name and style of Symons and Company, Lahore. The said R. D. O'Dell, re-sold the business to Pandit Daya Kishen Kaul on the 9th December 1898 for Rs. 10,000. After the purchase of the business from R. D. O'Dell, Pandit Daya Kishen Kaul invested a further sum of Rs. 8,240-6-0 in the said business before November 1899, and by a deed of agreement dated the 18th November 1899 (Exhibit D13), executed between Pandit Daya Kishen Kaul and R. D. O'Dell, the latter agreed that in consideration of the special knowledge of the business possessed by him, he will continue to manage the same on behalf of the said Pandit Daya Kishsen Kaul as heretofore on the terms and conditions agreed upon and set forth in the deed of agreement. Then followed ten clauses II to XI, of which clauses IV, VI, X and XI are the only clauses meterial to this case. Clause IV provides in effect that out of six annas of every rupee of the profits, after making certain payments on account of the interest on the capital fund due to Pandit Daya Kishen Kaul and also on account of the expenses incidental to the business, etc., R. D. O'Dell will draw his salary as Manager of the business. Under clause VI, R. D. O'Dell agreed that in consideration of the said share of profits as provided for in clause IV, he will devote his whole time and attention to managing, conducting, superintending, and improving the business. Clause X recited that the agreement was made for a period of four years ending with the 1st January 1904, and clause XI provided that at any time within the four years abovementioned it will be optional with the said R. D. O'Dell to pay the said Pandit Daya Kishen Kaul all the capital that may then remain invested (*vide* paragraph III) in the business together with interest at 8 per cent. per annum and become full proprietor of the business, good-will, stock-in-trade, etc., and thereafter Pandit Daya Kishen Kaul will cease to have anything to do with the business.

It seems that in the early part of 1903 O'Dell was trying to persuade one Mr. William Dorton to puchase the business of Symons and Company from Pandit Daya Kishen Kaul and thereafter to agree to the business being carried on in partnership by both Dorton and O'Dell. Dorton apparently made an offer by telegram to Pandit Daya Kishen Kaul for the purchase of the business, and the latter communicated by telegram to O'Dell on the subject. This is shown by Exhibit P. W. 15, dated the 30th May 1903, which is a letter written by O'Dell to Dorton. In that letter O'Dell says that the initial outlay (on the business) is Rs. 20,000. On the 1st June 1903 two letters were written to Pandit Daya Kishen Kaul one by O'Dell, Exhibit D7, and the other by Dorton, Exhibit P. W. 16. In Exhibit D7, O'Dell says that he got Mr. Dorton to send to Pandit Daya Kishen Kaul the telegram that he did, and further says that the initial outlay is Rs. 18,240-6-0 which he (Dorton) is quite prepared to pay. In Exhibit P. W. 16, Dorton referring to a telegram received by him from Pandit Daya Kishen Kaul says that the initial outlay on the business as borne out by the books and the agreement between Pandit Daya Kishen Kaul and O'Dell [which no doubt means the agreement, dated the 18th November 1899 (Exhibit D13)] is Rs. 18,240-6-0, and Dorton adds that this amount he is prepared to pay as soon as Pandit Daya Kishen Kaul comes to Lahore and signs the necessary documents. The next important document is Exhibit P. W. 17, dated the 3rd June 1903, which is a letter from Dorton to O'Dell. In this letter reference is made to certain draft articles of agreement which were intended to be the basis of a deed of partnership between the two in connection with the business which Dorton was going to purchase from Pandit Daya Kishen Kaul, and the draft referred to in the letter is the document Exhibit D2 on the record. This draft agreement shows that Dorton had agreed to advance O'Dell Rs. 18,240-6-0 to enable him to buy out Pandit Daya Kishen Kaul by paying the latter the said sum as provided for by clause XI of the deed of agreement, dated the 18th November 1899; and that thereafter O'Dell and Dorton were to enter into partnership to carry on the business of the firm of Symons and Company. On the

10th June 1903, O'Dell wrote a letter to Pandit Daya Kishen Kaul, Exhibit D8, in which he enclosed a cheque for Rs. 8,240-6-0 and said: "As soon as I can raise a further loan of Rs. 10,000, you shall have it per return post. In order to enable me to do so as soon as possible, please send me a letter to the effect that I owe you Rs. 10,000 only, and that as soon as I can pay you that amount the business will be mine. Armed with this I shall try the several banks, and if I have good luck I hope to remit the amount soon." As requested by O'Dell, Pandit Daya Kishen Kaul sent him a letter, dated the 11th June 1903, Exhibit D15, in which it is stated that as soon as the amount of Rs. 10,000 is paid by O'Dell the business will become his and Pandit Daya Kishen Kaul will cease to be a part proprietor of it.

It is important to note here that in Exhibit D8, O'Dell did not say that he had received Rs. 8,240-6-0 from Dorton or that he had sent this sum to Pandit Daya Kishen Kaul on his (Dorton's) behalf; but it is clear from a letter, dated the 2nd October 1906, Exhibit P. W. 1, written by O'Dell to Dorton asking him to return the voucher for Rs. 10,000, that some time between the 3rd and the 10th June 1903, *i.e.*, between the dates on which Exhibit P. W. 17 and Exhibit D8 were written, Dorton advanced to O'Dell in pursuance of the terms of the draft agreement, Exhibit D2, a sum of Rs. 10,000 to enable O'Dell to pay to Pandit Daya Kishen Kaul part of the purchase-money of the business, Rs. 18,240-6-0. The voucher for Rs. 10,000 referred to in Exhibit P. W. 1 has not been produced in the case; but it is not disputed by either side that Rs. 10,000 was advanced by Dorton to O'Dell some time between the dates mentioned above. It would seem that although originally O'Dell had arranged to let Dorton purchase the business from Pandit Daya Kishen Kaul on payment of Rs. 18,240-6-0, they subsequently agreed that the purchase should be made by O'Dell under the terms of clause XI of the agreement, dated the 18th November 1899; and Dorton therefore advanced Rs. 10,000 to O'Dell to make part payment to Pandit Daya Kishen Kaul towards the purchase of the business in his own name. It is not clear why Dorton did not pay the whole amount of Rs. 18,240-6-0 to O'Dell, as apparently he was originally prepared to pay to Pandit Daya Kishen Kaul. Whatever the reason for this may have been, Dorton paid O'Dell only Rs. 10,000 and it was clearly out of that Rs. 10,000 that O'Dell sent to Pandit Daya Kishen Kaul a cheque for Rs. 8,240-6-0. At the same time O'Dell wrote to Pandit Daya Kishen Kaul saying that he was arranging to raise the additional Rs. 10,000 to complete the purchase of the business, and he asked for a letter from Pandit Daya Kishen Kaul to the effect that as soon as the sum is paid to him the business will be O'Dell's.

It is perfectly clear from the above correspondence that O'Dell intended to exercise the option that was given to him under clause XI of the agreement, dated the 18th November 1899, of buying out Pandit Daya Kishen Kaul after paying the latter the capital invested by him in the business in question, and that Dorton advanced Rs. 10,000 to O'Dell to enable him to carry out this intention. O'Dell paid Pandit Daya Kishen Kaul Rs. 8,240-6-0, as we have seen above, on the 10th June 1903; but for some reason or other he did not pay him the balance, Rs. 10,000, and so the intended purchase of the business by O'Dell from Pandit Daya Kishen Kaul was not completed. Meanwhile, it would seem that the Rs. 10,000 which was advanced by Dorton to O'Dell was treated by the latter as a deposit with the firm of Symons and Co. bearing interest at the rate of 6 per cent. per annum. It would further appear that the money really belonged to three of Dorton's grandchildren who were minors in 1903, but who attained majority some time before September 1906. On the 1st September 1906 O'Dell, on behalf of Symons and Co., wrote a letter, Exhibit P. W. 2, to Frank B. Pool, plaintiff in the present case, stating that his grandfather, W. Dorton, had written to O'Dell that from 1st September 1906 the firm of Symons and Company would have to deal direct with his three grandchildren, Oswold Pool, Mrs. Louisa Wight, and Frank D. Pool, in connection with the deposit of Rs. 10,000 and asking Frank B. Pool what his intentions were on the subject. On the 17th September 1906 the document (Exhibit P1), which is the basis of the present suit, was executed by O'Dell, in the name of Symons and Co., in favour of Frank B. Pool, and on the 2nd October 1906 he wrote a letter, Exhibit P. W. 1, to Dorton saying that as Symons

and Co. had adjusted Mr. Oswold Pool's claim for Rs. 3,333-5-4 and had entered into an agreement with Mr. Frank B. Pool, the voucher for Rs. 10,000 might be returned to the company. Whether this voucher for Rs. 10,000 was returned or not is not known, and, as we have said above, the voucher has not been placed on the record. O'Dell died on the 30th November 1906, and on the 1st December 1906 Dorton sent a notice, Exhibit P. W. 3, to Pandit Daya Kishen Kaul saying that as the co-partner of the firm of Symons and Co., Chemists, he (Pandit Daya Kishen Kaul) was indebted to Dorton and his grandson, Frank B. Pool, in the sum of Rs. 6,666-10-8 and asking for a settlement of accounts at once. In this notice O'Dell is referred to as the Managing Proprietor of the firm. After the death of O'Dell certain proceedings connected with the administration of O'Dell's estate were held in the Court of the District Judge, Lahore, and in the course of those proceedings certain applications were made by Pandit Daya Kishen Kaul and his Legal Adviser, Mr. Harkishen Lal, to the District Judge which have been referred to in argument. In one of them, Exhibit P. W. 9, dated the 3rd January 1907, Pandit Daya Kishen Kaul referred to O'Dell as "the Managing Partner" of the firm of Symons and Co., and to himself as "the partner in the business," and in another application, Exhibit P. W. 12, dated the 7th March 1907, Mr. Harkishen Lal described his client, Pandit Daya Kishen Kaul, as the surviving partner. On the other hand, an application dated the 15th April 1907 (Exhibit P. W. 13) was made by Dorton in the District Judge's Court in which he referred to O'Dell as Manager and to Pandit Daya Kishen Kaul as Proprietor of the firm of Symons and Co. The real position of Pandit Daya Kishen Kaul was, however, explained by Mr. E. W. Parker, Advocate, in a statement which he made in the District Judge's Court on behalf of the Pandit on the 22nd October 1907, Exhibit P. W. 14.

The present suit has been filed by Frank B. Pool against Pandit Daya Kishen Kaul to recover principal and interest alleged to be due under the document of the 17th September 1906, Exhibit P 1, which was executed in his favour by O'Dell in the name of Symons and Co., and the question for decision before us is whether the defendant is liable to the plaintiff upon that document. The plaintiff has described the document throughout this litigation as a promissory note, but it clearly is not a promissory note and cannot be treated as such, but whether it can be so treated or not, it is not disputed that the defendant can be liable on this document only if it is proved that at the time when it was executed by O'Dell in favour of the plaintiff, O'Dell was a partner in the firm of Symons and Co., and further that he had borrowed the money in respect of which this document was executed in his capacity as such partner in the ordinary course of business. The Courts below have found on the affirmative on this question and have, therefore, concurred in decreeing the plaintiff's claim. We find ourselves unable to agree in this view. The whole course of the correspondence between Dorton and O'Dell, between O'Dell and Pandit Daya Kishen Kaul as also between Dorton and Pandit Daya Kishen Kaul indicates clearly that the sum of Rs. 10,000 was not advanced by Dorton in June 1903 to O'Dell in his capacity of partner of the firm of Symons and Co., but that it was advanced to him to enable him to buy out Pandit Daya Kishen Kaul, who was known and considered to be the sole Proprietor of that firm, on the understanding that thereafter the business would be carried on in partnership by O'Dell and Dorton. The deed of agreement, dated the 18th November 1899, clearly shows, in our opinion, that O'Dell was not a co-partner in the firm with Pandit Daya Kishen Kaul, but that the latter was its sole Proprietor and O'Dell was simply a Manager of the business who was being paid his salary as Manager out of a six-annas share of the profits of the concern. It is clear from O'Dell's letter to Pandit Daya Kishen Kaul, dated the 10th June 1903 (Exhibit D 8), that O'Dell did not consider himself a partner in the business and that his intention was to pay Rs. 18,240-6-0 to Pandit Daya Kishen Kaul and to become the sole Proprietor thereof in place of the latter. The words part proprietor used by Pandit Daya Kishen Kaul in his letter of the 11th June 1903 (Exhibit D 15) on which the Divisional Judge relies were used by Pandit Daya Kishen Kaul in a loose sense, as meaning that on payment of part of the

purchase-money O'Dell had become as it were a part proprietor of the business to the extent of the money advanced by him. Strictly speaking this view of the position was incorrect, and it is manifest that at the time when the Rs. 10,000 was advanced by Dorton to O'Dell, Pandit Daya Kishen Kaul was no less the sole proprietor of the business because in his letter of the 11th June he referred to himself as "part proprietor." Clearly no question of estoppel arises in this case with reference to the letter of the 11th June, and the plaintiff's suit must succeed or fail according as it is held that at the time when Dorton advanced the Rs. 10,000 to O'Dell the latter was or was not a partner in the firm of Symons and Co., who had power to borrow and had borrowed the money in the ordinary course of business as such partner. In our opinion O'Dell was at that time not a partner in the firm, nor did he borrow the money from Dorton on behalf of the firm in the ordinary course of business as such partner. The mere fact that O'Dell signed the voucher for Rs. 10,000 in the name of Symons and Co., (assuming that he did so sign it) is not sufficient to create any liability on the part of the Proprieter, Pandit Daya Kishen Kaul, and it follows that (Exhibit P1), which is sued upon in this case and which was executed by O'Dell in the name of Symons and Co., cannot furnish the plaintiff with a cause of action against Pandit Daya Kishen Kaul. Sections 249, 250 and 251 of the Contract Act, on which the Divisional Judge has relied in support of his view that Pandit Daya Kishen Kaul is liable to the plaintiff on Exhibit P1 have (upon our finding as to the position of O'Dell in the firm) no bearing whatever upon the case.

For the reasons given, we accept this appeal and reversing the decree of the Divisional Judge dismiss the plaintiff's suit. The record shows that at one time the defendant gave the plaintiff to understand that he was prepared to settle his claim on certain terms without prejudice; but that as the plaintiff found himself unable to forego any part of his claim, the defendant stood on his legal rights and denied his liability *in toto*. The plaintiff had a perfectly good claim against O'Dell who was managing the business of the defendant's firm, and it is unfortunate that owing to the death of O'Dell plaintiff has lost all that was advanced by his *quondam* guardian for his benefit to the deceased. In these circumstances we think that the ends of justice would be met by ordering the parties to pay their own costs throughout and we direct accordingly.

KENSINGTON, C. J.—I agree throughout with my learned colleague and regret that by an unfortunate oversight there has been delay in delivery of the judgment, which was announced at the hearing.

Appeal accepted.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 888 OF 1912.

May 6, 1914.

Present:—Mr. Justice Shadi Lal.

AMIR CHAND—OBJECTOR—PETITIONER

versus

RAM SARAN DAS—DECREE-HOLDER AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 58—Objection to attachment Court's duty to decide on merits.

An objection to an attachment of property under Order XXI, rule 58, Civil Procedure Code, should not be dismissed and the claimant forced to file a regular suit to get the attached property released, on the ground that the question of possession is doubtful and of title complicated, but should be adjudicated on the merits.

Petition, under section 70 (*a*) of Act III of 1912, for revision of the order of the District Judge, Lahore, dated the 23rd February 1912, dismissing the objection.

Kanwar *Dalip Singh*, for Mr. *Gokal Chand Narang*, for the Petitioner.

Mr. *Duni Chand*, for the Respondents.

JUDGMENT.—The District Judge has refused to adjudicate upon the objection preferred by the petitioner, a minor, against the attachment of certain property, upon the ground that the question of possession is doubtful and of title most complicated. He, therefore, declined to deal with the question of title and possession in summary proceedings and cited *In the matter of Deafholts* v. *Peters* (1) in support of his view. The

(1) 14 C. 631.

Calcutta case has been distinguished by this Court in *Musammat Chand Kuar* v. *Mela Ram* (2), and the latter judgment is binding upon me. I find that the decree in the present case is very similar to the one in *Musammat Chand Kuar* v. *Mela Ram* (2) and the executing Court has ordered the attachment of the mortgaged property which has led to the objections by the petitioner. If a person is in possession of property as his own and satisfies the Court on that point, I fail to see why he should be forced to file a regular suit to get the property released from attachment.

In the present case, there is this further point in favour of the petitioner that he applied to be impleaded as a defendant in the mortgage suit and the plaintiff resisted his application and got it rejected. Surely the plaintiff cannot now ask the executing Court to refuse to give a decision on the rights of the minor when the latter claims to be in possession as owner. The refusal by the Court will lead to great injustice.

Following *Musammat Chand Kuar* v. *Mela Ram* (2), I set aside the order of the District Judge and direct him to decide the objection case on the merits. The parties will bear their own costs in this Court.

Revision accepted.

(2) 8 P. R. 1897.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 458 OF 1913.

June 24, 1914.

[*Present*:—Mr Justice Scott-Smith.

Musammat JUGGO KAUR—APPLICANT—APPELLANT

versus

DURGA DAS—RESPONDENT.

Guardians and Wards Act (*VIII of* 1890), *s.* 25—*Guardian and ward—Custody of minor—Welfare of minor only to be considered—Practice—Enquiry—Court, duty of.*

In deciding the question of custody of a minor, the welfare of the minor alone is to be considered.

In such a case all the Court has to do is to satisfy itself what is best in the interests of the minor, and is not bound to make a protracted inquiry.

Miscellaneous first appeal from the order of the District Judge, Delhi, dated the 11th January 1913, rejecting the application for custody of Parshotam Das, minor,

Lala *Balwant Rai*, for the Appellant.

Mr. *Santanam*, for the Respondent.

JUDGMENT.—On the 8th June 1912 *Musammat* Juggo was appointed guardian of the persons and property of her minor sons one of whom is Parshotam Das, aged 13 or 14 years. He is at present living with his grand-uncle, Durga Das, who is a certificated and practising *Mukhtar* and apparently a man of means. *Musammat* Juggo's present application was under section 25 of the Guardians and Wards Act for return of Parshotam Das to her custody. The District Judge has refused the application and has ordered that the boy should remain with Durga Das for the present, the order to remain in force so long as the boy wishes to remain with him.

Musammat Juggo appeals,—and after a careful consideration of all the facts of the case, I cannot find any sufficient reason to interfere with the order of the District Judge. What the Court has to look to above all things in these cases is the welfare of the minor. The real reason why *Musammat* Juggo wishes the boy to live with her is that he may work for and help to maintain her; this emerges from the 6th ground of appeal. Considering his age, he is not fit to maintain his mother and brothers, and it is far more to his advantage that he should be comfortably maintained by his uncle who is well off and able to support him.

An objection is raised to the effect that *Musammat* Juggo was not given an opportunity of producing evidence. She summoned only one witness, who was, however, not examined; the reason for this is not apparent on the record. But in any case all the Court had to do was to satisfy itself what was best in the interests of the minor, and was not bound to make a protracted inquiry. The inquiry made appears to me to be quite sufficient.

The appeal is dismissed, but I leave the parties to bear their own costs.

Appeal dismissed.

SAHODORA MUDIALI v. SARBOSOBHA DASI.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 1125 AND 1264 TO 1268 OF 1912.

June 10, 1914.

Present:—Mr. Justice N. Chatterjea and Mr. Justice Beachcroft.

SAHODORA MUDIALI AND OTHERS—DEFENDANTS—APPELLANTS

versus

SARBOSOBHA DASI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 8—Suit for rent other than house rent, whether cognisable by Small Cause Court—Revenue Sale Law (Act XI of 1859), s 37 cl. (4)—Land on which a garden stood before, sold for arrears of revenue—Incumbrance, whether void—Landlord, right of, to annul notice—Notice, how sufficient—Civil Procedure Code (Act V of 1908), s. 102—Appeal, second, whether competent.

A suit for rent (other than house rent) is not cognizable by a Small Cause Court and in the absence of a notification issued by the Local Government expressly investing a Judge of the Court of Small Causes with authority to exercise jurisdiction with respect thereto, a second appeal in such a suit, although the value thereof does not exceed Rs. 500, is not barred by section 102, Civil Procedure Code.

The mere fact that a garden was made on a piece of land a quarter of a century before it was sold for arrears of revenue, would not make it land "on which a garden has been made" for all time to come, and it does not fall within the exception to section 37 of Act XI of 1859 and is liable to be annulled.

A sale for arrears of revenue does not *ipso facto* avoid incumbrances or under-tenures, but only renders them voidable at the option of the purchaser. It is, therefore, necessary that the purchaser must, by some unequivocal act, indicate his intention to avoid under-tenure if he desires to do so A formal written notice is not essential, but the election of the purchaser to avoid must be brought to the knowledge of the tenure-holder.

Per *Beachcroft, J.*—Section 37, clause (4), of Act XI of 1859 contemplates improvements or works of a permanent character and these are protected, irrespective of whether the lease was or was not given for the purpose of the work in question. But to afford protection the work must still be in existence or the land be used for the purpose of the work.

Appeals against the decrees of the Additional District Judge, 24-Parganas, dated the 19th of February 1912, reversing that of the Munsif, Second Court at Sealdah, dated the 26th of April 1911.

Babus *Dwarka Nath Chuckerbutty, Mohendra Nath Roy, Biraj Mohun Mojumdar* and *Harendra Kumar Sarbadhicary*, for the Appellants.

Mr. *B. Chuckerbutty* and Babu *Atul Krishna Roy*, for the Respondent.

JUDGMENT.

N. CHATTERJEA, J.—These appeals arise out of suits for recovery of rent of homestead lands comprised in a *mouroosi mokurari* tenure which belonged to the plaintiffs. The defence was that the tenure held by the plaintiffs had been extinguished by the sale of the estate within which it is situated, for arrears of revenue under the provisions of Act XI of 1859, that the purchaser had entered into possession of the estate and that the defendants had paid the rents to the purchaser.

A preliminary objection has been taken to the hearing of the appeals on behalf of the respondents under section 102, Civil Procedure Code. It has been contended that a suit for rent is of a nature cognizable by the Small Cause Court, and reliance is placed on the case of *Soundaram Ayyar* v. *Sennia Naickan* (1). Now, Article 8 of the second Schedule of the Provincial Small Cause Courts Act expressly exempts suits for rent other than house rent from the cognizance of Small Cause Courts, unless the Judge of the Court of Small Causes has been expressly invested by the Local Government with authority to exercise jurisdiction with respect thereto. But the majority of the Judges constituting the above Full Bench of the Madras High Court were of opinion that a suit for rent is of the nature of a suit cognizable by the Small Cause Court. It appears that by a notification the Madras Government has invested all Subordinate Judges and District Munsifs within the Presidency with jurisdiction to try on their Small Cause Court side all suits for rent falling within the pecuniary limits of their special jurisdiction. No such notification has been issued by the Local Government in this Presidency and so far as this Court is concerned, second appeals in suits for rent (other than house rent), although the value thereof does not exceed Rs. 500, have always been entertained. I accordingly overrule the preliminary objection.

Two questions have been raised in these appeals. The *first* is whether the tenure of the plaintiffs is protected under the provisions of clause (4) of section 37, Act XI of 1859, and *secondly*, whether the tenure has been annulled.

As regards the first question it appears that the estate consists only of 2 *bighas* 14 *cottas* of *basit* land. The learned District Judge, however, has held the land is one on which a garden has been made, because it

(1) 23 M. 547 (F. B.); 10 M. L. J. 329.

formed part of 10 *bighas* of land which was once a garden and is called Seal's Garden. I am of opinion that he is wrong in this view. The land ceased to be garden about a quarter of a century ago, and tenants have been settled on the land since then. The mere fact that a garden was made on a piece of land a quarter of a century before the sale would not make it land "on which a garden has been made" for all time to come. The land comprised in estate No. 1678 for a very long time has been, and at the time of the sale, was *basti* land. In the plaints themselves, the lands are described as homestead lands. I am accordingly of opinion that the tenure does not fall within the exception to section 37 of Act XI of 1859 and is liable to be annulled.

The next question is, whether the tenure has been annulled. It is no doubt true that a sale for arrears of revenue does not *ipso facto* avoid incumbrances or under-tenures, but only renders them voidable at the option of the purchaser. See *Titu Bibi* v. *Mohesh Chunder Bagchi* (2). But the purchaser may annul an under-tenure not only by the institution of a suit against the under-tenure-holder, but can do so by any suitable means. It has been contended on behalf of the appellant that, it is not necessary to give any notice to the under-tenure-holder for avoiding the tenure, and reliance is placed on an observation in the judgment in the case of *Darsan Singh* v. *Bhawani Koer* (3) *viz.*, that "the purchaser may elect to annul an under-tenure not only by institution of a suit or by giving a notice to vacate, but may indicate it by other means." In that case a notice was in fact given to the under-tenure-holder, and all that was meant to be said was that a formal written notice was not essential. The effect of a sale is not *ipso facto* to avoid under-tenures; the purchaser has the option of avoiding them or keeping them intact. It is necessary, therefore, that the purchaser must by some unequivocal act indicate his intention to avoid under-tenure, if he desires to do so. A formal written notice to the tenure-holder would certainly be the most convenient mode of doing it, and this litigation demonstrates the difficulties in which the purchaser may be placed if he omits to serve a written notice on the tenure-holder. But I do not think that a formal notice is essential and although the election of the purchaser to avoid must be brought to the knowledge of the tenure-holder, a written notice is not the only mode in which it can be done.

The learned District Judge has held that the verbal notice said to have been given to the plaintiff was not proved, and that "the purchaser did nothing to avoid the incumbrance, but only started collecting rent on his own account which I hold cannot be sufficient notice to the plaintiff." But the Court of first instance found that on the purchaser's demanding rent from the tenants, they informed the plaintiff of it, but that he declined to assist them unless they paid off the arrears of rent due from them, that the purchaser sued the tenants for rent, took out warrant of attachment in execution of decrees and realised rents from the tenants in repudiation of the plaintiff's title, and that Court came to the conclusion that the purchaser is in actual possession of the *taluk* through the tenants. These findings have not been displaced on appeal. If these findings are correct, they show that the plaintiff had not only notice of unequivocal acts on the part of the purchaser indicating his election to avoid the *mokarari*, but that the purchaser had in fact obtained possession of the estate.

It was pointed out on behalf of the respondents that in the case of *Mir Wasiruddin* v. *Lala Deoki Nandan* (4) the forcible taking away of crops of the tenants by the purchaser and the institution of rent suits, which must be taken to be strong indications of the purchaser's intention to avoid under-tenures, were held not to be sufficient. But in that case the purchaser sought to annul under-tenures and recover possession more than twelve years after the date of the sale, and those facts were considered by the learned Judges as bearing upon the question of limitation. The rent suits instituted against some of the tenants were withdrawn as soon as the latter denied the plaintiff's title and no further attempt was made to enforce the right to realise any rent from any of the tenants of the property. The only attempt

(2) 9 C. 683 (F. B.), 12 C. L. R. 304.
(3) 19 Ind Cas 974; 17 C. W. N. 984 at p 987.
(4) 6 C L J. 472 at p 488.

at possession consisted in an endeavour by a servant to take away crops grown by one of the many tenants of the estate, and the learned Judges held that an entry upon the land for this purpose, an entry which resulted in a conviction for theft and criminal trespass, did not constitute possession, much less possession of the entire estate for the purposes of limitation.

In the present case there is no question of limitation. Had the purchaser instituted a suit for annulment of the plaintiffs' *mokarari*, they could have no possible defence to the action, and if the purchaser has succeeded in obtaining possession of the estate peacefully and openly and is in possession of the estate by receipt of rent through the tenants, the *mokarari* of the plaintiffs must be held to have been annulled. The lower Appellate Court has, however, not come to clear findings upon the facts found by the Court of first instance. The decrees of the lower Appellate Court are accordingly set aside and the cases sent back to that Court. The Court will come to clear findings upon the facts found by the Munsif indicated above, and dispose of the appeals according to law. Costs to abide the result.

BEACHCROFT, J.—All civil suits the value of which does not exceed Rs. 500 are cognizable by Courts of Small Causes, subject to the exceptions contained in the first Schedule of the Provincial Small Cause Courts Act and to the provision of any special Act. Suits for rent, other than house rent, are included in the first Schedule of the Provincial Small Cause Courts Act. But the Local Government has authority to vest Judges of Small Cause Courts with powers to try rent suits. No notification has been made vesting Small Cause Court Judges in Bengal in general, nor the Judge of first instance in this particular case, with such powers. I am, therefore, of opinion that this appeal is not incompetent.

As regards the question of annulment of an under-tenure, I agree with my learned brother in thinking that no particular method of expressing an intention to annul an under-tenure is necessary, but that any unequivocal act is sufficient which indicates the intention to annul and which brings that intention to the knowledge of the under-tenure-holder. The learned Judge has found against the story that definite notice was given by the purchaser to the under-tenure-holder. There remains the question of the collection of rent from the tenants. In my opinion it is impossible to lay down any hard and fast rule as to how far collection from tenants may be taken, not only to indicate the intention to annul, but also to establish the fact that that intention was brought to the knowledge of the under-tenure holder. Collection from so large a majority of the tenants as to amount to obtaining possession of the estate would probably be sufficient to indicate the intention to annul to the under-tenure-holder. But other considerations might come in, *e.g.*, whether the number of tenants was large or small, and whether collections were made openly or secretly. It is needless to multiply examples. It is sufficient to say that two things must be established: (1) a definite intention to annul, (2) an indication of that intention to the under-tenure-holder.

As the learned Judge has dealt with this part of the case apparently with the idea that a definite notice was necessary, I agree in the proposed order of remand.

As regards the remaining question whether the under-tenure was protected under clause 4 of section 37, Act XI of 1859, it is clear that in so far as protection is claimed on the ground that the land is garden land, the claim must fail. It is apparently now a mill *basti*, but the learned Judge held it was protected because it was part of a larger area on which a garden was once made. Now the 4th clause of section 37 clearly contemplates improvements or works of a permanent character. These are protected, irrespective of whether the lease was or was not given for the purpose of the work in question.

But to afford protection the work must still be in existence or the land be used for the purpose of the work. The wording of the clause is "leases of land whereon..... gardens have been made." The perfect tense denotes a present state. If the garden has ceased to exist, the fact that there was once a garden on the land will not protect it.

Whether the land would be protected as part of a mill *basti* would depend on a variety of circumstances. Land on which there are merely temporary huts is not of course on that account protected, but if the *basti*

land is covered by the lease of land on which the mill stands, or if the *basti* is an integral part of the mill and exists only for the purposes of the mill, it is possible that it might be protected. It is not, however, necessary to pursue this point further as protection has not been sought on this ground.

Appeals allowed; Cases remanded.

CALCUTTA HIGH COURT.
CIVIL RULE No. 1470 OF 1913.
February 20, 1914.
Present:—Mr. Justice Carnduff and Mr. Justice Richardson.

JADU NATH DEY AND ANOTHER—PLAINTIFFS—PETITIONERS
versus
ASAN MANDAL—DEFENDANT—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. IX, r. 13—Compromise decree—Compromise effected by unauthorised person—Decree, whether ex parte and can be set aside as such.

A decree based on a compromise cannot be treated as an *ex parte* decree and set aside as such simply because one of the parties was not authorised to compromise.

Revision, under section 115, Civil Procedure Code, in the matter of Miscellaneous Case No. 53 of 1913 of the Second Court of the Sadar Munsif, Mymensingh.

Babu *Upendra Kumar Roy*, for the Petitioners.

JUDGMENT.—The facts underlying this Rule are these: The petitioner sued the opposite party for rent. The suit was decreed in accordance with a petition of compromise signed apparently by both parties and their Pleaders. After the lapse of some two years, the opposite party applied to the Court for restoration of the suit, on the ground that he had not authorised the compromise and that the decree obtained against him was, in effect, an *ex parte* decree. The Court below allowed the application apparently under Order IX, rule 13, and this Rule was issued on the opposite party to show cause why the order should not be set aside on the ground that the Court below had no jurisdiction to make it under the rule quoted above.

No cause has been shown and the Rule is made absolute. We make no order as to costs.

Rule made absolute.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 2322 OF 1909.
June 8, 1914.
Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

AKSHOY KUMAR BANERJEE AND OTHERS.—DEFENDANTS—APPELLANTS
versus
CORPORATION OF CALCUTTA—PLAINTIFF—RESPONDENT.

Calcutta Municipal Act (III of 1899), ss. 223, 228—Consolidated rate first charge on property—Mortgage and charge, distinction between—Purchaser for value without notice—Purchaser under involuntary alienation—Inquiry.

Section 223 of the Calcutta Municipal Act, 1899, deals with the question of the personal liability (liability *in personam*) of the purchaser of the premises for arrears unsatisfied when the title vested in him. Section 228 deals with the question of the liability of the premises (liability *in rem*) for the rates due thereon. Section 228 is perfectly general in its terms and makes the consolidated rate, as it accrues due from time to time, a first charge on the property (subject to arrears of land revenue). The objects of the two sections are radically distinct and section 228 cannot be controlled by section 223.

A mortgage is a transfer of an interest in specific immoveable property. A charge only secures payment of money out of that property. The distinction becomes important in the determination of the question whether the property can be followed in the hands of a *bona fide* purchaser for value without notice.

Where only a charge has been created by express words of the Statute, the charge cannot be enforced against the property in the hands of a *bona fide* purchaser for value without notice.

A defendant to avail himself of the defence ought to plead in his written statement that he is a purchaser for value without notice, and the onus of proving it lies on him.

A purchaser with notice may shelter himself under the title of the person from whom he purchased if the latter could successfully raise the defence of want of notice.

To a purchaser acquiring title under an involuntary alienation, constructive notice cannot be imputed to the same extent as to a purchaser at a private sale. A purchaser without notice from a person who had notice is protected.

Where a purchaser should, and could, have ascertained before his purchase the true state of affairs as to the charge upon the property purchased by him, he is in the same position as if he had made such inquiry and the purchasers from him are in no higher position, if they could have by inquiry, before they acquired title, ascertained the fact.

Second appeal from a decision of the Sub-Judge of the 24-Parganas, dated 1st July 1909, modifying that of the Munsif, Second Court, at Sealdah, dated 27th February 1909.

Babu *Nagendra Nath Ghose*, for the Appellants.

AKSHOY KUMAR v. CORPORATION OF CALCUTTA.

Mr. *S. P. Sinha* and Babu *Debendra Chandra Mullick*, for the Respondent.

JUDGMENT.

MOOKERJEE, J.—This is an appeal by four of the defendants in a suit to enforce payment of money charged upon immoveable property. The land and buildings in suit lie within the jurisdiction of the Municipal Corporation of Calcutta and were originally owned by Saudamini Dasi. On the 11th September 1897 she executed a mortgage of this property by way of conditional sale. On the 13th January 1903 her right, title and interest were sold in execution of a decree for money against her and were purchased by Hari Charan Ojha, the first defendant to this suit. In 1904 the mortgagee, Bankubihari Ghose, sued to enforce his security, obtained the usual foreclosure decree, and ultimately, when the decree was made absolute, became full owner of the property. On the 19th February 1907 Bankubihari Ghose transferred the property to the four persons who are defendants other than the first defendant to this suit. On the 20th August 1908 the Corporation of Calcutta commenced this action against the five defendants to enforce a charge on the property in their hands in respect of arrears of consolidated rates. These arrears had accrued due during the three years from the 1st April 1903 to the 31st March 1906. The first defendant resisted the claim on the ground that she was not the owner in possession of the property and that no personal decree could be made against her. The remaining four defendants contended that there was no statutory charge enforceable against the property in their hands, and that as the arrears had accrued due more than one year before they became owners of the property, no personal decree could be made against them. The Courts below have dismissed the suit against the first defendant as also the claim for a personal decree against the other defendants. But they have made a decree which entitles the Corporation to realize the arrears by sale of the land and buildings, if the decretal amount is not paid within thirty days of the decree. On the present appeal, which has been preferred by the defendants other than the first, two points require consideration, namely, *first*, whether an arrear of consolidated rate is a charge on the land and buildings in respect of which it has accrued due and, *secondly*, if there is such a charge, whether it can be enforced against the property in the hands of the present appellants.

The answer to the first question, namely, whether an arrear of consolidated rate is a charge on the land and buildings in respect of which it has accrued due, must depend upon the true construction of the provisions of the Calcutta Municipal Act, 1899. For this purpose, reference may briefly be made to the relevant sections. The fourth part of the Calcutta Municipal Act deals with the subject of taxation, and comprises Chapters XII to XIX which include sections 147 to 235. Chapter XII treats of rates. Section 147 specifies four different classes of rates, which the Corporation is authorised to impose upon buildings and lands within its jurisdiction. Section 149 lays down that these rates are to be levied as one consolidated rate. Section 171 makes the consolidated rate payable in equal halves by the owner and the occupier. Sections 178 and 186 specify the circumstances under which the entire consolidated rate may be levied from the owner or from the occupier. We next come to Chapter XVIII which defines the special procedure for recovery of the consolidated rate. Section 212 lays down that the provisions of the Chapter shall be deemed to be in addition to, and not in derogation of, any powers conferred in other Chapters for the collection or recovery of the consolidated rate. Section 215 provides for one mode of realization of the rate, namely, by distress. Sub-section 3 of section 222 places a restriction upon the recovery, by distress against the occupier, of an arrear due from the owner; no arrear of the consolidated rate can be recovered by distress from any occupier or sub-tenant, if it has remained due for more than one year or if it is due on account of any period for which such occupier or sub-tenant was not in occupation of the premises on which the rate is assessed. Section 223 defines the extent of the liability of the purchaser of any building or land for his vendor's share of arrears of consolidated rate; the purchaser is liable for the amount due on account of the owner's share for any period not exceeding one year prior to his purchase. Section 227 authorises a suit for

recovery of arrears of consolidated rate, in substitution for or addition to the summary remedy by distress and sale. Section 228 which makes the consolidated rate a first charge on the premises is in these terms: "The consolidated rate due in respect of any building or land shall subject to the prior payment of the land revenue, if any, due to the Government thereupon, be a first charge upon the said building or land and upon the moveable property, if any, found within or upon such building or land and belonging to the person liable for such rate." The language of this section is perfectly plain, and the intention of the Legislature to make the consolidated rate a first charge upon the premises is obvious. But an earnest endeavour has been made, on behalf of the appellant, to restrict its scope and operation by a reference to section 223. It has been argued that as the purchaser of the premises is liable for arrears of consolidated rate, which have accrued due before title vested in him, only to the extent of arrears for the year immediately prior to his purchase, section 228 should be so interpreted as to restrict the charge on the property in his hands only to arrears for which he is liable. This contention is clearly fallacious, as the two sections are concerned with two entirely distinct aspects of the matter. Section 223 deals with the question of the personal liability (liability *in personam*) of the purchaser of the premises for arrears unsatisfied when the title vested in him. Section 228 deals with the question of the liability of the premises (liability *in rem*) for the rates due thereon. Section 228 is perfectly general in its terms and makes the consolidated rate, as it accrues due from time to time, a first charge on the property (subject to arrears of land revenue). The objects of the two sections are radically distinct and section 228 cannot be controlled by section 223. We may add that no attempt has been made here to support the view unsuccessfully put forward in the Court below, that the expression "belonging to the person liable for such rate" in section 228 qualifies, not only the expression "moveable property," but also the expression "building or land." We hold accordingly that section 228 makes the consolidated rate, as it accrues due from time to time, a first charge on the premises.

The answer to the second question, namely, whether such charge can be enforced against the property in the hands of the appellants, must depend upon the nature and incidents of the charge. A charge is defined in section 100 of the Transfer of Property Act in the following terms:

"Where immoveable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property." The distinction between a mortgage and a charge, thus indicated in section 100, is of a fundamental character and was explained by this Court in the case of *Roysuddi* v. *Kali Nath* [Sub-nom *Roysuddi* v. *Kritarthanath Mukherjee* (1)]. There is this well-marked distinction between the two, that a mortgage does, whereas a charge does not involve a transfer of an interest in specific immoveable property, *Narayana Ayyar* v. *Venkataramana Ayyar* (2), *Tancred* v. *Delagoa Bay and East Africa Ry. Co.* (3) following *Burlinson* v. *Hall* (4), where Day, J., observed as follows: "A charge differs altogether from a mortgage. By a charge the title is not transferred, but the person creating the charge merely says that out of a particular fund, he will discharge a particular debt."

To the same effect is the decision in *Gobinda Chandra Pal* v. *Dwarka Nath Pal* (5): "A mortgage is a transfer of an interest in specific immoveable property, a charge only secures payment of money out of that property." When liability has been imposed upon property by act of parties, a question of some nicety may arise, whether a mere charge has been created or whether the property itself has been hypothecated. The point is of great practical importance, because whether the one view is taken or the other has an important bearing upon the question, whether the property can be

(1) 53 C. 985; 4 C. L. J. 219.
(2) 25 M. 220 at p. 237.
(3) 23 Q. B. 239 at p. 242; 58 L. J. Q. B. 459; 61 L. T. 229; 38 W. R. 15.
(4) 12 Q. B. D. 347 at p. 350; 53 L. J. Q. B. 222; 50 L. T. 723; 32 W. R. 492; 48 J. P. 216.
(5) 35 C. 837 at p. 843; 7 C. L. J. 492; 12 C. W. N. 849.

followed in the hands of a *bona fide* purchaser for value without notice, *Maina* v. *Bachahi* (6). No such question, however, arises where, as here, only a charge has been created by express words of the Statute, and not a mortgage as in cases under section 13 of the Patni Regulation or section 171 of the Bengal Tenancy Act. What then is the position? The consolidated rate, as it accrued due, became a first charge upon the property, but no interest in such property was transferred by operation of law to the Corporation. The owner continued to be the full owner of the property; the entire interest therein remained vested in him; when he transferred his right, title and interest in the property, the transferee acquired the whole interest therein. The owner was not in the position of a mortgagor, who has in him nothing beyond the equity of redemption and can consequently convey to the transferee no larger interest in the property. From this principle, the conclusion is inevitable that the charge cannot be enforced against the property in the hands of a *bona fide* purchaser for value without notice; in other words, while a mortgagee can follow the mortgaged property in the hands of a transferee from the mortgagor, a charge can be enforced against a transferee only if he has taken with notice of the charge [*Kishan Lal* v. *Ganga Ram* (7), *Koynuddi* v. *Kali Nath* (1)]. The question consequently arises, whether the appellants are purchasers for value without notice. Here, it is worthy of note that they did not, in their written statement, plead that they were purchasers for value without notice. If they wished to avail themselves of this defence, they should have pleaded it. It was ruled in *Attorney-General* v. *Biphosphated Guano Company* (8) and *Wilkes* v. *Spooner* (9) that it is not a case of, *first* a defence that the defendant is a purchaser for value, and *then* a reply that he had notice, but of a single defence that the defendant is a purchaser for value without notice, the onus of proving which is on the defendant. But even if we assume that the defence, though not expressly taken in their written statement, is available to the defendants, they are in a position of difficulty from which there is no escape. The appellants are private purchasers of the property, and if they had inquired at the time of their purchase they would have discovered that the rates were in arrear; as a matter of fact they would be personally liable under section 223 for the arrears of the year immediately prior to the date of their purchase, and they admit that they have satisfied such arrears, though they do not disclose whether by inquiry they had ascertained the existence of the arrears before they made the purchase. But let us assume that they had notice of the arrears at the time of their purchase; still, as a purchaser with notice may shelter himself under the title of the person from whom he purchased if the latter could successfully raise this defence, we must examine the position of the vendor of the appellants, *Sweet* v. *Southcote* (10), *M'Queen* v. *Farquhar* (11), *Barrow's* case (12), *Wilkes* v. *Spooner* (9). Now as regards the position of Bankubehari Ghose, the mortgagee who acquired title by foreclosure, he was no doubt not in the position of a private purchaser, and if he had inquired of his mortgagor or the subsequent purchaser of the equity of redemption, neither of them would have been bound to give him any information such as a vendor is under an obligation to furnish under section 55 of the Transfer of Property Act to an intending purchaser of his property. The mortgagee, therefore, was in reality a person who acquired title under an involuntary alienation by his mortgagor; to a person in this position constructive notice cannot be imputed to the same extent as to a purchaser at a private sale *Radha Madhab* v. *Kalpataru Roy* (13), *Magu Brahma* v. *Bholi Dass* (14). But, by inquiry from the Municipal Authorities, he could still have ascertained whether any arrears of consolidated rate were due. When he took the mortgage, he knew full well that if the rate was not duly paid, the

(6) 3 A. L. J. 551; 28 A. 655; A. W. N. (1906) 165.
(7) 18-A. 28 at p. 44; A. W. N. (1890) 216.
(8) 11 Ch. D. 327 at p. 337; 49 L. J. Ch. 68; 40 L. T. 201; 27 W. R. 621.
(9) (1911) 2 K. B. 473 at p. 486; 80 L. J. K. B. 1107; 104 L. T. 911; 55 S. J. 479; 27 T. L. R. 426.
(10) (1788) 2 Brown C. C. 67; Dick 670; 29 E.R. 38.
(11) (1805) 11 Ves. 467; 8 R. R. 212; 32 E. R. 1168.
(12) (1880) 14 Ch. D. 432 at p. 44; 49 L. J. Ch. 498; 41 L. T. 755.
(13) 16 Ind. Cas. 811; 17 C. L. J. 209 at p. 214.
(14) 20 Ind. Cas. 195; 19 C. L. L. J. 352; 18 C. W. N. 657.

arrears would become a first charge upon the property and would gain priority over his debt; and in our opinion before he became full owner by foreclosure, he should have ascertained the true state of affairs. He is consequently in the same position as if he had made such inquiry; and the purchasers from him are in no higher position, because although a purchaser without notice from a person who had notice is protected [*Harrison* v. *Forth* (15)], the appellants cannot claim such protection, as before they acquired title, they might have by inquiry from the Municipal Authorities ascertained the precise period for which the rates were in arrears. We hold accordingly that the appellants are not entitled to protection as purchasers for value without notice.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

BEACHCROFT, J.—I agree.

Appeal dismissed.

(15) (1695) Prec. Ch. 51; 24 Eng. Rep. 26.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 907 OF 1913.

October 26, 1914.

Present:—Mr. Justice Kumaraswami Sastri.

NARAYANA SINGH—DEFENDANT—PETITIONER

versus

AYYASAMY REDDI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Court Fees Act (VII of 1870), Sch. II, Art. 17—Suit by claimant under s. 283, Civil Procedure Code, 1882, Court-fees on—Value of quantum of interest claimed.

In suits under section 283 of the Civil Procedure Code of 1882 the test for the purposes of the Court-fees is, what is the value of the quantum of interest which the plaintiff wishes to establish.

Dwarka Das v. *Kameshar Prasad*, 17 A. 60; A. W. N. (1895) 3, followed.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the District Court of Chingleput, in Original Suit No. 31 of 1913.

Mr. *S. Krishnamurti Iyer*, for the Petitioner.

Mr. *K. S. Krishnaswamy Iyer*, for the Respondents.

JUDGMENT.—Where both the judgment-debtor and the attaching creditor dispute

the title of a person to property, it is open to him to file a suit for a declaration of title in respect of the property. The case is like the ordinary one where a person whose title to property is disputed seeks to establish it. I am of opinion that the present case is governed by the decision in *Dwarka Das* v. *Kameshwar Prasad* (1) and *Fisher* v. *Arunachella Chettiar* (2). The difference between cases where the judgment-debtor is a party and cases where he is not is pointed out in *Dhan Devi* v. *Zamurrad Begum* (3) and *Krishnasami Naidu* v. *Somasundaram Chettiar* (4). *Phul Kumari* v *Ghanshyam Misra* (5) was one where the plaintiff wanted an injunction against the decree-holder from executing the decree. Their Lordships of the Privy Council observed that the value of the action must be the value of the plaint and held that the suit fell within Article 17 of Schedule II of the Court Fees Act.

The test is, what is the value of the quantum of interest which the plaintiff wants to establish.

The petition fails and is dismissed with costs.

Petition dismissed.

(1) 17 A. 60; A. W. N. (1895) 3.
(2) 2 Ind. Cas. 522; 5 M. L. T. 70; 19 M. L. J. 236.
(3) 27 A. 440; 2 A. L. J. 115; A. W. N. (1905) 87.
(4) 30 M. 335; 17 M. L. J. 95; 2 M. L. T. 116 (F. B.).
(5) 35 C. 202; 12 C. W. N. 169; 7 C. L. J. 36; 5 A. J. 10; 35 I. A. 23 (P. C.); 17 M. L. J. 618; 2 M. L. T. 506; 10 Bom. L. R. 1.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2791 OF 1909.

May 8, 1914.

Present:—Justice Sir Asutosh Mukerjee, KT. and Mr. Justice Beachcroft.

RASH MOHINEE DASSEE AND ANOTHER—DEFENDANTS—APPELLANTS

versus

NAFAR CHANDRA PAL CHOWDHURY—PLAINTIFF AND ANOTHER—*Pro forma* DEFENDANT—RESPONDENTS.

Landlord and tenant—Eviction of tenant from part of demised lands—Abatement of rent—Cause of action—Res judicata—Finding of fact not to be questioned in second appeal even if based upon evidence on remand.

Where the question for abatement of rent had been raised in a previous litigation between the parties and by mutual consent it was left open for con-

sideration by the Court, which was quite competent to do so, the matter would not be *res judicata* in a subsequent suit for rent.

A claim for rent, as it accrues due from year to year, is a recurring claim, and to each of such recurring causes of action, the defendant is entitled to interpose his claim for abatement of rent.

The parties in a second appeal are not entitled to call in question the accuracy of findings of fact, even if such findings are based upon additional evidence taken for the first time by the Court of Appeal below on remand from the High Court.

Gopal Singh v. *Jhakri Rai*, 12 C. 37 and *Beni Pershad Kuari* v. *Nand Lal Sahu*, 24 C. 98, referred to.

A lessee is entitled to abatement of rent in proportion to the loss of lands through eviction by title paramount.

To justify the inference that the tenant would continue liable for the entire rent even after such loss, there must be a clear and unambiguous provision in the lease to that effect.

Satyendra Nath v. *Nilkantha*, 21 C. 388, referred to.

Appeal against the decree of the District Judge, Nadia, dated the 27th of August 1909, reversing that of the Subordinate Judge, Nadia, dated the 24th of May 1909.

Babus *Mohendra Nath Roy* and *Panchanon Ghose*, (for Babu *Hara Prasad Chatterjee*), for the Appellants.

Babu *Amarendra Nath Bose*, for the Respondents.

JUDGMENT.—This is an appeal by the defendants in a suit for arrears of rent. The claim is based on a *mourasi mokarari* lease granted to them on the 24th January 1881.

There are two substantial matters in controversy between the parties at this stage, namely, *first*, whether the defendants are entitled to abatement of rent on the ground of eviction from a portion of the lands of the tenancy by title paramount, and *secondly*, whether the plaintiff is liable to be restricted in the first instance to the sale of the defaulting tenure for realisation of his dues.

As regards the first of these matters, the primary Court came to the conclusion, upon the evidence, that the defendants had been dispossessed of a share of the lands of the tenancy by title paramount, and that they were consequently entitled to a reduction of rent. Upon appeal, the District Judge did not determine whether there had been dispossession, as alleged, but he held that as in 1907 the plaintiff had obtained a decree for rent at the full rate, the defendant must be deemed to have waived the question of abatement of rent, although the decree stated explicitly that the question of abatement was left open for consideration in a subsequent litigation. When the present appeal came to be heard in the first instance by Mr. Justice Sharfuddin, the learned Judge consequently remitted an issue to the District Judge to determine whether the defendants had been evicted as alleged. The finding upon the issue sent down has now been received and is in favour of the defendants. The District Judge has in substance found that in the share permanently let out by the plaintiff to the defendants, there was included a share of 19 *gundas* odd in which the plaintiff had only a temporary right, that he was consequently not competent to sublet his limited interest in such share to the defendants in perpetuity and that upon the expiry of his term, the superior landlord has since 1889 re-entered on the land to the extent of that share. Exception has been taken to this finding on behalf of the plaintiff, on the ground that it is opposed to the weight of the evidence on the record. In these circumstances three questions arise for consideration with regard to the first matter in controversy between the parties, namely, *first*, is the question of abatement of rent open for consideration in this suit; *secondly*, is it open to the plaintiff, at this hearing, to challenge the finding of the District Judge on the question of eviction by title paramount, on the ground that it is based on an erroneous estimate of the evidence on the record; and *thirdly*, are the defendants, upon a true construction of the lease, entitled to abatement in the contingency which has happened?

As regards the first point, there is no room for serious controversy that the question of the right of the defendants to claim abatement of rent is open for consideration in this suit. The question was, no doubt, raised in the previous litigation between the parties, but it was, by mutual consent, left open for consideration. The matter is consequently not *res judicata*; there has never been an adjudication upon the question whether the defendants are entitled to abatement of rent. The decision of the Judicial Committee in the case of *Robert Watson* v. *Collector* of

Rajshahye (1) does not support the contention that it was not competent to the Court to leave the matter open in the way it was done. The claim for rent, as it accrues due from year to year, is a recurring claim, and to each of such recurring causes of action, the defendants are entitled to interpose their claim for abatement of rent. The question, consequently, must be determined on the merits.

As regards the second point, on behalf of the plaintiff-respondent, it has been contended that, as the finding upon the question of the alleged eviction was not embodied in the original judgment of the District Judge, he is in the same position as an appellant in an appeal from original decree and is entitled to invite this Court to examine the correctness of the finding with reference to the evidence on the record. There is clearly no foundation for this contention, which is, besides, contrary to the established practice of this Court. The District Judge should have determined the question of eviction. He erroneously omitted to do so; the result was that he was directed by this Court to record a finding on the point. His determination has now precisely the same effect as if it had been incorporated in his original judgment; and as it has not been disputed that, had the finding been so embodied, it would not have been open to the respondent to challenge its accuracy with reference to the evidence, he is clearly in no better position now. This view is supported by the decision in the case of *Bal Kishen* v. *Jasoda Kuar* (2), although there is a dictum to the contrary in *Arthur Richard Hinde* v. *Ponnath Brayan* (3). In this Court, indeed, it has been held that the parties in a second appeal are not entitled to call in question the accuracy of findings of fact, even if such findings are based upon additional evidence taken for the first time by the Court of Appeal below [*Gopal Singh* v. *Jhakri Rai* (4) and *Beni Pershad Kuari* v. *Nand Lal Sahu* (5)]. We must consequently determine the rights and obligations of the parties on the basis that the defendants have been evicted from a share of the lands of their tenancy, as alleged by them and as found concurrently by both the Courts below.

As regards the third point, it has been argued on behalf of the plaintiff-respondent that, under the terms of the lease of the 24th January 1881, the defendants are not entitled to claim abatement of rent on the ground of eviction by title paramount. Our attention has been invited specially to two clauses of the lease. The first of these clauses provides that the lessees would, at their own expense, recover possession of all the lands of the tenancy, even though there might have been an encroachment thereon by neighbouring landlords, and that if, at any time subsequent to the grant of the lease, there was such an encroachment, they would similarly bring suits for ejectment. The clause then proceeds to lay down that the defendants would not be entitled to claim abatement of rent on the ground that they were not in possession of all the lands comprised in the lease. This plainly refers to what immediately precedes, and applies only to the case of eviction by a person without title. This clause, consequently, is not of any assistance to the plaintiff.

The second clause upon which reliance has been placed refers to the diminution of the lands of the tenancy by acquisition for the purpose of a Railway or for any other public purpose; it is stated that in such event, the compensation money would be distributed between the parties in the prescribed manner and that the tenants would not be entitled to claim abatement of rent on any other ground.

This clearly cannot be construed in the way suggested by the plaintiff-respondent, to cover the case of loss of lands through eviction by title paramount. If the contention of the respondent were to prevail, the position would follow, as was stated by Sir Barnes Peacock, Chief Judge, in the case of *Gopaniund Jha* v. *Lalu Gobind Pershad* (6) that the tenant would continue liable for the entire rent, even though it transpired that the landlord had no title to any portion of the lands of the tenancy. To justify an inference of this description, there

(1) 13 M. I. A. 160; 3 B. L. R. (P. C.) 48; 12 W. R. (P. C.) 43; 3 Suth. P. C. J. 290; 2 Sar. P. C. J. 500; 20 E. R. 511.
(2) 7 A. 765, A. W. N. (1885) 225.
(3) 7 M. 52; 7 Ind. Jur. 599.
(4) 12 C. 37.
(5) 24 C. 96.
(6) 12 W. R. 109.

must be a clear and unambiguous provision in the lease to that effect [*Satyendra Nath* v. *Nilkantha* (7)]. We are, therefore, of opinion that, upon the terms of the lease, the defendants are not precluded from claiming abatement of rent on the ground of eviction by title paramount. The fact of such eviction has been established on the evidence, and in view of the decisions in *Gopanund Jha* v. *Lala Gobind Pershad*(6), *Horo Kishen Banerjee* v. *Joy Kishen Mookerjee* (8), *Brojonath Pal Chowdhury* v. *Heera Lal Pal* (9) and *Rung Lall Singh* v. *Roodur Pershad*(10), which are based on the rule of English law that the rent is apportionable when the lessee ceases to have possession of part of the demised premises, because he is evicted from that part by a person lawfully claiming under title paramount [Co. Litt. 148*a* *Walker's* case (11), *Smith* v. *Malings* (12), *Eybridge* v. *Meidon* (13)], it cannot be disputed that the defendants are entitled to abatement of rent. We may add that it has been found by the Courts below that, during a period of years antecedent to the institution of the suit, whenever the rent has been amicably paid, the landlord has granted abatement to the tenants, as now claimed by them. This not only confirms the finding that there has been, as a matter of fact, an eviction by title paramount, but also supports the construction which we have placed on the contract between the parties. In so far, therefore, as the first matter is concerned, we must hold that the Court of first instance rightly allowed abatement of rent to the defendants.

With regard to the second matter, the Court of first instance held, upon a consideration of the contract between the parties, that the landlord was, in the first instance, limited to proceedings against the tenure for realisation of the judgment debt, and that it was only in the event of the failure to realise the whole sum by sale of the tenure, that he could proceed against the judgment-debtor personally. The lease has been read to us and we are of opinion that the Subordinate Judge took a correct view of its legal effect. It has been faintly suggested, however, that this provision of the lease was *ultra vires* because contrary to the rule laid down in section 61 of Act VIII of 1869, B. C., which was in force when the lease was granted. In our opinion, section 61 has no application to the case, and the clause in question is operative between the parties.

The result is that this appeal is allowed, the decree of the District Judge set aside and that of the Court of first instance restored.

The appellants are entitled to their costs of two hearings in this Court, as also in the Court of the District Judge.

Appeal allowed.

(7) 21 C. 383.
(8) 1 W. R. 220.
(9) 10 W. R. 120.
(10) 17 W. R. 386.
(11) 8 Coke 22 *a*, 22 *b*; 76 E. R. 676.
(12) Cr. Jac. 160; 79 E. R. 140.
(13) 24 L. R. Ir. 91.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 1329 OF 1911.

July 31, 1914.

Present:—Justice Sir Harry Stephens KT., and Mr. Justice Mullick.

RAMADHIN SINGH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

JADUNANDAN SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Water, flow of—Right ancillary to property—Lands adjoining each other on different levels.

Where *A* owns land adjoining that of *B* on a higher level and the water falling on the land of *A* naturally flows on to the land of *B*, it is the duty of *B* to allow the water from *A*'s land to pass on through his land, and then to dispose of it as *B* thinks best.

The question is not one of easement, but of a right ancillary to property.

Appeal against the decree of the Subordinate Judge, Arrah, dated the 17th February 1911, affirming that of the Munsif, Third Court, at Arrah, dated the 6th of June 1910.

Mr. *C. R. Dass* (with him Babu *Surendra Nath Ghoshal*), for the Appellants.

Babus *Ramcharan Mozumdar* and *Raghunath Singh*, for the Respondents.

JUDGMENT.—In this case the plaintiffs own some land on the south of that of the defendants on a higher level, and the water falling on the land of the plaintiffs naturally

flows on to the land of the defendants. The defendants recently built a *bund* on their land so as to obstruct the water accumulated on the plaintiffs' land from flowing towards the north through the defendants' land. The plaintiffs allege that they are entitled to have the water on their land discharged through the defendants' land; but they do not claim it as an easement. They claim it as a right ancillary to their property which they have not parted with. This raises a question in a very simple form; namely, whether there is any such right. On the authorities placed before us, we are of opinion that there is; although the plaintiffs do not claim the right to discharge their water and do not in fact discharge their water on to the defendants' land by any definite channel. The duty of the defendants is to allow the water from the plaintiffs' land to pass on through their land. It is then open to them to dispose of it in the way they think best. The lower Courts have ordered the defendants to remove the *bund* which they have erected. It is not necessary in order to satisfy the plaintiffs' claim that this should be done, but it will be sufficient if the defendants make some arrangement by which the water coming on to their land from the plaintiffs' land may pass over their land in such a way as not to remain on the plaintiffs' land. So far the appeal is allowed.

A second point has been raised in connection with two maps, which it is said the Court below refused and which the defendants say ought to have been judicially noticed. On considering the nature of the case and the course followed and from what we understand the contents of the maps to be, we do not think that the defendants have made out any grounds for appeal on this ground. We accordingly allow the appeal only to the extent we have indicated above.

Under the circumstances of this case we make no order as to costs.

Appeal partly allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 297 OF 1913.

October 14, 1914.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Kumaraswami Sastri.

NAMAGIRI LAKSHMI AMMAL—DEFENDANT No. 3—APPELLANT

versus

KO. SRINIVASA AIYANGAR—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 53—Remission of debt to defeat creditors—Voidable—Evidence Act (I of 1872), s. 92—Registered deed—Rescission or cancellation cannot be proved by oral agreement or unregistered document—Agreement to pay lesser amount in full discharge or fixing different period—Variation in terms—Endorsement on mortgage-deed, when admissible and when not.

Under section 53 of the Transfer of Property Act, 1882, it is not necessary that the transferor should reserve a benefit to himself, as gifts to a third party are as much voidable as other transfers. Though the section does not apply in terms, the principle on which it is based will apply to a creditor voluntarily remitting, with a view to defeat his creditors, the whole or a portion of a debt due to him.

Section 92, clause 4, of the Evidence Act precludes evidence of an oral agreement to rescind a registered contract.

Srinivasaswami Aiyangar v. *Athmarama Aiyar*, 2 Ind. Cas. 612; 32 M. 281; 19 M. L. J. 280; 5 M. L. T. 84; *Iyetaly Surayya* v. *Nalamilli Venkanna*, 9 Ind. Cas. 340; 9 M. L. T. 326, referred to.

Appanna Nayudu v. *Ramanna*, 23 M. 92; 9 M. L. J. 124; *Trimbak Gangadhar Ranade* v. *Bhagwandas Mulchand*, 23 B. 348; *Kattika Bapanamma* v. *Kattika Krishnamma*, 30 M. 231, 17 M. L. J. 80, distinguished.

Where it is sought to prove that though the parties provided in the registered-deed for performance in a particular way, *e. g.*, by re-payment of the debt in a particular manner, an agreement whereby a lesser amount was agreed to be taken in full discharge or a different period was fixed, would be a variation of the terms and would fall within section 92.

A mortgage having been created by a registered document cannot be cancelled or rescinded either orally or by an unregistered endorsement on the mortgage-deed, reciting that the bond was cancelled and returned as the amount due was paid.

Hari Narain Banerjee v. *Shama Sundari Dasi*, 6 Ind. Cas. 159; 37 C. 580; 11 C. L. J. 551, *Uppalakandi Kunhi Kutti* v. *Kunnam Vithal Kottaprath*, 19 M. 288, referred to.

Second appeal against the decree of the District Court of Trichinopoly, in Appeal Suit No. 491 of 1911, preferred against that of the Court of the District Munsif of Namakkal, in the Original Suit No. 441 of 1910.

Mr. *T. Narasimha Aiyangar*, for the Appellant.

Mr. *T. Rangachariar*, for the Respondent.

JUDGMENT.—The 3rd defendant is the appellant. Defendants Nos. 1 and 2 are sisters, while the plaintiff is their brother and the 3rd defendant their niece. The plaintiff filed Original Suit No. 60 of 1900 against the 1st defendant and obtained a money decree, in execution of which he attached and purchased on the 11th August 1906 the mortgage-debt alleged to be due by the 2nd defendant to the 1st defendant on a deed of mortgage dated the 26th November 1890. Prior to his purchase, the 2nd defendant sold the mortgaged property to the 3rd defendant by a registered deed of sale dated the 20th June 1901; the deed of mortgage, with an endorsement that the amount due on it had been paid, was given to the purchaser. The suit out of which this second appeal arises was filed by the plaintiff as purchaser of the mortgage-debt for the recovery of the amount due on the ground that the mortgage was not discharged and that the sale to the 3rd defendant was a fraudulent transaction entered into with the object of defrauding him. The 3rd defendant pleaded *inter alia* that the sale to her was *bona fide* and for consideration and that the mortgage was discharged by payments made by the 2nd defendant to the 1st defendant out of moneys paid by the 3rd defendant.

The District Munsif disbelieved the evidence of discharge and held that the amount due on the mortgage was not paid. On appeal the District Judge held that it was proved to the extent of Rs. 215, and modified the decree of the District Munsif. The 3rd defendant files this second appeal against that part of the decree as in favour of the plaintiff and the plaintiff has filed a memorandum of objections against that part of the decree which modified the decree of the District Munsif.

The only issue raised on this part of the case was issue No. 3 which runs as follows:—'Was the plaint debt paid up as alleged by the 3rd defendant?" Treating the case as one of discharge, pure and simple, it is difficult to see how we can in second appeal disturb the findings of fact.

It is argued by the appellant's Vakil that as it was open to the mortgagee to remit the whole or any part of the mortgage debt, as the mortgagor and mortgagee agreed to treat the mortgage as discharged long prior to the attachment and purchase by the plaintiff and as the property was sold free from all encumbrances to the 3rd defendant, it was not open to the plaintiff to treat the mortgage as subsisting. It is also argued that section 53 of the Transfer of Property Act has no application as there is no transfer of any immoveable property, but only the relinquishment of a debt without any benefit having been reserved for the transferor.

The endorsement, Exhibit I, on the deed of mortgage (Exhibit A) runs as follows: "1901 May 26, Towards principal and interest on this bond the amount received previously in several instalments is Rs. 870. The amount received in cash to-day is Rs. 215. Total Rs. 1,085. As this sum of Rs. 1,085 has been paid, this bond has been cancelled and returned". The mortgage, therefore, was alleged to have been discharged by payments made from time to time amounting to Rs. 870 and a payment of Rs. 215 made on the date of the endorsement. Both Courts have found that Rs. 870 was not paid and having regard to the relationship between the defendants and the fact that the plaintiff had obtained a money decree against the 1st defendant shortly before the endorsement and sale to the 3rd defendant, there can be no little doubt that the object of the defendants was to prevent the plaintiff from attaching the mortgage debt. The effect of a creditor voluntarily remitting the whole or a portion of a debt will be to put it out of the reach of his creditor just as much as a gift of the debt to a third person. In either case there is no consideration for the transaction and though section 53 of the Transfer of Property Act will not apply in terms, the principle on which it is based will apply. It is not necessary under section 53 that the transferor should reserve a benefit to himself, as gifts to to a third party are as much voidable as other transfers. Supposing that the only property a person has is a large sum due to him from a relation of his and that he to defeat his creditors, remits the debt, is there any principle on which the case can be distinguished from one where he makes a gift of the debt to a third person? We think not. No authority has been cited for such a distinction being drawn, and it would open a wide door to fraud if the remission of a debt is placed on a different footing from a transfer.

Even assuming that the parties agreed to receive Rs. 215 in full settlement of the mortgage-debt and that the transaction was *bona fide*, the mortgage having been created by a registered document, it cannot be cancelled or rescinded either orally or by an unregistered document. Exhibit I, the endorsement on the mortgage bond, was cancelled and returned as the amount due was paid. It, therefore, falls under section 17, clause (*n*), of the Registration Act. *Hari Narain Banerjee* v. *Shama Sundari Dasi*(1) and *Uppalakandi Kunhi Kutti* v. *Kunnam Mithal Kottaprath* (2) were cases where the endorsement of receipt did not purport to extinguish the mortgage. Exhibit I cannot, therefore, be received in evidence to prove discharge. Nor is oral evidence admissible to show cancellation. In *Srinivasaswami Aiyangar* v. *Athmarama Aiyar* (3) it was held that section 92, clause 4, of the Evidence Act precludes evidence of an oral agreement to rescind a registered contract. This case was followed in *Iyotaly Surayya* v. *Nalamilli Venkanna* (4). It has, no doubt, been held in *Appamma Nayuralu* v. *Rumanna* (5) that an instrument which purports to extinguish a mortgage might even if unregistered, be received in evidence of payment and that oral evidence can be admitted in proof of payment, even if the receipt was inadmissible for want of registration. A similar view was also taken in *Trimbak Gangadhar Ranade* v. *Bhagwandas Mulchand* (6), *Kattika Bapanamma* v. *Kattika Kishnamma* (7). In these cases the question was one of discharge by payment. No terms were sought to be varied, but it was sought to prove that the debt was extinguished by payment, that is, that the contract was fulfilled in the manner specified in the registered deed of mortgage. Where however it is sought to prove that though the parties provided in the registered mortgage for performance in a particular way, *e. g.*, by repayment of the debt in a particular manner, an agreement whereby a lesser amount was agreed to be taken in full discharge or a different period was fixed, would be a variation of the terms and would fall within section 92.

The second appeal fails and is dismissed with costs. The memorandum of objections is also dismissed with costs, as it does not raise any question of law.

Appeal dismissed.

(1) 6 Ind Cas. 159; 37 C 589; 11 C L. J. 551.
(2) 19 M. 288.
(3) 2 Ind. Cas. 612; 32 M. 281; 19 M. L. J. 280; 5 M. L. T. 84.
(4) 9 Ind Cas 340; 9 M. L T. 326.
(5) 23 M. 92; 9 M. L. J. 124.
(6) 23 B. 348
(7) 30 M 231; 17 M. L. J. 30.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1539 OF 1913.

July 29, 1914.

Present:—Mr. Justice Holmwood and Mr. Justice Chapman.

Srimati AMINUNNISA—PLAINTIFF—APPELLANT

versus

JINNAT ALI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Under-raiyati holding, not transferable—Tenure, when can be transferred—Bengal Tenancy Act (VIII of 1885), s. 49, applicability of—Relinquishment or abandonment—Transfer of the whole holding—Landlord, right of, to eject.

An under-*raiyati* holding is not transferable. Where a tenure or holding, apart from the Transfer of Property Act, is not transferable, it cannot become so unless it is expressly made so by some other Statute.

Hira Mota Dasayya v. *Annoda Prosad Ghosh*, 7 C. L. J. 553 at p. 555, referred to.

Where a transfer of the whole holding has been made, the landlord is ordinarily entitled to enter on the holding and a relinquishment of the whole holding without any proof of payment of rent or any arrangement made to pay the rent is a relinquishment in fact, which would entitle the landlord to eject the tenant. Section 49 of the Bengal Tenancy Act does not apply to such a case.

What is relinquishment or abandonment depends on the substantial effect of what has been done in each case.

Appeal against the decree of the District Judge, Noakhali, dated the 22nd of April 1913, modifying that of the Munsif, first Court, at Sudharam, dated the 30th of April 1912.

Babu *Hot Lal Guha*, for the Appellant.

Babu *Hem Chandra Sen*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff for declaration of her *raiyati* right in the land in suit and *khas* possession thereof. It appears that the plaintiff became 16-annas tenant of an occupancy holding by purchase from her husband

in the year 1314 and that she then found that the under-*raiyat* on the land, who is defendant No. 2, had sold the under-*raiyati* to defendant No. 1 eight years before, in 1306.

It is admitted that the lease was only for a term and it appears that now that lease must have expired, since more than nine years have elapsed from the time when it was sold to defendant No. 1. Be that as it may, it is conceded that the learned Judge's finding that all lease-hold property is saleable and that there is nothing in the Bengal Tenancy Act to prevent the sale of an under-*raiyati* is not a correct view of the law. That is a rule of English Law and it is incorporated in the Transfer of Property Act. But the Transfer of Property Act by section 117 clearly excludes all agricultural lands from that rule, and the true rule is as was laid down by the late Sir Francis Maclean in the case of *Hira Moti Dasayya* v. *Annoda Prosad Ghosh* (1), that where a tenure or holding apart from the Transfer of Property Act is not transferable, it cannot become so unless it is expressly made so by some other Statute. The learned Chief Justice pointed out, if it had been intended to make holdings transferable which were before non-transferable we might have expected the Legislature in framing the Bengal Tenancy Act to have said so. It was clearly laid down in 1878 by Chief Justice Garth and Jackson, J.,* that *jumma* rights of a *kurpha* under-tenant are not transferable without the consent of the *raiyat* landlord. Mr. Justice Jackson goes so far as to say, "I would only add that I never heard before that the question as to the possiblity of selling a *kurpha* tenant's right could be raised, and it appears to me to be contrary to the nature of things that such a thing could happen." The Tenancy Act has not made any change in the law as laid down there, and it must be held as a matter of law, contrary to what has been said by the learned Judge in the Court below, that an under-*raiyati* is not transferable.

That being so and the plaintiff being the landlord of the entire 16 annas and the defendant having transferred the whole holding to defendant No. 1, the case falls within the second heading of the recent Full Bench ruling. Where the transfer of the whole holding has been made, the landlord is ordinarily entitled to enter on the holding, and such a relinquishment as the relinquishment of the whole 16 annas without any proof of payment of rent or any arrangement made to pay the rent is certainly a relinquishment in fact which would entitle the plaintiff to eject the defendant.

It is sought to be argued that an under-*raiyat* cannot be ejected except under section 49 of the Bengal Tenancy Act. But the answer to that is that the defendant No. 2 has by his own acts ceased to be an under-*raiyat*, and defendant No. 1 has never obtained the status of an under-*raiyat*; therefore, section 49 does not apply. It has further been contended that every transfer does not operate as an abandonment or as forfeiture. But the transfer, which is found as a fact by the Munsif in the first Court and has not been set aside by the Judge in this case, is certainly such a transfer as would in our opinion constitute a complete abandonment in fact, and what is relinquishment or abandonment has been held by the Full Bench to depend on the substantial effect of what has been done in each case. The substantial effect of what has been done in this case appears to be that the recent purchase has deprived the plaintiff of the tenant to whom alone she could look for her rent and to whom alone she could look for the proper cultivation of her holding; and we do not know who the defendant No. 1 may be or whether he is in any way a proper person to cultivate her land. It does not appear that any rent has been paid since the year 1306, at any rate that it has been paid to the plaintiff.

The appeal must, therefore, be decreed. The judgment and decree of the lower Appellate Court are set aside and those of the Munsif restored, with costs in all Courts to the plaintiff.

Appeal allowed.

(1) 7 C. L. J. 553 at p. 555.

* Apparently the case referred to is *Bonomali Bajadur* v. *Koylash Chander Majoomdar*, 4 C. 135—*Ed.*

KALA GAZI v. MAHESWAR CHAUDHURI.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 2970 OF 1911.
April 8, 1914.
Present:—Mr. Justice Holmwood and Mr. Justice Chapman.
KALA GAZI AND OTHERS—DEFENDANTS—APPELLANTS
versus
MAHESWAR CHAUDHURI—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), s. 49—Under-raiyat—Suit for rent by raiyat dismissed—Res judicata as to title—Under-raiyat claiming to hold directly under landlord and paying rent to plaintiff as gomastah—Notice to quit necessary.

The plaintiff, a *gomastah* of the landlord of a village obtained certain lands from the landlord and let them out to the defendant. In a previous rent suit brought by the plaintiff against the defendant, the defendant had pleaded that he had always paid his rent to the plaintiff for the benefit of the landlord and that the plaintiff was nothing more than a *gomastah*, and he was a *raiyat* holding directly under the landlord. The rent suit was decided in favour of the defendant, and the plaintiff then sued that in establishment of his title as *raiyat* he could eject the defendant without notice as a trespasser.

Held, that the decision in the rent suit did not operate as *res judicata* on the question of title of the plaintiff,

that the defendant could not be evicted without notice to quit as required by section 49 of the Bengal Tenancy Act 1885.

Dhora Kairi v. *Ram Jewan Kairi Mahton*, 20 C. 101, followed.

Ekabbar Sheikh v. *Hara Bewah*, 8 Ind. Cas. 660; 15 C. W. N. 835; 13 C. L. J. 1, distinguished.

Second appeal against the decree of the Sub-Judge, Tippréah, dated 17th July 1911, reversing that of the Munsif of Nabinagore, dated 6th June 1910.

Moulvi *Nuruddin Ahmed* and Babu *Rajendra Prosad*, for the Appellant.

Babus *Tarakishore Chaudhuri* and *Bepin Chandra Mullick*, for the Respondent.

JUDGMENT.—This is a second appeal in a suit in which the plaintiff sued for *khas* possession of some land mentioned in schedule II of his plaint.

It appears that the plaintiff was the *gomastah* of the landlord of the village and that he obtained certain lands from the landlord and let them out to the defendant. In a previous rent suit brought by the plaintiff against the defendant, the defendant pleaded that he always paid his rent to the plaintiff for the benefit of the landlord and that the plaintiff was nothing more than a *gomastah*, and he was a *raiyat* holding directly under the landlord. That rent suit was decided in his favour, and the plaintiff now sues that in establishment of his title as *raiyat* he can eject the defendant without notice as trespasser.

The first point that was taken by the defendant was that the case is barred by limitation, inasmuch as the plaintiff had been unable to prove that he was in actual possession within twelve years. The first Court found that there was such limitation. The lower Appellate Court has clearly found that within four or five years the plaintiff was in possession as *raiyat* of the land and is the defendant's landlord, and, therefore, there was no limitation. This decision, we think, cannot be impugned.

The next question raised was the question of *res judicata*. It was urged on behalf of the appellant that the decision in the rent suit operated as *res judicata*, so as to bar the plaintiff from putting forward his title as superior landlord to the defendant. We think that the case of *Sahadeb Dhali* v. *Ram Rudra Haldar* (1) entirely disposes of this contention.

But then there comes the third question, whether the plaintiff can eject the defendant without notice. It seems to us that as regards this question he is on the horns of a dilemma. If he pleads denial of his title in the rent suit and the finding against him in that suit did not operate as *res judicata*, then he has to allege, as he does allege in his plaint, that the defendant is still his under-*raiyat* and that he is still a *raiyat*. Now if he alleges that, then it seems on the authority of the rulings of this Court [we may refer to the case cited by the learned Subordinate Judge, *Dhora Kairi* v. *Ram Jewan Kairi Mahton* (2)] that where it is found by the lower Appellate Court that the defendant was an under-*raiyat* of the plaintiff, he could not be evicted from his holding except after notice to quit, and this applies to all cases to which the Bengal Tenancy Act applies. We are referred as against this decision to a decision in *Fayaj Dhali* v. *Aftabuddin Sirdar* (3) and to a case reported as *Ekab-*

(1) 10 C. W. N. 820.
(2) 20 C. 101.
(3) 6 C. W. N. 575.

bar Sheikh v. *Hara Bewah* (4), where the case of *Dhora Kairi* v. *Ram Jewan Kairi Mahton* (2), to which we have just referred, is discussed and distinguished. We may say that in the same way as *Dhora Kairi's* case (2) is distinguished by the learned Chief Justice from the case that was before him, so we can distinguish *Ekabbar's* case (4). This case appears to us to fall within the rule in *Dhora Kairi's* case (2), and that rule has never been doubted. In the case in *Ekabbar Sheikh* v. *Hara Bewah* (4), there was no question of under-*raiyati* or of notice, and it appears to us that if the plaintiff were to carry his plea of *res judicata* so far as to exclude the defendant's right to any notice, then he would be in grave jeopardy of himself falling within the law of *res judicata*, which we have just now held does not apply.

It, therefore, appears to us consonant with justice and with the true interpretation of law to hold that the plaintiff, having in this case pleaded that the defendant was an under-*raiyat* and the defendant not having denied tenancy in the land but having stated that he held it on a higher basis, he still remains on the finding of the lower Courts an under-*raiyat* and can only be ejected upon notice. For these reasons we decree the appeal and the plaintiff's suit must be dismissed without prejudice to any action that he may take under section 49 of the Bengal Tenancy Act.

We make no order as to costs, as the plaintiff has lost his rent for a long time.

Appeal allowed.

(4) 8 Ind. Cas. 660; 13 C. W. N. 335; 13 C. L. J. 1.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1270 OF 1912.
CIVIL REVISION PETITIONS NOS. 899 AND 1027 OF 1912.
October 15, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

NUKALAPATI RAMI REDDI AND OTHERS —PLAINTIFFS—APPELLANTS

versus

VAVILLA VENKATESAM AND OTHERS— DEFENDANTS—RESPONDENTS.

Mortgagor and mortgagee—Mortgagor purchasing benami in revenue sale—Subsequent mortgage sale, validity of—Right of bona fide lessee.

The plaintiff mortgagee brought a suit on a mortgage and it was dismissed by the first Court and while an appeal against that dismissal order was pending, the mortgagor let the revenue of the mortgaged land fall into arrears and had it brought to sale by the Revenue Department for the recovery of such arrears and purchased the property himself in the name of the 2nd defendant. The plaintiff succeeded in appeal and the property was sold and purchased by him but he failed to get actual possession as the judgment-debtor had let the lands to the first defendant. The plaintiffs then sued for possession of the land and the crops standing on it:

Held, that the sale under the mortgage decree was valid and conveyed the full title to the plaintiff, as the 2nd defendant was only the *benamidar* of the plaintiff's judgment-debtor, who was the owner notwithstanding the revenue sale, and that the first defendant who was a *bona fide* lessee of the properties from the 2nd defendant was entitled to the crops raised during the continuance of the lease, and that the auction-purchaser could only get the rent during the remaining portion of the tenancy.

Section 59 of the Revenue Recovery Act has no application in a case where the mortgagor purchases the property at a revenue sale *benami* in another person's name and the revenue sale need not be set aside by a mortgagee suing on a mortgage.

Second appeal against the decree of the District Court of Nellore, in Appeal Suit No. 194 of 1911, preferred against that of the Court of the District Munsif, Kavali, in Original Suit No. 449 of 1910, and petitions, under section 115 of the Code of Civil Procedure, praying the High Court to revise the decrees of the District Court of Nellore, in Appeals Suits Nos. 187 and 186 of 1911 respectively, against those of the Court of the District Munsif of Kavali, in Original Suits Nos. 325 and 329 of 1910 respectively.

Mr. *P. Nagabhushanam*, for the Appellant.

Messrs. *A. N. Sitaram* and *B. Somayya*, for the Respondents.

JUDGMENT.—The plaintiffs are the appellants. They had brought a suit, Original Suit No. 108 of 1896, to obtain a mortgage decree against one K. Subbayya. That suit was ultimately dismissed by the first Court about the beginning of 1906. The plaintiff appealed against the dismissal of that suit to the District Court in Appeal Suit No. 171 of 1906 on the file of the District Court of Nellore. While that appeal was pending, the heirs of the defendant Subbayya let the revenue of the mortgaged lands fall into arrears, had it brought to sale by the Revenue Department for the recovery of such arrears and purchased the lands themselves in such revenue sale in December 1906 in the name of the 2nd defendant. The plaintiff succeeded in his Appeal Suit No. 171 of 1906 in obtaining

a decree for sale of these properties on the 1st November 1907 (See Exhibit B). He brought the properties to sale in pursuance of that mortgage-decree, as the properties of Subbaya's heirs who are his judgment-debtors, and purchased them himself in the year 1909 (Exhibit S.) He seems to have also obtained a sort of possession through Court at the end of October 1909, but he was unable to get actual possession as the first defendant had been let into the lands as lessee by the judgment-debtors, who made the first defendant execute the *muchilika* (Exhibit VIII) in July 1909 to their creature, the 2nd defendant, for a term of three years.

These are the facts found by the lower Appellate Court as we understand its judgment. The lower Appellate Court on these facts decreed the plaintiffs' claim for possession of the lands as against the defendants Nos. 1 and 2, but dismissed the plaintiffs' claim for the crops which stood on the land on the date of delivery through Court to the plaintiffs and which the 1st defendant had *bona fide* raised as lessee of the land. The plaintiffs' appeal relates only to the disallowance of the value of the said crops which the mediator, the 3rd defendant, gave up to the lessee, the 1st defendant. The reason given by the lower Court for disallowing the value of the said crops was that the question was *res judicata* by the decree in Original Suit No. 325 of 1910, which was heard with Original Suit No. 449 of 1910 out of which this second appeal has arisen. The learned District Judge is, however, mistaken in holding that the plaintiffs did not appeal against the decree in Original Suit No. 325 of 1910 on this question of the 1st defendant's liabilty to give the plaintiffs the value of the crops. Further even if they did not so appeal, the Full Bench case in *Panchanadha Velan* v. *Vaithinatha Sastrial* (1) shows that such failure to appeal could not make the decision on that question *res judicata* as the same question was raised in the appeal in the other suit filed contemporaneously.

We however think that, on the finding that the 1st defendant was a *bona fide* lessee who raised the crops during the continuance of a lease which was not affected by the plaintiff's mortgage-decree for sale, the plaintiff's claim for the crops raised by the 1st defendant was rightly rejected. Order XXI, rule 96, Civil Procedure Code, recognises the right of a tenant who is not affected by a decree to occupy the land till his tenancy is over, if the period of the tenancy was the usual or a reasonable term. The crops raised during his tenancy of course belong to him. The purchaser at the Court sale can only get the rent during the remaining portion of the tenancy. The second appeal, therefore, fails and is dismissed with the 1st defendant's costs.

The 2nd defendant's legal representatives (respondents Nos. 3 to 5) have filed a memorandum of objections, contending that plaintiffs' suit is barred by limitation and ought to have been dismissed in its entirety as the plaintiffs did not bring their suit within six months of the revenue auction sale at which the 2nd defendant purchased the property. They rely on section 59 of the Revenue Recovery Act and on the cases reported in *Venkata* v. *Chengalu* (2), *Narayana Nambudri* v. *Damodaran Nambudri* (3) and *Raman Naidu* v. *Bhassoori Sanyasi* (4).

Though the plaintiffs state in paragraph 12 of the plaint that if the Court is of opinion that the plaintiffs should have the revenue sale set aside the cancellation of that revenue sale is also prayed for among the reliefs in this suit, they state in the previous sentence that there is no necessity for their having the revenue sale set aside. On the facts found, we hold that it is not necessary to have the revenue sale set aside because it has been decided by the lower Courts that the 2nd defendant was only the *benamidar* of the plaintiffs' judgment-debtors; the latter continued to be the owners notwithstanding the revenue sale certificate issued in 2nd defendant's name, and the sale under the mortgage decree passed against them transferred the title to the plaintiffs. The memorandum of objections is, therefore, dismissed with plaintiffs' costs. The connected Civil Revision Petitions No. 899 and 1027 of 1912 follow the result of the second appeal and are dismissed with the respondents' costs.

Appeal dismissed
Petition dismissed

(1) 29 M. 333; 16 M. L. J. 63.

(2) 12 M. 168.
(3) 17 M. 189; 4 M. L. J. 80.
(4) 26 M. 638.

SUSIL KUMAR BANERJEE *v.* APSARI DEBI.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 96 OF 1913.

August 26, 1914.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Beachcroft.

SUSIL KUMAR BANERJEE—OBJECTOR—APPELLANT

versus

APSARI DEBI AND OTHERS—PETITIONERS—RESPONDENTS.

Will—Succession Act (X of 1865), s. 46—Testamentary capacity, meaning of—Burden of proof—Opinions of witnesses as to competency, value of—Extraordinary terms—Requisites of valid Will—Testator of sound mind at time of giving instructions for Will—Subsequent execution, whether valid—Facts, finding of, by trial Court—Appellate Court, power of, to disturb.

It is the duty of the propounders of a Will to show that the testator had testamentary capacity, *i. e.*, capacity to comprehend the nature and effect of his act; to discharge the burden of proof, it must be shown that he was able to dispose of his property with understanding and reason, that he was able to realise his position, to appreciate his property and to form a judgment with respect to the parties whom he decided to benefit.

The opinions of witnesses as to competency of a testator are entitled to little regard, unless supported by good reasons founded on facts which warrant them.

Mere ability to sign one's name does not necessarily imply the possession of the full mental powers requisite for a valid disposition of property. Nor is it sufficient to show that the testator was conscious when he executed the instrument.

A Court will not reject a Will merely because its terms appear extraordinary, against clear evidence of due execution by a competent testator. But where the terms are unusual and the evidence of testamentary capacity doubtful, the vigilance of the Court will be roused and, before pronouncing for the Will, the Court will require to be satisfied beyond all reasonable doubt that the testator was fully cognisant of its contents and in a condition to exercise and did exercise thought, judgment and reflection respecting the act he was doing.

When a testator is of sound mind when he gives instructions for a Will but at the time of signature accepts the instrument drawn in pursuance thereof, even though not able to follow its provisions then, he must be deemed to be of sound mind when it is executed.

The proof eminently lies on him who sets up a Will, and it is more fatal to him than to his adversary if he leaves difficulties entirely without explanations.

Where, therefore, a Will was executed by a man about two hours before his death, when his condition was critical and when he was restless with pain, and there was no information whatsoever either as to instructions, if any, given by him, or the time when and the person to whom the directions were given and there was no evidence to show that the Will, as prepared, was, before execution read over to and approved by him;

Held, (1) that the propounders had failed to establish that the testator had sound and disposing mind when he affixed his signature to the Will;

(2) that the propounders could not be given any further opportunity of filling up the deficiencies in the proof, offered by them as there was a real danger of manufacture and manipulation of evidence if witnesses were allowed to speak to events which happened many years ago.

The principle that "it is always difficult for Judges who have not seen and heard the witnesses to refuse to adopt the conclusion of fact of those who have," is not of universal application. Where the case is one not so much of estimate of credibility of witnesses who have been believed by the trial Court, as of the effect of their statements, on the assumption that they have spoken the truth, the Appellate Court will refuse to adopt the conclusion of the trial Court if good grounds are shown.

Appeal against the decree of the District Judge of Alipur, dated the 2nd January 1913.

Babu *Susil Madhab Mullick*, for the Appellant.

Dr. *Dwarka Nath Mitra*, Babus *Pramatha Nath Ganguli* and *Probodh Chandra Dutta*, for the Respondents.

JUDGMENT.—This appeal is directed against the grant of Letters of Administration, with a copy of the Will annexed, to the estate of one Haralal Banerjee, who died on the 22nd August 1895. Haralal Banerjee was the eldest of three brothers, of whom the second was Kaliprasanna Banerjee and the youngest was Sarat Chandra Banerjee. In 1890 a suit for partition had been brought by the youngest brother, and when Haralal died, the brothers had apparently ceased to be members of a joint family. Haralal left a widow, Nistarini (who is described as his second wife), a daughter by her named Faring, *alias* Sukamari, and four other daughters by his first wife, Gangamani, who had predeceased him, namely, Apsari, Puti *alias* Sarojini, Baraburi *alias* Promila and Chotaburi *alias* Soroshbala. At the time when Haralal died, his wife Nistarini was in the family way and was on the 15th November 1895 delivered of a posthumous son, subsequently named Susil Kumar Banerjee. On the 19th February 1912, more than sixteen years after the death of Haralal, his three daughters by the first wife (other than Promila who had died meanwhile) applied for Letters of Administration to his estate with copy annexed of a Will alleged to have been executed by him on the day

of his death. The application was opposed by the infant son of Haralal through his mother, on the ground that the alleged Will was not genuine and that his father had no testamentary capacity at the time when he is said to have executed the instrument. The District Judge has pronounced in favour of the Will and has directed Letters of Administration to issue to the three surviving daughters by the first wife, each of whom is a legatee under the Will. On the present appeal, preferred by the infant through his mother, it has been argued that the genuineness of the Will has not been established, and that the propounders have failed to discharge the burden which lay upon them to prove that the deceased had testamentary capacity at the time of the alleged execution of the Will. Before we examine the evidence, it is desirable to set out briefly the provisions of the Will.

The Will recites that the executant had been suddenly attacked with illness, that his body had become very weak and that he was in apprehension of death. The Will then states that the testator had no male issue, that he accordingly thought it advisable to make some arrangement, and that to carry out his directions, he appointed his brothers Kaliprasanna and Sarat Chandra as the executors. Then follow two schedules: in the first, the debts and assets are stated; in the second, various legacies are specified. In the first schedule, in the enumeration of the assets, a sum of Rs. 5,525 is mentioned as money for purchase of a house; this, it has been said, is an erroneous statement, as a house had been purchased precisely for that sum on the 12th November 1893 (Exhibit B). In the second schedule, there is a legacy of Rs. 2,000 for the eldest daughter Apsari, Rs. 1,500 for her daughter, Rs. 1,000 each for Puti, Baraburi and Chotaburi, Rs. 2,000 for the marriage of Faring (the daughter by the second wife) and an additional sum of Rs. 1,000 for her. There is also a direction to pay Rs. 100 to one Nanigopal Mookerjee, possibly the sister's son of the testator. There is finally a direction that the balance do belong to his wife Nistarini. The Will purports, on the face of it, to bear the signatures of two attesting witnesses, Satya Charan Mookerjee and Chandra Kumar Bannerjee, both residents of the locality where the testator resided, the former a medical practitioner, the latter a Government pensioner.

Before we determine whether the alleged testator was of sound mind, within the meaning of section 46 of the Indian Succession Act, we must consider how far the case for the petitioner is affected by the fact that there has been a delay of many years before the Will has been actually produced in Court. The District Judge has held that satisfactory explanation has been offered in this respect and that the mere fact of delay does not tend to throw doubt upon the genuineness of the Will. In concurrence with the District Judge we hold that, after the death of Haralal, the Will was in the custody of his youngest brother, Sarat Chandra, and that after the death of the latter, the Will was found amongst his papers by his son Krishnahari, who, after some delay, made it over to Apsari, the eldest daughter of the testator. The evidence shows that Krishnahari found the Will among the papers of his father in April 1911, but did not make it over to Apsari till November 1911; as he explains, he took time to consider whether he should make over the Will which had been kept by his father in the iron safe so long. It is needless to consider whether this is an absolutely true explanation of his conduct; it is not altogether improbable that he decided to deliver the Will to Apsari, only after his mother had been sued by the infant son of Haralal for recovery of money due on a promissory note executed by his father. It is only necessary to observe that it is proved that Apsari did not obtain possession of the Will till within three months of the date when she, along with her two sisters, applied for Letters of Administration. In these circumstances, we hold that the delay in the production of the Will has been sufficiently explained.

Two points now require consideration, namely, *first*, whether what purport to be the signatures of the testator on the Will were made by his hand, and, *secondly*, whether he had at the time sound mind within the meaning of section 46 of the Indian Succession Act. As regards the first

question, we are inclined to adopt the view that the signatures are genuine. No good reason has been assigned to discredit, in this respect, the testimony of the two witnesses who have deposed that the testator signed the document. We are fortified in this opinion by a comparison of the signatures in the Will with the admitted signatures of the testator. There is a striking resemblance between the two sets of signatures, but not that absolute identity which, in many instances, may furnish indications of deliberate imitation by the careful forgerer. The first signature, however, on the face of it, gives ample indication that it had been written by a man in a very feeble state of health. The second signature consists of initials and ends in a scrawl, as if the effort to make the first signature had proved too much for the strength of the executant. We now proceed to consider the second question, namely, that of testamentary capacity, on the assumption that the Will was signed by Haralal.

It appears from the evidence on both sides that Haralal had been ill for about ten or twelve days before he died. It is also clear that he had an attack of fever, but the medical witness for the petitioners adds that he had also dysentery. He was, during the first week of his illness, under the treatment of a Kabiraj. Three days before his death, Satya Charan Mookerjee, an Allopathic Medical Practitioner, was called in. He treated him for two days. On the third day, he called in, for purposes of consultation, Dr. Rajendranath Mallik. This was on the day that Haralal died. The evidence on both sides shows that Dr. Mallik came to see the patient in the afternoon between 5 and 6; according to Satya Charan, Dr. Mallik attended also in the morning. It further appears, from the evidence on the side of the objector, that on the same day, at about 2 P.M., Manimohan Mookerjee, father-in-law of Haralal, called in another physician, Dr. Mohendranath Ray. Satya Charan admits that he himself came to see the patient twice on that day, once in the morning and a second time in the afternoon. Haralal died early in the evening. The evidence indicates the time as between 7 and 8 o'clock, possibly a little later. We have, therefore, the fact that the physicians attended on the dying man five times in the course of the day, namely, Satya Charan twice, Dr. Mallik twice and Dr. Ray once. The Will is said to have been executed by Haralal in the afternoon between 5 and 6 P.M., *i.e.*, about two hours before his death. The frequent visits of the different physicians indicate plainly that the condition of the patient was grave, and there are other circumstances which unmistakably indicate that the illness had taken a serious turn at least two or three days before his death. We have, first, the fact that the mode of treatment was changed, and Satya Charan, in whose charge the patient was placed, found it necessary to call in a consulting physician on the third day after he had taken him in hand. We have, in the second place, the fact that messengers were sent to bring in the daughters of Haralal. Nanigopal, his nephew, went away to Jessore on the night of the 20th August and returned with Apsari on the morning of the 22nd August, the day on which Haralal died. The other daughters arrived late in the same evening after Haralal had passed away. All these circumstances incontestably show that the illness of Haralal had caused serious anxiety to his relations at least three days before his death and that, on the day of his death, his condition was such as to necessitate the attendance of three physicians on five occasions at his bedside. The Court must, consequently, scrutinize with care and caution the evidence as to his testamentary capacity at the time when he is said to have executed the Will.

It is unfortunate that of the three medical attendants, who saw the patient on that date, Dr. Mallik and Dr. Ray are both dead, and we are left with the testimony of the sole survivor, of whom it is no disparagement to say that he does not hold the diploma of any 'recognised' medical institution. It is a matter for legitimate comment that no attempt was made on behalf of the petitioners to obtain from the witness detailed information as to the nature of the illness and the condition of the patient. Satya Charan made the somewhat bald statement that Haralal died of fever and dysentery and was in full

possession of his senses up till 5-30 or 6 P.M. Satya Charan had been asked to produce his prescription book; he did so and was at liberty to refresh his memory by reference thereto. It does not appear that he did so; but it seems probable that a reference to the prescriptions might have enabled him to give more definite information as to the condition of the patient than he actually did. It also appears from the evidence on the side of the objector that Dr. Mallik injected some medicine into the body of the patient when he saw him in the afternoon. No attempt was made to get out from Satya Charan what happened when Dr. Mallik came in, though it is clear from the evidence that the two met and were with the patient for some time. We have, on the other hand, the assertion of the witnesses for the objector that the temperature of Haralal was very high and that he was delirious. Even if it be assumed that there is an element of exaggeration in the descriptions given by the witnesses for the objector who are laymen, it cannot be seriously disputed that the evidence adduced by the petitioners is by no means convincing. The burden was upon the propounders to show that the testator had testamentary capacity *i.e.*, capacity to comprehend the nature and effect of his act; to discharge this burden, it must be shown that he was able to dispose of his property with understanding and reason, that he was able to realise his position, to appreciate his property and to form a judgment with respect to the parties whom he decided to benefit. The direct evidence, upon which the propounders rely, is, from this point of view, not of much assistance; an assertion by a witness that the man was in full possession of his senses is of little value; it is merely an expression of his opinion, the value of which depends in a large measure on the facts observed by him. As Williams, J., observed in *Kinne* v. *Kinne* (1), the opinions of witnesses as to competency are entitled to little regard, unless supported by good reasons founded on facts which warrant them. It is concievable that, at this distance of time, the witness might have found it extremely difficult to recollect the facts he had then observed; we are not unmindful that lapse of time may sometimes account for the meagreness of the evidence or for lacuna therein. But it is a matter for legitimate comment that, in the present case, no attempt whatever was made on behalf of the propounders to obtain the details from the witness; it is not as if the witness was asked to give the information and failed to recollect what he had noticed many years previously.

The difficulty in the way of the petitioners is further enhanced by the fact that no particulars are given as to the time and mode of preparation of the Will. The two attesting witnesses merely state that they signed the Will. Satya Charan does not state in examination-in-chief the name of the person who had asked him to be an attesting witness, but in cross-examination it has been brought out that the request came from the testator. Chandra Kumar Banerjee cannot recollect who asked him to become a witness. Neither witness is able to give any information as to whether there was a draft and whether instructions had been given as to the contents of the Will, and, if so, by whom. In these circumstances, the evidence of the writer would have been a valuable aid in determining the question of validity of the Will. Satya Charan cannot say who the writer was. Chandra Kumar Banerjee has no personal knowledge of the subject, but adds that he had heard that one Annada Prosad Sarkar was the scribe. Krishnahari then comes forward with the story that they had two officers, Bishunpada Banerjee and Annada Prosad Sarkar, both of whom had left their service some years previously. He then states that the Will was in the handwriting of Annada Prosad Sarkar, and adds that Annada was in some village not known within Katwa in the District of Burdwan. This is said obviously with a view to explain why Annada had not been called. The next witness, Nibaran Chandra Mookerjee, however, asserted that Annada had a rice-shop in Kidderpore where the parties resided, and, though asked, had not agreed to give evidence. In cross-examination, it transpired that no corroboration could be obtaind of the allegation that Annada had refused to give evidence, because none else besides the witness was present when Annada is said to have made the statement. We have consequently the fact that the writer has not been called; it is not proved beyond

(1) (1831) 9 Connecticut 102; 21 Am. Dec. 732.

doubt that a serious effort was made to obtain his evidence; in any event, if the petitioners had good reason to suppose that he could not be trusted to tell the truth, they might have asked the Court to summon him, with liberty to both parties to cross-examine him, if necessary. We have thus no information as to the instructions, if any, given by the testator for the preparation of the Will, except the bare statement by Satya Charan that he spoke about the Will for two or four days previously. Even this does not give any indication that the testator had expressed his intention to make a Will, or as to the details of its terms, or that he had consulted anybody about making a Will. We do not know when, if at all, instructions were given. We do not know that the provisions in the Will, as it stands, represent the wishes of the testator. In addition to this, we have the fact that there is no reliable evidence to show that the Will as drawn up was, before execution, read over to the testator, and its terms approved by him. Satya Charan, in his cross-examination, alleges that some one read out the Will, who he could not remember; he does not say, however, at what stage the Will was so read over. The person who read over the Will, if the story be true, should undoubtedly have been examined. We have consequently a Will executed by a man about two hours before his death, when his condition was critical and when, according to the evidence, he was restless with pain, without any information either as to the instructions, if any, given by him, or the time when and the person to whom the directions were given, and without any evidence to show that the Will as prepared was, before execution, read over to and approved by him. The Court called upon to pronounce in favour of such a Will, would, on well-recognised principles, to which a brief reference will presently be made, refuse to hold in favour of the propounder.

But in the present case we have the additional fact that the contents of the Will tend materially to confirm the conclusion against the operative character of the instrument. As we have already stated, the Will contains a serious misstatement, inasmuch as it includes amongst the assets a sum of money for the purchase of a house which, as a matter of fact, had been purchased by the testator twenty months earlier; the recitals in the conveyance, together with the details of the currency notes paid to the vendor, show that the transaction had been completed. But, in addition to this misstatement in the Will, we have what cannot but be regarded as a serious omission from the Will. As we have already mentioned, the wife of the testator was in the family way and a posthumous son was born within three months of his death. It may safely be assumed that the testator was aware of the condition of his wife; yet the Will makes no provision whatsoever for the possible child, though legacies are given to every one of the daughters and even to the grand-daughter. The Will recites that, up to that time, the testator had no male issue; yet it makes no reference to the possible child and makes a disposition of the properties which would completely disinherit the son, if one was born. It is difficult to believe that if the Will, as drawn up, was really the act of the testator and represented his wishes and judgment, no reference should be made to the possible child and no provision made for it, whether a daughter or a son. On the other hand, if the terms of the Will were practically settled by the brothers or other well-meaning relations of the testator, when enfeebled by mortal illness and almost within sight of the end, they might have arranged for provisions like those we find in the Will, in ignorance of the condition of the testator's wife. It is further clear that if the available cash alone was taken into account, very nearly the whole of it was given away in legacies, and practically nothing but the houses was left for the widow. The provisions of the Will are consequently such as are calculated to excite suspicion. No doubt, as pointed out by the Judicial Committee in *Musammat Bulli Kunwar* v. *Musammat Bhagirathi* (2), a Court will not reject a Will merely because its terms appear extraordinary, against clear evidence of due execution by a competent testator. But where the terms are unusual and the evidence of testamentary capacity doubtful, as the Judicial Committee observed in *Dufour* v. *Croft* (3) and *Harwood* v. *Baker* (4), the vigilance of the Court will be roused, and before pronouncing for the Will,

(2) 9 C. W. N. 640; 15 M. L. J. 285.
(3) 3 M. P. C. 136; 13 E. R. 59.
(4) 3 M. P. C. 282; 13 E. R. 117, 50 R. R. 37.

the Court will require to be satisfied beyond all reasonable doubt that the testator was fully cognizant of its contents and in a condition to exercise and did exercise thought, judgment, and reflection respecting the act he was doing: *Tyrrell* v. *Painton* (5). Upon a careful scrutiny of the entire evidence, we are of opinion that the propounders have failed to establish that the testator had sound and disposing mind when he is said to have affixed his signature to what purports to be his Will.

The principle applicable to cases of this character is now settled beyond possibility of dispute. Mere ability to sign one's name does not necessarily imply the possession of the full mental powers requisite for a valid disposition of property. Nor is it sufficient to show that the testator was conscious when he executed the instrument. As Creswell, J., said in *Sefton* v. *Hopwood* (6), "it is not sufficient in order to make a Will that a man should be able to maintain an ordinary conversation and to answer familiar and easy questions. He must have more mind than suffices for that. He must have what the old lawyers called a disposing mind; he must be able to dispose of his property with understanding and reason. This does not mean that he should make what other people may think a sensible Will or a reasonable Will or a kind Will. But he must be able to understand his position, he must be able to appreciate his property, to form a judgment with respect to the parties whom he chose to benefit by it after death; and if he has capacity for that, it suffices." Sir John Nicholl observed in *Marsh* v. *Tyrrell* (7): "it is a great but not uncommon error to suppose that because a person can understand a question put to him and can give a rational answer to such question, he is of perfectly sound mind and is capable of making a Will for any purpose whatever, whereas the rule of law, and it is the rule of common sense, is far otherwise." As Redfield, J., said in *Converse* v. *Converse* (8), "in order to execute a valid Will, one must have sufficient active memory to recall his family and his property and to form a rational judgment in regard to the deserts of the one, and the disposition of the other with reference to such deserts." [*Delafield* v. *Parish* (9)]. The position is somewhat different where a testator has given instructions for his Will while his mind is still in vigour, and, then, with the requisite decree of knowledge, executes the instrument shortly before his death: *Parker* v. *Felgate* (10); *Woomesh Chunder Biswas* v. *Rashmohini Dassi* (11), affirmed by the Judicial Committee on appeal, *Rashmohini Dasi* v. *Umesh Chunder Biswas* (12). As Lord Macnaghten said in *Perera* v. *Perera* (13), where a testator is of sound mind when he gives instructions for a Will, but at the time of signature accepts the instrument drawn in pursuance thereof, even though not able to follow its provisions then, he must be deemed to be of sound mind when it is executed. The case before us does not fall within this rule, of which the cases of *Kusum Kumari* v. *Satishendra Nath Bose*, (14) and *Venkata Rangavulu* v. *Baggimmal* (15) may be mentioned as recent illustrations. On behalf of the respondents the view, however, has been earnestly pressed upon us that a Court of Appeal should be extremely slow to disagree with the primary Court on a question of appreciation of oral evidence. We are not unmindful that, in the words of Lindley, M. R., in *Coghlan* v. *Cumberland* (16), quoted with approval by Lord Collins in *Shunmugaroya Mudaliar* v. *Manika Mudaliar* (17), it is always difficult for Judges who have not seen and heard the witnesses to refuse to adopt the conclusion of fact of those who have: *Shama Charan Kundu* v. *Khettromoni Dasi* (18), *Marmavula Venkatakrishnayya*

(5) (1894) P. 151; 6 R. 540; 70 L. T. 458; 42 W. R. 343.
(6) (1858) 1 F. & F. 578.
(7) (1827) 2 Hagg. 84 at 122.
(8) (1849) 21 Var. 168; 52 Am. Dec. 58.
(9) (1862) 25 N. Y. 9.
(10) (1883) L. R. 8 P. D. 171; 52 L. J. P. 95; 32 W. R. 186; 47 J. P. 808.
(11) 21 C. 279.
(12) 25 C. 824; 25 I. A. 109; 2 C. W. N. 321.
(13) (1901) A. C. 354; 70 L. J. P. C. 46; 84 L. T. 371; 17 T. L. R. 389.
(14) 3 Ind. Cas. 787; 13 C. W. N. 1128.
(15) 14 Ind. Cas. 550; 23 M. L. J. 54.
(16) (1898) 1 Ch. 704; 67 L. J. Ch. 402; 78 L. T. 540.
(17) 3 Ind. Cas. 799; 36 I. A. 185; 32 M. 409; 11 Bom. L. R. 1206 (P. C.); 10 C. L. J. 276; 6 M. L. T. 304; 19 M. L. J. 640.
(18) 27 C. 521; 27 I. A. 10; 4 C. W. N. 501.

v. *Annapurni Ammamori* (19). The principle mentioned, no doubt, embodies the general rule, but is not of universal application, and cases are by no means rare where an Indian Appellate Court has taken a different view on the facts with reference to the validity of a Will from that taken by the primary Court, and the conclusion of the Appellate Court has been ultimately affirmed by the Judicial Committee: *Rashmohini Dasi* v. *Umesh Chunder Biswas* (12), *Gangamoyi Debi* v. *Troiluckhya Nath Chowdhry* (20), *Mussammat Bulli Kunwar* v. *Mussammat Bhagirathi* (2). Here, however, the case is one not so much of estimate of credibility of the witnesses for the petitioners, who have been believed by the trial Court, as of the effect of their statements on the assumption that they have spoken the truth. The decision of the District Judge is vitiated by his failure to test the evidence from the standpoint of the fundamental principle that the testator must be of sound and discerning mind and memory, so as to be capable of making a disposition of his property with sense and judgment, in reference to the situation and amount of such property and to the relative claims of different persons who are or might be the objects of his bounty. It does not necessarily follow that in order to entitle us to disagree with the conclusion of the trial Court, we must disbelieve the witnesses who have been accepted as truthful by that Court. In this connection, the observations of Baron Parke in *Baker* v. *Batt* (21) may be usefully remembered: "in a Court of Probate where the *onus probandi* most undoubtedly lies upon the party propounding the Will, if the conscience of the Judge, upon a careful and accurate consideration of all the evidence on both sides, is not judicially satisfied, that the paper in question does contain the last Will and Testament of the deceased, it is bound to pronounce its opinion that the instrument is not entitled to probate. And it may frequently happen that this may be the result of an inquiry in cases of doubtful competency in particular, without the imputation of wilful perjury on either side: or it may be, the Judge may not be satisfied on which side the perjury is committed, or whether it certainly exists." To the same effect are the observations of Lord Brougham in *Panton* v. *Williams* (22): "There is no duty cast upon the Court to strain after probate, and to grant it where grave doubts remain wholly unremoved, and great difficulties oppose themselves to our progress, which we are quite unable to surmount. It may suffice to say that the proof eminently lies on him who sets up a Will, and further that it is more fatal than to his adversary if he leaves difficulties entirely without explanations. It is much less material that those who seek to impeach a testamentary instrument should be unable to explain certain things in their case and should be forced to admit that their argument is not in every point consistent with all the facts, than that they who seek to establish the Will should give no rational, consistent or intelligible solution of those difficulties which encumber their suppositions and obstruct the path towards the conclusion they would have us arrive at." In the case before us, we are unable to say that the propounders have satisfied us that the instrument put forward as the last Will of Haralal Banerjee was executed by him when he had a sound disposing mind.

The only other matter for consideration is, whether the case should be re-tried and the propounders allowed an opportunity to fill up the deficiencies in the proof offered by them, after an anxious examination of all the circumstances, we have arrived at the conclusion that the matter should not be re-opened. There would be a real danger of manufacture and manipulation of evidence if witnesses were now allowed to be brought forward to speak to events which happened nearly twenty years ago.

The result is that this appeal is allowed, the decree of the District Judge set aside and the application for Letters of Administration made on the 19th February 1912 with reference to the alleged Will of Haralal Banerjee dismissed. We direct, however, that the parties do bear their own costs throughout these proceedings.

Appeal allowed.

(19) 12 Ind. Cas. 393; 10 M.L.T. 304; (1911) 2 M. W. N. 330.

(20) 33 C. 537; 3 C. L. J 349; 10 C. W. N. 522; 8 Bom. L. R. 375; 1 M. L. T. 131; 16 M. L. J. 161; 33 I. A. 60.

(21) (1838) 2 Moo. P. C. 317; 12 E. R. 1026; 46 R. R. 52.

(22) (1843) 2 Curt. 530; 2 Notes of Cases Sup. 21.

RAJARAJESWARA DORAI v. SUNDARAPANDIYASWAMI THEVAR.

MADRAS HIGH COURT.

CIVIL APPEALS NOS. 173 AND 193 OF 1911.

October 28, 1914.

Present:—Sir John Wallis, Kt., Offg. Chief Justice, and Mr. Justice Seshagiri Aiyar.

IN No. 173 OF 1911

RAJARAJESWARA DORAI *alias* MUTHU RAMALINGA DORAI AVERGAL—DEFENDANT—APPELLANT

versus

V. SUNDARAPANDIYASWAMI THEVAR—PLAINTIFF—RESPONDENT.

IN No. 193 OF 1911.

RAMA RAJA THEVAR—PLAINTIFF—APPELLANT

versus

RAJARAJESWARA DORAI *alias* MUTHURAMALINGA DORAI AVERGAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Impartible zemindari—Maintenance allowance, whether charge—Intention of parties—Heir taking as donee under a gift—Santhathi Paramparayai *—Annuity in nature of personal estate—Assignment of heir's rights.*

Where a suit for the recovery of a certain *zemindari* was compromised and the plaintiff agreed to receive a sum of Rs. 700 monthly for himself and his heirs from the then and future holders of the *zemindari* and on the allowance falling into arrears, the son of the grantee instituted a suit for the amount and obtained a decree, but the decree was held to be not executable by his heirs, who were referred to a regular suit, which was duly brought:

Held, (1) that the grant was chargeable on the *zemindari* and enforceable by the descendants of the original grantee;

(2) that the fact that the defendant took the estate as a gift from his father did not take away the liability which would have devolved on him if he had succeeded to the property as son and heir;

(3) that the words "*Santhathi paramparayai*" clearly showed that the annuity was intended to be descendible to the heirs of the grantee generally and not limited to his lineal descendants.

Per *Seshagiri Aiyar, J.*—The language of the grant makes the grantor's heirs liable for all time to come.

No special language is necessary to create a charge, it depends upon the intention of the parties, and in the present case the maintenance allowance made payable under the deed of compromise was intended to be a charge upon the *zemindari*.

The principle that where property is given by Will to a person who would otherwise be entitled to it as heir the character of the property is not changed, is also applicable where the transfer is *inter vivos*.

Per *Wallis, C. J.*—The grant is analogous to maintenance allowances payable by the proprietor of an impartible estate to the junior members of his family for maintenance, which are not deemed to be charged on the estate as a whole.

The words used are not sufficient to impose a charge on the *zemindari*, but merely create an annuity in the nature of a personal estate that may be made descendible in the same manner as real estate.

Where the heir of a deceased person executed a deed in favour of another which, after reciting that there was some question whether he or the other person was the next reversioner, provided that in consideration of a payment of Rs. 1,000, the former should give up in favour of the latter his claim as heir of the deceased and all rights connected therewith and that the latter should enjoy the estate with all rights of ownership and that the executant and his heirs should have no claim to it:

Held, that this was a valid transfer of the heir's rights, which accrued to the transferee and could be lawfully enjoyed by him.

Appeals against the decrees of the District Court of Madura, in Original Suit No. 17 of 1910.

IN No. 173 OF 1911

Mr. *K. Sreenivasa Iyengar* (with him Mr. *A. Krishnasami Aiyar*), for the Appellant.

Mr. *S. Sreenivasa Iyengar* (with him Mr. *S. Sundararaja Aiyangara*), for the Respondent.

IN No. 193 OF 1911

Mr. *K. Sreenivasa Iyengar* (with him Mr. *A. Krishnasami Iyer*), for the Appellant.

Mr. *Sydney Smith*, for the Respondents.

JUDGMENT.

WALLIS, OFFG. C. J.—I agree, for the reasons given by my learned brother, with the decision of the District Judge that the first plaintiff has failed to prove that he was the adopted son of the deceased Muthudorasami Thevar and that his appeal (No. 193 of 1911) must be dismissed with costs; the memoranda of objections must also be dismissed with costs. The appeal (No. 173 of 1911) of the Rajah of Ramnad (the 2nd defendant) against the decree in favour of the 3rd plaintiff, who is the father of the 1st plaintiff but claims as assignee of one Poolar Thevar, the next reversioner of the deceased Muthudorasami Thevar, has now to be dealt with. The mother of the deceased was the 2nd plaintiff and sued as his heiress, and it was on her death pending the suit the 3rd plaintiff, the assignee of the next reversioner, was brought on and allowed to continue the suit as her legal representative.

The claim is for an annuity of Rs. 700 settled in January 1861 on Sivasami Thevar,

the father of Muthudorasami, and his heirs as one of the terms of a compromise of a suit, in which Sivasami claimed the *zemindari* of Ramnad from the then *zemindarni* and her adopted son, the grandfather of the present Rajah. The litigation to which this annuity has given rise, subsequently to Sivasami's death, is succinctly stated in paragraph 1 of the District Judge's judgment. His senior widow, Kulandai Nachiar, disputed the legitimacy of Muthudorasami, and after obtaining a decision in her favour in the High Court, which was afterwards reversed by the Privy Council, instituted Original Suit No. 10 of 1867 against the Rajah of Ramnad, in the Madura District Court, *who pleaded* unsuccessfully that the annuity was only settled on the lineal heirs of the deceased Sivasami. In 1880 Muthudorasami, Sivasami's son, sued the Rajah in Original Suit No. 16 of 1880 in the District Court of Trichinopoly, and obtained a decree under which he drew the allowance till his death in 1905. In the present suit the defence has again raised the contention that the annuity was confined to the lineal heirs of Sivasami, and the District Judge has held that it is not *res judicata* by reason of the decision in Original Suit No. 10 of 1867, on the ground that Kulandai Nachiar, the plaintiff in that suit, cannot be considered to have respresented the estate. He has, however, arrived at the same conclusion as the District Judge in that suit, whose judgment (Exhibit R 3) was approved by the High Court in appeal (Exhibit R), and has rejected the contention that the annuity was only settled on the lineal heirs of Sivasami. I may at once dispose of this contention which was again raised before us, by saying that I see no reason to differ from those decisions. The compromise was arrived at while the decree of the Court of Sudder Adaulat dismissing Sivasami's claim to the *zemindari* was under appeal to the Privy Council, and was embodied in two documents, Exhibits Q2 and Q3, one in Tamil and one in English, both signed by the Pleaders of the parties and filed in the Sudder Court. The English version, Exhibit Q3, is as follows: "The plaintiff has thus relinquished all right and claim (to the *zemindari*); the defendant and her heirs holding the *zemindari* shall, from the 1st November 1860, pay to the plaintiff and his heirs a monthly allowance of rupees seven hundred within the 10th of every succeeding month." The words *santhathi parampayai* used in the Tamil version are of Sanscrit origin, signifying literally from generation to generation. The same word *santhathi* is used in an earlier portion of the document, which provides that neither the plaintiff Sivasami nor his heirs shall have any claim to the *zemindari*, and as pointed out more than once in the judgment, it is absurd to suppose that it was the intention that the settlement should be binding only on the lineal heirs of Sivasami and might be disputed by collaterals. Further, the District Judge stated in his judgment of 1869 that these words were often used loosely among the Tamil people to signify heirs general and the same construction has often been placed on similar words by the Privy Council. It is, I think, clearly shown that under the terms of the compromise the annuity is descendible to the heirs of Sivasami generally and is not limited only to his lineal descendants.

A further contention has, however, been raised before us, that the provision that "the defendant and her heirs holding the *zemindari* shall from the 1st November 1860 pay to the plaintiff and his heirs a monthly allowance of Rs. 700 within the 10th of every succeeding month" (Exhibit Q3), is bad in law and that the plaintiff takes nothing under it. This contention was not raised in the suits of 1867 and 1880 already mentioned or in the written statements or issues in the present suit. It no doubt appears from paragraph 9 of the District Judge's judgment that an argument based on the nature of the interest conveyed to Sivasami and his heirs was addressed to him, but he appears to have understood it as directed to the contention that the annuity was descendible only to Sivasami's heirs lineal and not to his heirs general. It is not disputed that, if the annuity were charged upon the lands of the *zemindari*, it would constitute a rent charge and would be good. The District Judge has held that it is so charged, and the first point for consideration is whether he is right as to this. If the annuity had been made payable out of the rents and profits, that of course would have constituted a charge, but it is made payable

by the *semindarni* and her heirs holding the *semindari*, and I am not satisfied that these words are sufficient to impose a charge. The grant is analogous to maintenance allowances payable by the proprietor of an impartible estate to the junior members of his family for maintenance which, it is well settled, are not deemed to be charged on the estate as a whole. Having regard to the enormous extent of the *semindari* which covers half a district, it was perhaps hardly thought necessary to create a charge binding the whole estate for so small a sum as this. We have been referred to *Lakshmi Narayana Ananga* v. *Durga Madhava Deo* (1), a decision of the Privy Council in which a sum of Rs. 300 for maintenance of a junior member and his family is referred to in the beginning of their Lordships' judgment as a charge created by the *semindar*, but a reference to the printed book shows that no charge was claimed in the pleadings and that no question as to any charge was raised at the trial or in the appeal to the High Court; and that in the way the case came before their Lordships, nothing turned on the question whether there was a charge or not and no such question apparently was raised.

Assuming that the grant was merely of an annuity payable to Sivasami and his heirs by the *semindarni* and her heirs holding the *semindari*, I do not think such a grant offends against either the rules of English or of Hindu Law. According to Halsbury's Laws of England, Volume 24, Title "Rent Charge," such an annuity is in the nature of personal estate but may be made descendible in the same manner as real estate, and in India there is no reason why it should not be descendible according to the ordinary rules of Hindu Law. In case of non-payment, but not otherwise, relief may be sought by administration of the estate of the deceased settlor, when provision may be made for it out of the assets of the deceased: *In re Hargreaves Dicks* v. *Hare* (2), Halsbury's Laws of England, Volume 24, page 520.

It is, however, contended that the compromise creates a covenant running with the land in favour of Sivasami and his heirs obnoxious to the rule in *Austerberry* v. *Corporation of Oldham* (3). In my opinion it has not that effect, but merely renders the estate of the covenantor (including in that term not only the *semindarni*, but also her adopted son whom she represented) liable in the hands of their legal representatives to the extent of the assets: and in this view, the 2nd defendant as their legal representative is liable to the extent of the assets in his hands, which include the *semindari*. The defence relies on the decision of the Privy Council in *Chandi Churn Barua* v. *Sidheswari Debi* (4), but in my opinion that case does not affect the question. A Rajah in 1776 had made a grant in favour of certain of his dependants, confirming them in the possession of three villages and providing that, if they were not sufficiently supported by his successors, they were to be entitled to four more villages which were named, and the suit was brought for the recovery of the four villages on the ground that the event specified had happened. Their Lordships thought that such a grant might either be regarded as a present assignment to persons not yet in existence, subject to a suspensive condition which might prevent its taking effect at all, or for generations to come, or else as a covenant running with the Raj estate and binding its possessor to give the villages to these persons in the event specified. In either case they held it prevented the owner from alienating his estate discharged of such future interest, and imposed a restraint upon alienation contrary to the principles of Hindu Law. No such results follow from recognising the present gift, which moreover is not in favour of strangers but of members of the family. In the *Tagore* case [*Jatindra Mohan Tagore* v. *Ganendra Mohan Tagore* (5)] after laying down the illegality under Hindu Law of gifts to unborn persons, their Lordships make an express reservation "as to certain exceptional cases of provisions by way of contract or of conditional gift on marriage or other family provision, for which authority may be found in Hindu Law or usage." In *Karim Nansey* v. *Heinrichs* (6) their Lordships

(1) 16 M. 268; 20 I. A. 9; 17 Ind. Jur. 106; 6 Sar. P. C. J. 270.

(2) (1890) 44 Ch. D. 236; 59 L. J. Ch. 375; 62 L. T. 819.

(3) (1885) 29 Ch. D. 750 at p. 755; 55 L. J. Ch. 633; 53 L. T. 543; 33 W. R. 807; 49 J. P. 532.

(4) 15 I. A. 159, 10 C. 71; 12 Ind. Jur. 320, 5 Sar. P. C. J. 231.

(5) I. A. Sup. Vol. 47; 18 W. R. 359; 9 B. L. R. 377.

(6) 25 B. 563 at p. 573; 3 Bom. L. R. 472; 6 C. W. N. 1; 28 I. A. 108 (P. C.).

observe: "Gifts or contracts expressed to be for maintenance, and indefinite as regards duration, may be shown by the acts of the parties or other circumstances to be intended to operate in perpetuity; but *prima facie* they are limited to the life either of grantor or grantee;" and in *Aziz-un-nissa* v. *Tassadduq Husain Khan* (7), another decision of their Lordships, the question was whether the sum of Rs. 70 payable monthly under an award was intended to create a heritable interest, and it was not suggested that if it did, it would be bad.

Here I may say that the case cited for the plaintiff, *Chatti Chalamanna* v. *Pandrangi Subbamma* (8), does not seem to me to afford much assistance, as it was found there that the intention was to create a charge on the produce of the estate.

However, the explanation of a *nibandha* or *corody* taken from the *Dipacalica* in Colebrook's Digest, Volume I, page 443, includes such gifts as "I will give 150 *swarnas* every month of Karthigai" and "I will give monthly one *swarna*", in which there are no words of charge. Assuming, however, that there is no charge, I think that following the practice in the case of maintenance allowances, and also the practice in England as to making provision in administration for perpetual annuities payable out of the estate, it will be proper to make the annuity a charge on a part of the *zemindari* and that the case should be sent back for that purpose. In 1895 the Rajah's father, having involved himself in difficulties, executed a trust-deed under which the trustees were to provide for payment of some of his liabilities and hold the estate in trust for his son, the present 2nd defendant. Paragraph 23 of the deed provided that such part of the income as might be necessary should be applied in payment to Muthudorasami Thevar and his heirs of the monthly sum of Rs. 700, payable under the decree in Original Suit No. 16 of 1880 on the file of the District Court of Trichinopoly. At the trial the plaintiff relied upon the provision as a fresh grant in favour of the deceased and his heirs, a contention rejected by the District Judge. On appeal the defence has raised a new case based on this deed, and contend that the 2nd defendant holds the *zemindari* as transferee under the deed and not as heir of the late Rajah, and that he is not liable to pay the annuity sued for to the heirs of the deceased Muthudorasami, as the reservation is only of the annuity to the deceased and his heirs under the decree in Original Suit No 16 of 1880, and it has since been held, as mentioned in paragraph 12 of the plaint, that that decree was in favour of Muthudorasami personally and that his heirs are not entitled to execute it. Assuming for a moment that it is open to the defence to raise a new case like this at such a late stage of the suit, I think these contentions fail upon the merits. The reservation in paragraph 23 of the trust-deed is expressly in favour of Muthudorasami and his heirs, and to borrow the language of Vaughan Williams, L. J., *In re Rowe*, *Pike* v. *Hamlyn* (9) which was cited for the defence, it seems difficult, if not impossible, to suggest any reason for mentioning the heirs unless it was intended to provide for the payment of the annuity to them. The annuity was in fact payable to them under the compromise of 1861, as every one knew, and appears to have been supposed erroneously, it now turns out, to be also payable to the heirs under the terms of the decree in Original Suit No. 16 of 1880. In these circumstances I think the words referring to the decree were mere misdescription, to which the maxim *falsa demonstratio non nocet* is applicable. This conclusion is supported by the provisions of paragraph 26 of the deed, that the *zemindari* and other property dealt with by the deed are to be transferred to the present Rajah (2nd defendant), his heirs and assigns, "absolutely so that he may have the same kind and nature of estate, right and interest therein as he would have had if the same had devolved upon him from the settlor by right of inheritance according to the said law and custom of primogeniture and Hindu Law." Then follow certain reservations which are not material. These provisions, in my opinion, clearly disprove the contention that it was the intention to transfer the *zemindari* to the present Rajah discharged of the liabilities attaching to it in respect of the annuity now in question. Lastly, it is far from clear that it was open to the late Rajah so to discharge his heir by means of a voluntary conveyance

(7) 23 A. 324; 11 M. L. J. 160, 3 Bom. L. R. 607; 5 C. W. N. 500; 28 I. A. 65 (P. C.).

(8) 7 M. 23; 7 Ind. Jur. 465.

(9) (1898) 1 Ch. 138; 67 L. J. Ch. 87; 77 L. T. 476; 46 W. R. 357.

in his favour, and in any case, I think, the Court should lean strongly against a construction of the deed which would have that effect. Another ground of appeal is that the District Judge was wrong in allowing the 3rd plaintiff to be brought on as the legal representative of the deceased 2nd plaintiff, the mother of Muthudorasami, who survived him. As already mentioned the next reversioner is one Poolar Thevar, who on the the 8th April 1910 executed a deed, Exhibit Y, in favour of the 3rd plaintiff, in which, after reciting that there was some question whether Poolar Thevar or the 3rd plaintiff was the next reversioner, the deed provides that in consideration of a payment of Rs. 1,000 the former should give up in favour of the third plaintiff his claim as heir of the deceased and all rights connected therewith, and that the 3rd plaintiff should enjoy the estate with all rights of ownership and that the executant and his heirs should have no claim to it. This appears to me to be a valid transfer, until it is set aside by Poolar Thevar, to the 3rd plaintiff of all his rights as reversioner of the deceased, and I think the District Judge was, therefore, right in allowing the 3rd plaintiff to continue the suit as the legal representative of the deceased 2nd plaintiff. The decree will be affirmed, subject to the modification already mentioned as to the new charge, which will be postponed to the claims of the 3rd and 4th defendants, and also by making the annuity payable on the 15th of each month, and the appeal will be dismissed with costs. The memorandum of objection is dismissed with costs.

SESHAGIRI AIYAR, J.—I entirely agree. The 1st plaintiff claims to be the adopted son of one Muthudorasami Thevar, who died on the morning of the 17th of November 1905. The 2nd plaintiff is the mother of the deceased. Their claim is that the monthly allowance of Rs. 700 due from the Rajah of Ramand, the 2nd defendant in this case, is payable either to the 1st plaintiff as being the adopted son of the deceased Muthudorasami Thevar, or in the alternative, if the adoption should be found against, to the 2nd plaintiff as being the mother of the deceased. The 2nd plaintiff died in the course of the suit. The 3rd plaintiff was added on his allegation that he has acquired a right to the allowance by virtue of an assignment in his favour by one Poolar Thevar, who admittedly is the heir of Muthudorasami Thevar, failing the adoption. The defendant, the Rajah, resisted the claim of all the three. He denied the adoption of the 1st plaintiff and, as I have held in the connected appeal that the adoption has not been proved to have taken place, that question does not arise in the present appeal. He resisted the claim of the mother, on the ground that the allowance was payable only to the lineal heirs of the deceased and that consequently she was not entitled to it. As the 2nd plaintiff died since the institution of the suit, her claim need not be considered in this appeal.

The defence to the claim of the 3rd plaintiff was very meagrely stated in the written statement. It was amplified in this Court a great deal. In the first place it was stated, as in the case of the mother, that the allowance was not payable to any but the lineal heirs of the deceased and consequently the collateral heirs of Muthudorasami Thevar had no right to claim it. The claim was also resisted on the ground that the agreement to pay a monthly allowance from generation to generation was invalid and unenforceable. It was further pleaded that as the defendant, the Rajah, obtained the property not by inheritance from his father but by virtue of a deed of trust executed in his favour, the obligation to pay the allowance did not attach to him. A further defence was raised to the effect that the deed of assignment to the 3rd plaintiff from Poolar Thevar, the heir of Muthudorasami, was a sham transaction and that it contained no words of transfer which would vest the rights of Poolar Thevar in the 3rd plaintiff.

The District Judge found that the deed of assignment was valid and conferred title to the property of the deceased Muthudorasami Thevar, and that the Rajah as being in possession of the *zemindari* of Ramand was bound to pay the allowance to the 3rd plaintiff. The Rajah has preferred this appeal.

Before dealing with the various questions raised in the appeal, it is necessary to refer to the events which have led up to the present claim. A suit was filed by Sivasamy Thevar in the Madura Civil Court, Original Suit No.

3 of 1853, against Parvitha Vardhani Ammal for the recovery of the *zemindari* of Ramnad, on the ground that he was entitled to it in preference to the widow in possession. This suit was dismissed in the Court of first instance, and the appeal against that decision to the Sudder Adaulat Court was also dismissed. Sivasami then filed an application for leave to appeal to the Privy Council. At this stage the parties entered into a compromise. In consequence of that compromise the application to appeal was withdrawn and Sivasami agreed to receive a sum of Rs. 700 monthly for himself and his heirs from the *zemindar* of Ramnad in consideration of his having given up his claim to the *zemindari*. Parvatha Vardhini adopted Muthu Ramalinga Sethupati, who became the *zemindar* of Ramnad. He was succeeded by his son, Baskara Sethupati. The present defendant is his son.

The allowance continued to be paid during the life-time of Sivasami. On his death his widow, Kolanthai Nachiar, filed a suit for the recovery of the arrears of allowance. Meanwhile one Ramamani Ammal brought a suit to have it declared that she was the lawfully wedded wife of Sivasami and that her son, Muthudurasami, was the legitimate son of her husband. It was ultimately decided that Ramamani was not a concubine but that she was the lawfully wedded wife of the deceased Sivasami. After the termination of this litigation in favour of Ramamani and her son, a suit was instituted by the son. Muthudorasami, for the arrears of maintenance due to him from the date of the death of his father. It was Original Suit No. 16 of 1880 on the file of the District Court of Trichinopoly. He obtained a decree in that suit. The 1st and 2nd plaintiffs in this case applied to the District Court of Trichinopoly to execute the decree, contending that the decree gave them a right to receive the allowance without recourse to a regular suit. The District Judge held that the original decree in favour of Muthudorasami was not executable by his heirs and referred them to a regular suit. The present suit is the result of that order.

Mr. K. Srinivasa Aiyangar's first contention is that the right created under the *razinamah* was enforceable only against Parvatha Vardhini and is of no avail against her successors in the *zemindari*. It was admitted by the learned Vakil that the fact that it was a female holder of the *zemindari* that granted the allowance, would not make any difference in the solution of this question. He contended that Exhibit Q2 was the only *razinamah* that was filed in Court and that by its terms it does not affect Parvatha Varthini's heirs in the *zemindari*. The document literally translated reads: "That the defendant who is in the enjoyment of the *zemindari* and her heirs should continue to pay the plaintiff generation to generation an allowance, etc....." This was accompanied by an English *razinamah* which is Exhibit Q3 in this case. It is somewhat differently worded. It says that "the plaintiff having thus completely relinquished all right and claim, the defendant and her heirs holding the *zemindari* shall from the 1st November 1860 pay to the plaintiff and his heirs a monthly allowance," etc. It was argued that Exhibit Q3 was intended to be a translation of Exhibit Q2 and that the *razinamah* which was put in Court and acted upon was Exhibit Q2. It was suggested that Exhibit Q3 must have been prepared for the purpose of transmitting a translation to the Privy Council. This is clearly wrong. Exhibit Q2 was admittedly filed on the 8th January 1861 and the direction of the Registrar to translate and send copies to the Privy Council was not given until the 18th January 1861 (*Vide* Exhibit Q4). It seems more probable that Exhibits Q2 and Q3 were duplicates and were both filed in Court. They were both signed in the original by the parties and their Pleaders. I am of opinion that we must read Exhibits Q2 and Q3 together, especially as the language of Exhibit Q2 is ambiguous, to find out what the parties meant to effect by the compromise.

Further, the question as to whether under this *razinamah* only a personal right, as against the grantor, was secured was not pleaded in the written statement and there was no issue about it. If this contention were well founded, it would have been a complete answer to the suit of Muthudorasami Thevar in the District Court of Trichinopoly. The *razinamah* was acted upon for over half a century and was construed by Courts and understood by the parties as conferring

rights as against persons holding the *zemindari*. The decision in the previous suit, evidenced by Exhibits S and S 2, proceeded upon this footing. I am of opinion that this contention is not open to the appellant.

Apart from these technical grounds I am satisfied that there is no substance in the argument. The document charges Parvatha Varthini and her heirs holding the *zemindari* with the liability to pay this allowance. The contention that the grantor had no power to bind her descendants was raised with reference to the observation of Channell, J., in *Read* v. *Price* (10). That case was decided on the ground that if two or more persons are jointly liable, the liability of the deceased obligor does not pass to the administrator jointly with the obligors on whom by survivorship such liability has devolved. It is no authority for the position that no person can covenant that his heirs shall be liable. The other decisions relied upon by the learned Vakil, namely *Tara Sundari Debi* v. *Saroda Charan Banerjee* (11) *Rajah Padmanund Singh* v. *Rama Prosad* (12) *Raja Padmanund* v. *Rama Prasad* (13), all relate to the question as to whether under the Civil Procedure Code a future right to maintenance can be attached and sold. They have no bearing on the question we have to decide.

The case most strongly relied upon was that of *Chandi Churn Barua* v. *Sidheswari Debi* (4). In that case the original grant recited that a perpetual remuneration should be given to certain individuals then living. In lieu of it, an immediate assignment of three villages was made. Then the document proceeded to say: "If ever in the time of my descendants you are not provided with the means of maintenance by them, then let those descendants of yours who may be living at that time produce this deed, and taking possession of the three above-mentioned villages and also of the four villages now held by me, enjoy possession of them rent free from generation to generation." After the deaths of the original grantor and grantee, the event contemplated happened. Thereupon the descendants of the grantee sued to recover possession of the additional villages by reason of the default made by the grantor's heirs. The Judicial Committee of the Privy Council held that as regards these four villages there was no contract made with the grantee at the time of the grant and that a promise to make a future grant in favour of persons yet unborn was not an enforceable contract. In the present case there was a completed contract at the time of the grant, and not merely a promise to convey in future in favour of persons yet unborn.

The case of *Lakshmi Narayana Ananga* v. *Durga Malhawa Deo* (1), before the Privy Council, is similar to the present case. In that case the holder of an impartible *zamindari* in making a grant used the following words: "I have agreed to give you, through the Collector, every month Rs. 300 on account of the maintenance of yourself and your younger brothers, three in all, and the rest of your family." In a suit by the son of the youngest brother against the successor of that *zemindar* for the allowance secured by this grant, the Judicial Committee of the Privy Council gave a decree in favour of the plaintiff. Lord Hobhouse in delivering the judgment of the Committee said: "It is contended on behalf of the defendant, that the payment of Rs. 300 a month was only to endure for the life of ogi Deo, or, at the most, for the lives of the three brothers. It is immaterial which of those constructions is put forward. Either of them seems to their Lordships to be directly at variance with the terms of the agreement." In another place it is taken for granted that the maintenance was a charge upon the *zemindari*. The language used in the *razinamah* in the present case is very similar to that employed in the document commented on by the Privy Council. If the grant in that case was regarded as not being personal to the grantee and as being enforceable against the heirs of the grantor, it is equally clear that the grant of the monthly allowance in the present case enures for the benefit of the heirs of Sivaswami and is enforceable against the successors of

(10) (1909) 1 K. B. 577; 78 L. J. K. B. 504.
(11) 7 Ind. Cas. 80; 12 C. L. J. 146.
(12) 11 Ind. Cas. 422; 14 C L. J. 127; 16 C. W. N. 14.
(13) 17 Ind. Cas. 284; 16 C. L. J. 354; 17 C. W. N. 662

Parvatha Varthini in the *zemindari*. To my mind the case in *Lakshmi Narayana Anarga* v. *Durga Madhava Deo* (1) is almost conclusive upon this question. In another case, *Mahomed Hossein Khan* v. *Mahomed Nehluddin Khan* (14), the Judicial Committee held that a grant of a similar nature is chargeable on the *zemindari* and enforceable by the descendants of the original grantee.

Mr. S. Srinivasa Aiyangar referred us to the statement of law contained in Volume 24 of "Halsbury's Laws of England", to the effect that a grant of this nature can be secured by a contract, that it is heritable, and can be enforced against persons who succeeded to the estate of the original grantor. In Section 903 of that Volume it is stated that "the right created by an instrument (whether deed, will, codicil or statute) to receive a definite annual sum of money is an interest which may be, strictly speaking, either a 'rent charge' or an 'annuity.' There can be no question that an annuity need not be charged upon the estate. The case of *Turner* v. *Turner* (15) decided that an annuity, though a personal estate, if given to a man and his heirs, would descend to the heir in default of alienation." In Section 933, the mode of creating annuities is referred to: "To create an annuity by instrument *inter vivos*, a deed, as a general rule, is necessary. An annuity is frequently secured by a personal covenant." That an annuity can be for the life of the annuitant or perpetual has also been laid down in a number of decided cases. Ordinarily under the English Law the remedy open to a person in whose favour an annuity has been created is to seek for the administration of the estate of the grantor and if it is secured by Will, to sue the executor that a fund be set apart from which the annuity may be made payable in perpetuity. Mr. K. Srinivasa Aiyangar argued from this that as the present claim is not for administration and as there is no precedent in this country for the setting apart of a particular fund for allocating a specific portion of property from which the annuity may be paid, the suit is not sustainable. The remedy open to a person in whose favour an annuity is created is not to bring an administration action only. If assets are admitted a suit to recover arrears will lie. Of course it will always be open to the defendant to plead that he has no funds in his hands from which the annuity can be paid. It may be that the annuitant runs the risk of getting a useless decree in case he does not obtain a charge upon any specific property for the payment of his annuity. In the present case, the plaint claims that the annuity should be charged on specific property. Even if the allowance in the present case is not to be regarded as a charge on the whole *zemindari*, I see no objection to granting the plaintiff's prayer that it be secured to him by making it a charge on a portion of the property in the hands of the defendant. My view is that the language of the *razinamah* amounts to creating a charge on the *zemindari*. Even in that view it is desirable that the charge should be restricted to specific portions of the *zemindari*. This is often done in maintenance cases; and it is in the interests of the defendant that he should not be fettered in the enjoyment of his property by fixing on it a general charge, affecting the whole estate. For all these reasons I am of opinion that the allowance secured by Exhibits Q2 and Q3 is enforceable against the heirs of the grantor and payable from out of the assets of that grantor which are in the hands of the defendant, subject to the reservation that a specific portion of his estate be charged with its payment.

The next contention of the learned Vakil for the appellant is that this contract to pay a monthly allowance does not run with the land and, therefore, the grantee's heirs cannot sue to recover it from persons holding the *zemindari*. Two decisions of the Allahabad High Court, *viz.*, *Sri Thakurji Maharaj* v. *Lachmi Narain* (16) and *Ram Gobind* v. *Sri Thakurji Maharaj* (17), were cited in this connection. In both those cases there was a transfer of property on condition that the transferee should pay the land revenue upon the portion retained by the transferor and should further pay him a monthly allowance. The transferee conveyed his property to third persons. It was held that those third persons were

(14) 18 C. L. R. 330.
(15) (1783) 1 Bro. C.C. 317; Amb. 776; 28 E. R. 1155
(16) 19 Ind. Cas. 67; 11 A. L. J. 212.
(17) 19 Ind. Cas. 188; 11 A. L. J. 231.

not bound to pay that monthly allowance for all time to come. No case is quoted in the judgment nor is the deed of transfer set out. It is probable that a purely personal right was secured by the contract. In the present case, the language of the grant makes the grantor's heirs liable for all time to come.

I am also inclined to think that a grant of this kind is covered by the second clause of section 40 of the Transfer of Property Act, which says: "Where a third person is entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immoveable property, but not amounting to an interest therein or easement thereon, such right or obligation may be enforced against a transferee with notice thereof or a gratuitous transferee of the property affected thereby." In the present case Sivaswami was entitled under the contract to an allowance. The contract is annexed to the ownership of the *zemindari* of Ramnad, as is clear from the language employed in Exhibits Q2 and Q3. It may be that Sivaswami's right did not amount to an interest in the property. Nonetheless according to the language of section 40 the benefit is enforceable against a gratuitous transferee and against all transferees with notice of the original grant. There are no Indian cases upon this point, but as the language seems very apt to cover the present case, although in terms Chapter II of the Transfer of Property Act" is not applicable to Hindus, I see no reason why the principle of that section should not be applied to the facts of the present case.

I may refer to the decision of the Court of Appeal in *Ex parte, Graham; In re Blackburn Benefit Building Society* (18) quoted by Mr. K. Srinivasa Aiyangar. It is an authority for the position that, so long as the grantee is in possession of the rents and profits of the land from which the allowance is payable, although no charge was created in his favour nor was there any covenant running with the land, the grantee could enforce his rights as against the grantor. Before dealing with the other contentions of the appellant, it is necessary to dispose of the question whether the allowance made payable under Exhibits Q2 and Q3 was a charge upon the *zemindari* of Ramnad. I am inclined to hold that it is. We have to remember that the document is of 1861, when the parties were not as fully conversant with legal technicalities as they are to-day. It must also be borne in mind that Sivaswami claimed the whole *zemindari*, and it is hardly conceivable that he would have been content to take a personal covenant for payment of the allowance when he had laid claim to the *zemindari* itself. Further, if no charge is intended to be created upon the *zemindari*, it was hardly necessary in these two documents to use the expression "the defendant and her heirs holding the *zemindari*." Moreover, the grant was in the nature of one for maintenance and it is well understood that maintenance, ordinarily comes out of an estate in the possession of the promisor. It is conceded that no special language is necessary to create a charge. It depends upon the intentions of the parties; and I am of opinion that the parties intended, from the circumstances, I have set forth, that this maintenance should be a charge on the *zemindari*. In *Lakshmi Narayana Ananga* v. *Durga Madhava Deo* (1), to which I have already referred, Lord Hobhouse assumes that language similar to the present would create a charge upon the *zemindari*; and it was held in *Mahomed Hussein Khan* v. *Mahomed Nehluddin Khan* (14) that it is permissible to refer to the surrounding circumstances to see whether there was an intention to create a charge. Reference may also be made to the case of *Hem Chundra* v. *Atul Chundra* (19). My conclusion is that the allowance in favour of Sivaswami and his heirs is a charge on the *zemindari*.

Mr. S. Srinivasa Aiyangar contended that such permanent and heritable grants are not unknown to Hindu Law. The ancient Hindu Smriti writers referred to it as a *nibhanda*. Ordinarily the term imports permanency. The origin of a *nibhanda* grant seems to lie in the Ruling Chiefs making hereditary grants to their dependants as remuneration for meritorious services rendered to them. They were money allow-

(18) (1888) 42 Ch. D. 343; 59 L. J. Ch. 183; 61 L. T. 748; 38 W. R. 178; 2 Meg 1.

(19) 21 Ind. Cas. 179; 19 C. L. J. 118; 19 C. W. N. 386.

ances from generation to generation or grants of land. In later years, this practice was followed by *zemindars*. All the authorities relating to the "*nibhanda* grant" are collected in Colebrook's Digest, Volume I, pages 442 and 443. See also *Balavantrah* v. *Purshotam Sidheshwar* (20). I am referring to this contention to point out that there is nothing repugnant to Hindu Law in making such a perpetual grant. It was pointed out in *Nafar Chandra Kundu* v. *Ratnamala Debi* (21) and *Dinesh Chandra Roy Chowdhury* v. *Biraj Kamini* (22) that the principles of *Jatindra Mohan Tagore* v. *Ganendra Mohan Tagore* (5) against grants in perpetuity should be restricted to cases of grants containe in Wills; the Judicial Committee pointed out in that case that there was nothing in Hindu Law to warrant a grant of the kind before them in perpetuity in favour of unborn persons. But where a hereditary grant of this kind is in the contemplation of Hindu text writers, their Lordships have expressly guarded themselves against saying that such, a provision will be obnoxious to the rule against perpetuities.

The next question for consideration is whether the defendant is not liable because he has taken the estate, not as heir of the last owner, but under a deed of trust created by his father. No issue was taken upon this point; in the absence of such an issue we are not in a position to say under what circumstances the trust-deed, Exhibit T, was executed. In my view, the fact that the defendant took the estate as a gift from his father will not take away the liability which would have devolved on him if he had succeeded to the property as son and heir. As pointed out in *Nagalingam Pillai* v. *Ramachandra Tevar* (23), where property is given by Will to a person who would otherwise be entitled to it as heir, the character of the property is not changed. The same principle should be extended to transfer *inter vivos*. Moreover, in this case Exhibit T, the trust-deed, shows that the settlor intended that the *zemindari* should continue to be liable as if the property descended in the ordinary course of succession and not by assignment under the trust deed. The maintenance of the younger brother is provided for, and language is employed in many places indicating that the fact that there was a trust-deed should make no difference regarding the liability of the *zemindari* for obligations resting upon it. A good deal of argument was addressed to us regarding the provision in Exhibit T to the following effect: "In the seventh place, shall apply such part or parts thereof as may be required for payment to Muthudoraswami Thevar and his heirs of the monthly sum of Rs. 700 payable under the decree in Original Suit No. 16 of 1881 on the file of the District Court of Trichinopoly." It was not disputed that the decree in the District Court of Trichinopoly did not make the allowance payable to Muthudoraswami Thevar *and his heirs*. It was, therefore, argued that these words, "and his heirs", in Exhibit T were "a surplusage and all that the document was intended to secure was the payment to Muthudoraswami Thevar of the amount of the decree. If this question had been raised in the issues, the meaning of this clause could have been rendered clear. For example, it is not a violent suggestion to make that what the parties intended to say was that the payment to Muthudoraswami Thevar and his heirs should be made as provided for in the *razinamah* on which the decree was obtained in the Trichinopoly District Court. The language of the document is capable of being made certain by extraneous evidence. It was, therefore, incumbent on the defendant to have raised a specific issue whether the trust-deed did oblige him to pay the descendants of Muthudoraswami Thevar the maintenance from out of the estate. The language of the residuary clause 26 seems to imply that all subsisting obligations upon the *zemindari* are to be met by the defendant from the income of the *zemindari*. I cannot, therefore, accept the contention that the fact of the execution of the trust-deed makes a difference in regard to the position of the defendant.

It is further argued that under the assignment-deed to the 3rd plaintiff no right to the maintenance passed to him. It is common ground that Poolar Thevar, the assignor, was the heir to the estate and

(20) 9 B. H. C. R. 99.
(21) 7 Ind. Cas. 921; 13 C. L. J. 85; 15 C. W. N. 66.
(22) 11 Ind. Cas. 67; 39 C. 87; 14 C. L. J. 20; 15 C. W. N. 945.
(23) 24 M. 420; 11 M. L. J. 210.

effects of Muthudoraswami. The deed of assignment, Exhibit Y, says:—"I have hereby given up to you the title of heir possessed by me and all rights connected therewith." It sets out by saying that the third plaintiff himself was the nearest heir. It also says that in case he is not the heir and if it is held that Poolar Thevar, the executant of Exhibit Y, is the heir, all the right of the latter should devolve on the third plaintiff. The language of the document is very explicit, and I feel no manner of doubt that under Exhibit Y all the rights of Poolar Thevar accrued to the 3rd plaintiff.

The last question to be considered is whether the fact that Poolar Thevar was not the lineal descendant of Muthoduraswami but was only a collateral, disentitles him from recovering the maintenance or from assigning it to the 3rd plaintiff. Such a contention was not raised when Kolandai Nachiar, the widow of Sivaswami Thevar, brought a suit to recover the maintenance. She was not the lineal heir of Sivaswami. The words used in Exhibits Q2 and Q3 are that Sivaswami was entitled to enjoy the allowances *anthathi paramparaiyaka*. These words convey a heritable estate from generation to generation. They are even stronger than the words *puthra pouthra paramiparaiyaka*. No authority has been quoted for the proposition that the word "*Santhathi*" is to be restricted to the lineal descendants. It means the heirs in general and as Poolar Thevar is undoubtedly in the line of heirs to Sivaswami, he is entitled to recover the allowance; and his assignee has the same rights to it. I am of opinion that the appeal fails and should be dismissed with costs, subject to the modification suggested by the learned Chief Justice.

IN APPEAL No. 193 OF 1911.

The only question for consideration in this appeal is whether the appellant was validly adopted by the deceased Muthudoraswami Thevar who died at 3 A. M. on the morning of the 17th November 1905. The adoption is said to have taken place the previous evening at about 6 P. M. The learned District Judge after a careful examination of the evidence has come to the conclusion that the adoption did not take place as alleged.

I see no reason to differ from him. The deceased was suffering from a serious illness for nearly two months before his death and was confined to his bed for a fortnight before he died. Two days before this event, he had sent for his legal adviser and friend, Mr. Rama Subba Aiyar, a leading Vakil of the Madura Bar. It is in evidence and not disputed that Mr. Rama Subba Aiyar left Ramnad on the forenoon on the 16th. If the deceased had any intention of adopting the appellant it is impossible to believe that he would not have executed a deed of adoption. Evidence was given to the effect that the object of Mr. Rama Subba Aiyar's visit was to induce the deceased to take the appellant in adoption. If that were so, either the adoption would have taken place when Mr. Rama Subba Aiyar was there, or there would have been some writing to evidence it. On the evidence I am inclined to think that there were serious disputes regarding the disposition of Muthudoraswami's property between his mother and a woman named Bapu Ammal, who was living with him in his house and by whom he had a daughter. It was in consequence of the irreconcilable attitude taken by the mother towards this woman that Mr. Rama Subba Aiyar was unable to get the deceased to execute any document disposing of his property. If the adoption was thought of, it is clear from the evidence that it was not the appellant that the deceased contemplated adopting, but a boy who was at that time in Rangoon.

One other circumstance, and a very significant one, which is against the theory of adoption is that the appellant admittedly did not perform the funeral obsequies of the deceased on the 17th; it is said that he gave the grass to his own natural father and that the natural father as proxy performed the obsequies. It is admitted that the boy did not get shaved. An attempt was made to explain this significant omission on the ground that the boy was suffering from a cold. Other witnesses deposed that the boy was laid up with fever, but the father said that he was suffering from a simple cold. That cannot account for not getting the boy shaved if he had really been adopted by the deceased. Among Hindus the performance of the funeral obsequies is the main object of

adopting a boy and the shaving of the boy on the date of the death is a condition precedent to the performance of the ceremonies. This fact is almost conclusive against the theory of the plaintiff's adoption.

It is true the adoption was set up on the 1st of December, that is, within fifteen days after the death of Muthudoraswami. In subsequent proceedings in the Civil, Revenue and Criminal Courts the appellant was put forward as the adopted son of the deceased. That only shows that the persons interested in the appellant were clever and astute enough to realise the necessity for early action on his behalf. Evidence was given that the plaintiff's first witness, Pandydoraiswami Thevar, had brought up the boy from his childhood and got him educated. Apparently, this gentleman had taken a great deal of interest in the boy. It is also in evidence that he was inimically disposed towards the Raja of Ramnad, the defendant in this case. He had petitioned for his removal from the managership of the Rameswaram Devastanam and had taken up an attitude of hostility towards him.

I am inclined to think that Pandydoraiswami Thevar put forward the appellant as adopted son with a view that the monthly allowance which was being given to the deceased might not lapse to the defendant and in order to enable the plaintiff to set up the claim to it. The second witness is the natural father of the plaintiff, and is deeply interested in the success of this suit. I cannot place any reliance on his deposition. The testimony of the other witnesses does not impress me as being disinterested and reliable. On the other hand, the evidence of the Assistant Surgeon, who attended upon the deceased, is clear that on the date of the alleged adoption the deceased was in a sinking condition and unconscious and could not have made the adoption. He is not shown to be interested in any of the contending parties and I see no reason to disbelieve his evidence. The evidence of the second witness, a very near relative of the deceased and a graduate of the University, impresses me as being true. I, therefore, agree with the District Judge in his conclusion that the alleged adoption never in fact took place. The appeal is, therefore, dismissed with costs.

I see no reason why the District Judge should not have given costs to the defendant in the lower Court.

I must allow the memorandum of objections with costs.

Appeals dismissed.

CALCUTTA HIGH COURT.

CIVIL RULE No. 1085 OF 1913.

June 1, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

ARJUN DAS—PETITIONER

versus

GUNENDRA NATH BASU MALLIK—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), ss. 47, 115, O. XXI, r. 22—Bengal Tenancy Act (VIII of 1885), s. 153—Suit for rent for less than Rs. 100—Decree—Execution—Sale of non-transferable occupancy holding—Proceedings carried on against a dead judgment-debtor—Application to set aside sale by a private purchaser, maintainability of—Order refusing to set aside sale—Second appeal, maintainability of—Revision, petition treated as memorandum of appeal.

A decree-holder initiated execution proceedings and carried them on throughout against a deceased judgment-debtor as if he were still alive. The Court was not only not apprised that the proceedings were taken against a dead man, but untrue returns were repeatedly filed to show that the processes had been duly served:

Held, that a sale held under such circumstances must be set aside on the ground of grave irregularity in the proceedings.

Judicial proceedings cannot be carried on in the name of a dead man.

A purchaser of a non-transferable occupancy holding from whom rent was received after his purchase but whose name was not formally entered as tenant, is competent under section 47 of the Civil Procedure Code to make an application to set-aside the sale held in execution proceedings against a dead judgment-debtor.

In such a case the burden lies upon the decree-holder to show that the person applying to have the sale set aside had knowledge of the sale before the delivery of possession to the decree-holder-purchaser.

A second appeal lies against an order refusing to set aside a sale held in execution of a decree obtained in a suit for rent for less than Rs. 100.

Where no question of limitation or Court-fees arises a petition may be treated as a memorandum of appeal, if necessary.

Rule against an order of the District Judge of 24-Parganas, dated the 22nd April

1913, confirming that of the Munsif of Baraset, dated the 23rd December 1912.

Babu *Probodh Chandra Chatterjee*, for the Petitioner.

Dr. *Dwarka Nath Mitter* and Babu *Tarkeswar Pal Chowdhry*, for the Opposite Party.

JUDGMENT.—We are invited in this Rule to set aside an order of the District Judge, who, in concurrence with the Court of first instance, has refused an application for reversal of an execution sale. The facts as they appear on the face of the record may be briefly recited. One Gunendranath Basu Mallik brought a suit for recovery of arrears of rent against Sitanath Banerjee, the recorded tenant of an occupancy holding, which comprised 17 *bigahs* of land and is said to have been worth at least Rs. 300. The decree was made *ex parte* on the 4th July 1909 for a sum of about Rs. 63 together with costs, about Rs. 9. On the 27th May 1911, the petitioner Arjun Das, who had previously purchased the holding from Sitanath Banerjee, made a deposit of Rs. 67 in satisfaction of the judgment-debt; by some oversight, the amount deposited did not cover the whole of the costs decreed. On the 25th October 1911, the decree-holder applied for execution of his decree against Sitanath Banerjee, for recovery of the balance still due, which amounted to a sum of about Rs. 5. Sitanath Banerjee had, however, died on the 17th May 1910. Execution was yet taken out against the dead man. On the 2nd November 1911, the Court ordered execution to proceed against the judgment-debtor on record, and notice under rule 22 of Order XXI of the Code was directed to issue upon him, as more than one year had elapsed from the date of the decree. A return was filed that the notice had been duly served on Sitanath Banerjee on the 28th November 1911. Subsequently, writ of attachment and sale proclamation were issued with the name of Sitanath Banerjee thereon. Returns were filed in usual course that the processes had been served in accordance with law. On the 12th January 1912, the holding was put up to auction; there was no bidder present, and the decree-holder purchased the property for Rs. 50. On the 8th April 1912, the Court delivered possession to the decree holder in his capacity as auction-purchaser. On the 7th May 1912, the petitioner applied to the execution Court for reversal of the sale. He alleged that he had purchased the holding several years before the sale, that he was in possession by payment of rent to the landlord, and that the decree-holder had managed to buy the property for a very small price at a sale held in the course of proceedings taken against a dead man. The Court of first instance refused to set aside the sale, and that order has been on appeal confirmed by the District Judge. In our opinion, the proceedings initiated and carried on against the dead judgment-debtor were infructuous and the Courts below have failed to exercise a jurisdiction vested in them, namely, to annul a sale held in the course of such a proceeding.

Order XXI, rule 22, provides that where an application for execution is made more than one year after the date of the decree or against the legal representative of a party to the decree, the Court executing the decree shall issue a notice to the person against whom execution is applied for, requiring him to show cause, on a date to be fixed, why the decree should not be executed against him. In the case before us, more than one year had elapsed from the date of the decree and the judgment-debtor had died in the interval. There was, consequently, a two-fold reason for the issue of the notice contemplated by rule 22, but such notice could be issued only upon the legal representatives of the judgment-debtor against whom alone execution could proceed under sub-section 1 of section 50. The decree-holder, however, initiated the proceeding and carried it on throughout against the dead man as if he were still alive. The Court was not only not apprised that the proceedings were taken against a dead man, but untrue returns were repeatedly filed to show that the processes had been duly served. It is difficult to conceive a graver abuse of the process of the Court, and the question inevitably arises, is a sale deliberately brought about under such circumstances to be treated as valid and operative? In the case of *Lerenia Ashton* v. *Madhabmoni Dasi* (1) this Court was called upon to

(1) 5 Ind. Cas. 390, 11 C. L. J. 489, 14 C. W. N. 509.

consider the effect of a sale-held without notice to the judgment-debtor under section 248 of the Code of 1882. In that case, the judgment-debtor was alive, but although more than a year had elapsed since the date of the decree, no notice under section 248 was served upon her. This Court held, on the authority of the decision of the Judicial Committee in *Malkarjun* v. *Narhari* (2), that although the sale could not be treated as a nullity and ignored by the party whose property had been sold as if it had never taken place, yet it was voidable, as the omission to issue the prescribed notice was a serious irregularity. It was pointed out that the omission to serve the notice was not a material irregularity in publishing or conducting the sale within the meaning of section 311 of the Code of 1882, but was a good ground for reversal of the sale upon an application under section 244, which could be made, under Article 178 of the second Schedule to the Limitation Act of 1877, within three years from the date of sale. It was also explained that the object of a notice under section 248 is, not merely to give the judgment-debtor opportunity to show cause why the decree should not be executed because, for instance, it is time-barred or has been adjusted, but also to give him an opportunity to satisfy it before execution is issued. The principles thus enunciated in *Levenia Ashton* v. *Madhabmoni Dasi* (1) have been adopted and applied in the cases of *Lakshmi Charan Sein* v. *Sris Chandra Roy* (3), *Rasaraj Kunai* v. *Prosonna Kumar Roy* (4) and *Sham Sunder Singh* v. *Jhumat Shah* (5). Tested in the light of these principles, the sale in the case before us cannot possibly be sustained. There was no notice under Order XXI, rule 22, upon the legal representatives of the judgment-debtor; the Court could not issue such notice, though it was incumbent upon the Court to do so, because the decree-holder never intimated to the Court that the judgment-debtor was dead. A sale held under these circumstances must be set aside on the ground of grave irregularity in the proceedings. But the present case is really much stronger than the one beforethis Court in *Levenia Ashton* v. *Madhabmoni Dasi* (1). Here the execution proceeding was initiated and carried on throughout against a dead man. The cases of *Stowell* v. *Ajudhia Nath* (6) and *Sheo Prasad* v. *Hira Lal* (7) are of no assistance to the decree-holder, auction-purchaser. In those cases, the execution proceeding had been commenced against the judgment-debtor and his property had been attached during his lifetime; the sale took place after his death without notice to his legal representative. It was ruled that the property, when sold, was as the result of the attachment validly in the custody of the Court, and that consequently the sale was not a nullity but could be set aside on the ground of material irregularity in the publication of the sale proclamation. The case before us is of an essentially different description; it is not the case of a man who, after due notice of the execution proceeding, defaults to pay the judgment-debt and as a result has his property brought to sale; it is the case of a man who is dead and whose property is sold, because he fails to respond to the notice issued by the Court on him at the instance of the judgment-creditor [see *Raja Debi Bakush* v. *Habib Shah* (8)].

The question of the legality of an execution sale held in course of proceedings initiated and carried on against a dead judgment-debtor has been repeatedly considered in cases of the highest authority. In *Chick* v. *Smith* (9) it was ruled that in the case of death of the judgment-debtor, even a few hours before execution issued, the execution was invalid; see also the notes to *Jeffreson* v. *Morton* (10); substantially to the same effect are the decisions in *Ramessurri Dassee* v. *Doorga Dass Chatterjee* (11), *Imam-un-nissa Bibi* v. *Liakat Hussain* (12), *Gopal Chunder Chatterjee* v. *Gunamoni Dasi* (13). No doubt, there has been some divergence of judicial opinion upon the point whether the sale should be treated as void or voidable; but the Courts are unanimous that if the sale is directly impeached, it cannot be sustained.

(2) 27 I. A. 216; 25 B. 337; 5 C. W. N. 10; 10 M. L. J. 368; 2 Bom. L. R. 927 (P. C.).
(3) 9 Ind. Cas. 584; 13 C. L. J. 162.
(4) 15 Ind. Cas. 506; 40 C. 45.
(5) 11 Ind. Cas. 893; 20 C. L. J. 337.
(6) 6 A. 255; A. W. N. (1884) 87.
(7) 12 A. 440; A. W. N. (1890) 103.
(8) 19 Ind. Cas. 526; 35 A. 331; 18 C. L. J. 9; 17 C. W. N. 829; 11 A. L. J. 625; 15 Bom. L. R. 640; 14 M. L. T. 33; (1913) M. W. N. 566; 25 M. L. J. 148; 16 C. C. 194; 10 L. A. 150.
(9) (1840) 8 Dowling P. C. 337; 5 Jur. 86.
(10) 2 Wms. Saund. 6 at p. 12; 85 E. R. 540.
(11) 6 C. 103; 7 C. L. J. 85.
(12) 3 A. 424; A. W. N. (1881) 1.
(13) 20 C. 370.

The question has been repeatedly examined in the Courts of the United States, and the authorities almost unanimously hold that if execution issues after the death of the judgment-debtor, the sale is void; only a small minority hold that it is voidable (Freeman on Executions, section 35; Freeman on Void Judicial Sales, section 24; Kleber on Void Judicial and Execution Sales, section 280; Rorer on Judicial Sales, section 827). The point has been elaborately investigated by the Supreme Court of the United States on more than one occasion, *Erwin* v. *Dundas* (14), *Taylor* v. *Doe* (15), *Ransom* v. *Williams* (16), *Mitchell* v. *Maxent* (17), and it has been uniformly ruled that an execution commenced after the death of the judgment-debtor named therein is void, and that the purchaser at a judicial sale held in such a void proceeding is not protected; but it is otherwise where an execution is regularly issued and is levied on the land of the judgment-debtor during his life-time; in the latter case, the sale is regarded as a completion of the previous execution by which the property had been expropriated in accordance with law. The matter may be put briefly in the words of the judgment in *Brown* v. *Parker* (18): "Judicial proceedings cannot be carried on in the name of a dead man; there is as much necessity for a plaintiff as for a defendant; the proceedings in either case are as much arrested by the death of one as of the other." We hold accordingly that the sale held on the 12th January 1912 must be set aside on the basis of the application dated the 7th May 1912, treated as one made under section 47 of the Code. No question of limitation arises, notwithstanding the comprehensive language of Article 166 of the first Schedule of the Limitation Act of 1908, which is wider in its terms than the Article it replaces, namely, Article 166 of the Limitation Act of 1877. The case is plainly one for the application of section 18; no notices had ever been issued upon any person interested in the property sought to be sold; false returns were, on the other hand, filed to the effect that the processes had been duly served on the judgment-debtor who had, as a matter of fact, died more than a year before the proceedings were commenced against him; besides this, the decree-holder, auction-purchaser, did not take delivery till after more than a month had expired from the date of the sale and the petitioner came into Court within one month from the date of such delivery. There is nothing to show that the petitioner had any previous knowledge of the sale, and, as their Lordships of the Judicial Committee observed in *Rahimbhoy Habibbhoy* v. *Charles Agnew Turner* (19), the burden would lie upon the decree-holder to show that the petitioner had on any date earlier than the 8th April 1912 knowledge of the sale held in course of proceedings of which no notice had been given to any living man.

We also observe that the objection was taken in the Court below that the petitioner had no *locus standi*, as he had failed to prove that the holding was transferable by custom. It was proved, however, that rent was received from the petitioner after his purchase, though his name was apparently not formally registered as tenant. We are of opinion that the petitioner was competent to make the application and that the decision in *Prosunno Kumar Midder* v. *Bama Churn Mondal* (20) does not govern this case.

We may finally add that although the application must be deemed to have been made under section 47 of the Code of 1908, a second appeal may at first sight seem barred under section 153 of the Bengal Tenancy Act, as the claim in this suit for rent was under Rs. 100, *Shyama Charan Mitter* v. *Debendra Nath Mukerjee* (21); but a second appeal does apparently lie in this case on the authority of the decision of the Full Bench in *Kali Mandal* v. *Ramsarbanoa Chakravarti* (22) the effect of which, as explained in *Beni Madhab Roy* v. *Bisseswar Bharati* (23), has not been completely nullified by the explanation added to section 153. The view that a second appeal lies to this Court in the present case does not, however, create any difficulty in the way of the petitioner, because the petition on which this Rule was granted may be treated as a memorandum of appeal, as no question of limitation or Court-fees arises.

(14) 4 Howard 58; 11 Law. Ed. 875.
(15) (1851) 13 Howard 287; 14 Law. Ed. 149.
(16) (1864) 2 Wallace 313; 69 U.S.; 17 Law. Ed. 803.
(17) (1866) 4 Wallace 237; 71 U.S.; 18 Law. Ed. 326.
(18) (1853) 15 Ill. 307.
(19) 20 I. A. 1; 17 B. 341.
(20) 3 Ind. Cas. 461; 13 C. W. N. 652.
(21) 27 C. 484; 4 C. W. N. 269.
(22) 32 C. 957; 9 C. W. N. 721; 1 C. L. J. 476.
(23) 15 Ind. Cas. 436; 16 C. L. J. 542; 17 C. W. N. 84.

The result is that the orders of the Courts below are discharged, the application to set aside the sale is granted and the sale is cancelled. The petitioner will be restored to possession in execution of the order of this Courts. The petitioner will also receive his costs in all the Court. We assess the hearing fee in this Court at five gold *mohurs*.

Order discharged.

MADRAS HIGH COURT.

CIVIL SUIT No. 179 OF 1913.

August 24, 1914.

Present:—Mr. Justice Kumaraswami Sastri.

VARADARAJA MUDALIAR AND ANOTHER —PLAINTIFFS

versus

NARAYANASAMI MUDALIAR AND OTHERS—DEFENDANTS.

Will—Bequest in favour of unborn persons—Hindu Transfers and Bequests Act (Mad. Act I of 1914), retrospective effect of—Gift to daughter with a gift over, whether valid.

A bequest to persons who are not born at the date of the testator's death is invalid.

The Hindu Transfers and Bequests Act (Madras Act I of 1914), has no application where the testator died long before the Act came into force and has retrospective effect only to the extent that it applies to Wills made before the passing of the Act where the dispositions made are intended to come into operation at a time which is subsequent to the passing of the Act.

Where a Will made no gift in favour of the testator's children, but directed that they should enjoy his properties without having any right to them and that the executors should collect the rents, etc., and after meeting all expenses should add up the surplus for the benefit of the grand-children, who should take the properties on the death of the testator's children, the grand-children not having been born at the testator's death:

Held, that the disposition in favour of the grand-children was invalid and the properties vested in the heirs of the testator as an intestacy, the grand-children taking no interest except as members of an undivided family who by birth acquire a right to the grandfather's properties.

Where a gift made in favour of the daughter also provides that after her the property should be enjoyed by her descendants, the fact that the gift over is invalid does not defeat the estate given to her.

Messrs. *Mahomed Ibrahim* and *C. Pattabhirama Iyengar*, for the Plaintiffs.

Messrs. *V. Masilamani Pillai* and *T. S. Rajagopala Aiyar*, for the Defendants.

JUDGMENT.—Plaintiffs, who are the sons of one Munisami Mudaliar, sue for a declaration that the bequests to the grand-children of the said Munisami made by his Will, dated the 6th August 1898, are invalid, and for a portion of the properties left by him. The plaint sets out that by his Will dated the 6th August 1898 the testator directed that his sons and daughters should have no interest in the estate and that the income should be accumulated for the benefit of the testator's grandchildren, who were to take all the property, that defendants Nos. 2 and 5 obtained Probate of the Will and have been guilty of various acts of mismanagement, that the bequests to the testator's grandchildren are void as they were not in existence when the testator died and that there has been an intestacy which entitles the plaintiffs, as the sons of the testator to claim the estate and a partition thereof between the various heirs of the testator.

Defendants Nos. 1 and 3 filed a written statement praying for the construction of the Will of their father and the ascertainment and delivery of their share. Defendants Nos. 2 and 5, the executors with Probate, deny that they undervalued the estate or were guilty of any of the acts set out in the plaint and pray that the Will may be construed and the rights of the parties ascertained. The 4th defendant filed a written statement, pleading that under the terms of the Will there is a valid bequest of house and ground No. 2/60 (item 3 of the plaint schedule) in her favour, that she and her husband acting in accordance with the terms of the Will contributed over Rs. 3,000 to the estate and that if the bequest in her favour be held to be invalid, then the sum of Rs. 3,000 be returned to her. Defendants Nos. 6 to 8 filed no written statements. Defendants Nos. 9 to 21 were directed to be made parties, as they were the grandchildren of the testator and had an interest in the suit which was to construe the Will. The guardian *ad litem* of defendants Nos. 9 to 15 filed a written statement setting up that the bequests were valid and that they had a share in the Will. Defendants Nos. 16 to 19 by their guardian *ad litem* filed a written statement stating that their rights should be established if the Court considers the bequests valid. Defendants Nos. 20 and 21 filed a written statement in similar terms.

The following issues were settled:—

I. Is there an intestacy to any and what extent?

II. To what relief are the parties entitled?

First issue.—Probate of the Will of Munusami Mudali has been filed as Exhibit A.

Munisami Mudaliar left no grandchildren at the time of his death and the question is whether the terms of the Will are valid. The Will directs that his properties, moveable and immoveable, should be enjoyed by the children of his first and second wife in common, but that they should have no right to the properties. It directs that the executors should collect the rents due, receive outstandings and pay liabilities, look after the maintenance of the family and perform the marriages of such of those children as are unmarried. The Will proceeds as follows :—" Besides thus remaining as one family and conducting everything in common all those, namely, the income derivable from the aforesaid houses, the income derivable from the cart stand and the income derivable from the bazaars and the incomes which my sons may get by employment or trade, should all be put together and both the aforesaid executors should look after those and on deducting the maintenance expenses of the family and Government tax and repairs and other expenses should give meals to 100 persons as a matter of charity annually in the month of Purattasi. On meeting all these expenses the remaining sum should be added as assets to the other properties and augmented. Those that do not abide to do so and refuse to give their earnings shall have no right whatever in this. They must go out with such earnings. Those that do not consent to remain in the family and do quarrel, if by their remaining anything bad should arise to the family, such of them should be removed from the family and if they have not any means of earning for their maintenance four or three should be given every month and those should remain and live in a room in the aforesaid house." It also provides that his second wife should continue to live in this family and conduct family affairs and that if she does not do so she should live in one room and receive a maintenance of three or four a month." The Will proceeds as follows:—" Nobody has any right in the aforesaid properties. Even if sold, the sale should be void. Of the aforesaid properties the house bearing door No. 6/20 should be given as *stridhanam* to my first wife's daughter, Audi Lakshmi Ammal, and Chiranjeevi Munusami Mudaliar, Chiranjeevi Ponnusami Mudaliar, sons of my sister, and the members of that family should remain jointly with this family and from the total of all the incomes should be met (the expenses in connection with) the good and bad occurring to this family." It states that after the death of the above persons house No. 6/20 should be enjoyed by their descendants. As regards the other properties the Will provides as follows :- "All other properties should be enjoyed by my sons as long as they are alive and after that one-half should be enjoyed by the descendants of my first wife's sons and the other half share by the descendants of the second wife's sons." The scheme of the Will seems to be that his children by his first and second wives should remain together and hand over their earnings to the executors who are directed to support them, that the earnings so handed over and the rents of the properties collected with any surplus should be accumulated for the benefit of the grandchildren and that the property should be taken by the grandchildren on the death of his sons and daughters. It is not disputed that none of the grandchildren were born at the death of the testator and it is proved by the 1st plaintiff that the first grandchild was born three or four years after the testator's death. It is well-settled law that a bequest to persons who are not born at the date of the testator's death is invalid, and consequently the dispositions in the Will in favour of the grandchildren of the testator are invalid. Madras Act I of 1914, which declares the rights of Hindus to make transfers and bequests in favour of unborn persons, has no application, as the testator died long before the Act came into force and the Act has retrospective effect only to the extent that it applies to Wills made before the passing of the Act where the dispositions made are intended to come into operation at a time which is subsequent to the passing of this Act. Where the testator dies before the Act came into force, the properties would vest in his heirs in the event of an intestacy according to the law then in force

and section 2 of the Act, as I read it, does not operate to divest such vesting. Moreover as no life-estate is given to the sons, it cannot be said that the gift to the grandchildren was intended to come into operation after the 14th February 1914, the date on which the Act was passed. Except the right to receive maintenance subject to certain conditions there has been no gift in favour of the sons. As the gift to children is invalid (except in the case of house No. 6/20, item 3 in the plaint to which I shall refer later on), there has been no gift in favour of the sons and daughters even for their lives, it follows that there has been intestacy so far as such properties are concerned. The directions in the Will that the daughters are to be maintained out of the estate is valid, and due provision will have to be made for their maintenance. Provision will have to be made for the marriage of the testator's daughters who have not yet been married. The result is that the sons and daughters take the properties as heirs under the Hindu Law, the grandchildren taking no interest except as members of an undivided family who by birth acquire a right to the grandfather's properties. As regards house No. 6/20 there is, in my opinion, a gift to the testator's daughter, Audi Lakshmi Ammal, as the Will says that house No. 6/20 should be given as *stridhanam* to her. It no doubt goes to state that after her, the property should be enjoyed by her descendants, but the fact that the gift over is invalid would not defeat the estate given to her. It is unnecessary to consider in this suit whether as between her and her children she has a power of alienation or not over the properties.

Second issue:—The result of my finding is that there is a valid direction in the Will whereby 100 persons should be fed annually in the month of Purattasi out of the income of the properties, except item 3 which is given to the daughter, that there is intestacy as regards the said properties and the rights of the parties are, therefore, to be determined under Hindu Law. The suit will be referred to the Chambers for an account being taken of the estate and effects of the deceased Munusami, and the executors will file accounts of the income and expenditure and the balance in their hands within a month from this date. Objections will be filed within two weeks after filing the accounts. After making provision for the feeding of one hundred persons in Purattasi every year, the properties will be divided between the sons of the testator in equal shares, subject to due provision being made for the maintenance of the daughters and the marriage expenses of such daughters as are unmarried. Costs will be reserved till after the accounts are filed and will be dealt with at the time of the passing of the final decree.

Order accordingly.

CALCUTTA HIGH COURT.

CIVIL RULE No. 5926 OF 1912.

SECOND CIVIL APPEAL FROM ORDER No. 420 OF 1912.

May 6, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

JITENDRA NATH ROY AND ANOTHER—PETITIONERS—APPELLANTS

versus

RASIK LAL SEN AND OTHERS—OPPOSITE PARTY—RESPONDENTS.

Mesne profits—Decree declaring liability of defendants, inoperative until extent and quality of liability determined—Amendment of decree once refused bars subsequent applications—Change of circumstances after decree—Remedy of decree-holder.

A decree declaring in general terms the liability of the defendants to pay mesne profits does not become operative till after the amount has been ascertained by the Court and the Court-fee prescribed by section 11 of the Court Fees Act has been paid by the decree-holder.

Kewal Kishan Singh v. Sookhari, 24 C 173; 1 C. W. N. 248, referred to.

A decree to be operative must define the extent and quality of the liability of the defendants for mesne profits.

When an application for the amendment of a decree has once been refused on the merits, the decision is conclusive between the parties.

Langat Singh v. Janki Koer, 12 Ind. Cas. 151; 39 C 265; 14 C. L. J. 481, referred to.

Where the amendment of a decree is required on the ground of subsequent change of circumstances, the decree-holders are not entitled to have it amended by an application to the Court which passed it, but may have their remedy in a suit appropriately framed to set aside the decree.

Musammat Gulab Koer v. Badshah Bahadur, 2 Ind. Cas. 129, 13 C. W. N. 197; 10 C. L. J. 420, referred to.

Rule against an order of the Subordinate Judge, Jessore, dated 20th November 1911, and appeal against an order of the District Judge, Jessore, dated 29th June 1912, reject-

ing an appeal against the above-mentioned order.

Dr. *Ghosh* and Babu *Lalit Mohan Banerjee*, for the Appellants.

Babus *Nil Madhab Bose*, *Shib Chandra Palit* and *Troilukhya Nath Ghosh*, for the Respondents.

JUDGMENT.—The substantial question in controversy in this Rule is, whether it was competent to the Subordinate Judge to entertain an application for amendment of a decree for mesne profits made on the 15th September 1906. The circumstances under which this question requires consideration may be briefly stated.

The predecessor-in-interest of the opposite parties to the Rule instituted a suit on the 15th December 1896 for declaration of title to immoveable property, for recovery of possession thereof and for mesne profits. The petitioners are the representatives of the first defendant in that litigation. On the 28th June 1897, the Subordinate Judge decreed the suit for possession. Under that decree the plaintiff became entitled to recover possession of the disputed property from the defendants and also to realise costs of the suit from them. As regards the claim for mesne profits, the decree of the Subordinate Judge stated, "the plaintiff do get mesne profits from the 6th January 1896 up to the date of recovery of possession". But the decree did not specify the amount of mesne profits, nor did it state explicitly any particular defendants from whom mesne profits were recoverable. Two of the defendants other than the predecessor of the petitioners preferred an appeal to the District Judge, to which the plaintiff alone was joined as a party respondent. This appeal was dismissed on the 6th September 1898, and an appeal against the decree of the District Judge was dismissed by this Court on the 12th December 1900. On the 6th April 1903 the decree-holder applied for assessment of mesne profits. Two Commissioners were appointed to ascertain the amount of mesne profits, but before this report could be considered by the Court, the decree-holder and the present petitioners had come to terms on the 19th November 1904. The decree-holder applied to the Court, and in the application he stated that the two defendants, now petitioners before this Court were ready to pay Rs. 1,500, that the payment was to be made by an assignment to him of a mortgage-decree held by them, and that they had accordingly agreed that Rs. 1,500 be deducted from such amount of mesne profits as might be settled by the Court, and that a decree for the balance might be passed only as against the other defendants to the suit. On the same date, the Court held that the amount of mesne profits was Rs. 4,295 and after deduction of Rs. 1,500 according to the terms of the compromise mentioned, made a decree for the balance, namely, Rs. 2,798. The Subordinate Judge in his order recited that the two defendants, now petitioners before this Court, had come to terms with the decree-holder and that they had agreed to set off the sum of Rs. 1,500 from the ascertained amount of mesne profits, and then he added that whether they should still be proceeded against or not was a matter that rested with the decree-holder and that the Court could make no order on that point. Under what circumstances this order was made, cannot now be definitely ascertained. The Subordinate Judge apparently overlooked that the decree-holder in his petition has explicitly stated that in view of the promised payment of Rs. 1,500, he would have no further claim against the two judgment-debtors, and it was on this condition that the Pleader for the two judgment-debtors had signified his assent to the compromise, as is clear from an examination of the petition which has been placed before us. It is worthy of note, however, that the order did not explicitly state from which of the judgment-debtors the sum of Rs. 2,795 was recoverable; but it has been argued that the order, taken as a whole and not interpreted in the light of the statement in the petition of compromise, implied that the sum was recoverable from all the judgment-debtors inclusive of the two who had promised to pay Rs. 1,500. But although this order was recorded on the 19th November 1904, no formal decree for mesne profits was drawn up. It transpires from an examination of the order sheet in the proceeding that the decree-holder was called upon to pay the deficit Court-fee under section 11 of the Court Fees Act. The fee was not paid for a considerable time, and was not till the 15th September 1906

JITENDRA NATH ROY v. RASIK LAL SEN.

upon an application of the decree-holder, dated the 30th August preceding, the Court proceeded to draw up a formal decree. The decree drawn up on the 15th September 1906 was in these terms: "It is ordered and decreed that the decree-holder do get Rs. 4,295-12-4½ *gandas* as *wasilat* from the judgment-debtors. Out of this, in accordance with the amicable settlement between the said decree-holder and the defendants Nos. 7 and 8 and in pursuance to the decree-holder's petition deducting Rs. 1,500, Rs. 2,795-12-4½ *gandas* is assessed as the amount of *wasilat* due to the decree-holder from the judgment-debtors other than Nos. 7 and 8, and judgment-debtors other than Nos. 7 and 8 do pay to the decree-holders Rs. 985-0-6 as costs of the suit." It will be observed that under the decree as finally drawn up, the seventh and eighth defendants were absolved from all liability to pay mesne profits. Subsequently, on the 10th December 1906, the decree-holder applied for amendment of the decree on the ground that it was at variance with the order of the 19th November 1904. This application was dismissed on the 16th February 1907. The Subordinate Judge held that the order of the 19th November 1904 must be read along with the petition of that date and that the decree as finally drawn up had given effect to the order so interpreted. No steps were taken by the decree-holder to have this order of the Subordinate Judge set aside. In the interval, the decree-holder had instituted a suit on the 17th January 1906 for specific performance of an agreement to lease certain property which, he alleged, had been made with him by the judgment-debtors as part of the consideration for the settlement of the 19th November 1904. The decree-holder was successful in the Court of first instance and the suit was decreed on the 13th September 1906. On appeal the District Judge dismissed the suit on the 20th May 1907; he held in substance that the alleged agreement had not been established. An appeal against the decree of the District Judge was dismissed by this Court on the 16th August 1910. On the 13th July 1911, the representatives of the original decree-holder initiated the present proceedings for modification of the consent decree of the 15th September 1906. The substantial ground upon which relief was claimed was that there had been a partial failure of the consideration on which the consent decree was based, and that in the interests of justice the decree should be varied under the altered circumstances. The relief which he sought was an alteration of the decree, so that the present petitioners might be made liable for mesne profits along with the other defendants in the original suit. The Subordinate Judge entertained this application, and although he felt doubtful under what provision of the law, if any, the applicant might be entitled to relief, he came to the conclusion that the amendment should be allowed. This order was sought to be challenged by way of an appeal to the District Judge, who, however, gave effect to the objection of the decree-holder that the appeal presented to him was incompetent. We are now invited by the petitioners to set aside the order of the Subordinate Judge in the exercise of our revisional jurisdiction, on the assumption that the view of the District Judge was correct. The order of the Subordinate Judge has been supported in this Court on behalf of the decree-holder on two distinct grounds.

It has been argued, in the *first* place, that the decree drawn up on the 15th September 1906 is at variance with the order of the 19th November 1904 and should be amended on this ground alone. Before we deal with this contention, it is necessary to advert for a moment to the argument addressed to us at one stage that the decree drawn up on the 15th September 1906 was superfluous and that the only operative decree in the case is the decree made by the Subordinate Judge on the 15th December 1896, by which he held that the plaintiff was entitled to mesne profits. In support of this view it was further contended that the application of the 30th August 1906 by which the Court was invited by the decree-holder to draw up a formal decree was also superfluous. In our opinion, there is no substance in this contention. The only operative decree for mesne profits in this case is the decree drawn up on the 15th September 1906 on the basis of the order of the 19th November 1904. There is no foundation for the contention that an operative

decree for mesne profits was made by the Subordinate Judge on the 15th December 1896. That decree, as we have already stated, merely declared in general terms the liability of the defendants to pay mesne profits to the successful plaintiffs. The nature of such a preliminary adjudication may be described in the words of Lord Watson in the case of *Radha Prasad Singh* v. *Lal Saheb Rai* (1): "None of the defendants were by that decree made judgment-debtors for mesne profits, in the sense that their property could be attached by virtue of it. The decree, no doubt, found that defendants in the suit were accountable for mesne profits, and by that finding they were bound; but it did not ascertain the amount of such profits, or determine the important question whether the defendants were liable jointly or severally in respect of their wrongful possession. There was no adjudication upon any of these matters until . . . . for the first time the appellant obtained a money-decree which was capable of being put into execution;" a decree to be operative must define the extent and quality of the liability of the defendants for mesne profits, which were ascertained for the first time by the final decree." This description is accurately applicable to the preliminary decree in the case before us, where there was as a matter of fact no decree for mesne profits in existence till the 15th September 1906. As was pointed out in *Kewal Kishan Singh* v. *Sookhari* (2), there could not be a decree for mesne profits capable of execution, till after the amount had been ascertained by the Court and the Court-fees prescribed by section 11 of the Court Fees Act had been paid by the decree-holder. The true position is, therefore, that the decree-holders, if they feel aggrieved by the decision of the Court, must seek to amend the decree of the 15th September 1906. The question consequently requires consideration whether it is open to them, in this proceeding, to seek that relief. As already stated, on the 10th December 1906 the decree-holders did apply to the Court below to amend the decree on the ground that it was, as drawn up, not in conformity with the order of the 19th November 1904. That application was refused on the 16th February 1907. It is plain, therefore, upon the authority of the decision of this Court in *Langat Singh* v. *Janki Koer* (3), that it is no longer open to the decree-holders to seek amendment of the decree of the 15th September 1906 on the very ground which was held untenable and was overruled on the 16th February 1907. The order of that date, whether it was rightly or wrongly made, is conclusive between the parties. The first ground upon which amendment is claimed must consequently be overruled.

The *second* ground, and this is really the substantial ground, is that circumstances have so altered that in the interests of justice the decree of the 15th September 1906 should be varied. In our opinion, even if the contention of the decree-holders be assumed, for the purposes of the argument and for that purpose alone, to be well founded on the merits, they are not entitled to have the decree varied by way of an amendment in these proceedings. If the circumstances have altered, the decree-holders, as was explained in the case of *Musammat Gulab Koer* v. *Badshah Bahadur* (4), where the previous decisions on the subject will be found analysed and reviewed, may have their remedy in a suit appropriately framed to set aside the decree. They cannot ask the Court to amend the decree, because it is conceded for this purpose that the decree as then made was correctly drawn up and it requires to be altered only by reason of events which have subsequently happened. But it is not necessary to rest our decision on this narrow basis, because we are clearly of opinion that no ground has been made out to set aside the decree of the 15th September 1906.

On behalf of the decree-holders it has been urged that on the 19th November 1904, the consent order was made on the assumption that the decree-holders would obtain a lease of certain property from the judgment debtors, and that as they have subsequently failed to get such a lease they are entitled to have the matter re-opened. But the obvious answer to this contention is that there never was such an agreement; the suit for specific performance of the alleged agreement to lease was

(1) 17 I. A. 150; 18 A. 53; 5 Sar. P. C. J. 900.
(2) 24 C. 178; 1 C. W. N. 213.
(3) 12 Ind. Cas. 151; 39 C. 265; 14 C. L. J. 481.
(4) 2 Ind. Cas. 129; 13 C. W. N. 1197; 10 C. L. J. 420.

dismissed on the ground that the agreement had not been established; this decision is conclusive between the parties and operates as *res judicata*. There is further the significant circumstance that no mention of the alleged agreement to lease is found in the petition of the decree-holders, dated the 19th November 1904, to which the judgment-debtors assented. If there had been in fact an agreement to lease as part of the consideration for the settlement, one would have expected to find it mentioned in the petition itself. The position consequently is that the Subordinate Judge has given effect to the compromise at which the parties arrived on the 19th November 1904, and the decree-holders have entirely failed to establish that there has been a partial failure of the consideration for that compromise. Consequently, there is no reason why the decree based on that compromise should be varied. The second ground upon which the decree-holders seek to have the decree amended or varied cannot be sustained on the merits.

We may add that we are satisfied that the justice of this case rests entirely on the side of the petitioners and that in view of the express terms of the petition of compromise, dated the 19th November 1904, we should not in any circumstances be disposed to give effect to a technical objection, even if any such could be taken.

The result is that the Rule is made absolute, the order of the Subordinate Judge dated the 20th November 1911 discharged and the application for amendment dismissed with costs both in this Court and in the Court below.

In view of the entirely untenable nature of the grounds upon which the application to the Court below was based, we assess the hearing fee in this Court at thirty gold *mohurs*.

The appeal is not pressed and is dismissed.

Rule made absolute;
Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 2889, 3343 TO 3347 OF 1911.

April 28, 1914.

Present:—Mr. Justice Mullick.

SIR NARAIN SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SAHBOOL KHAN AND ANOTHERS—DEFENDANTS—RESPONDENTS.

Bengal Cess Act (IX B. C. of 1880), s. 20, construction of—Whether suit barred, where zerait *in occupation of tenant entered in the cess return simply as* zerait—*False entry in the return, effect of.*

Section 20 of the Bengal Cess Act (IX B. C. of 1880) does not enact that if a proprietor, whether by mistake or otherwise, enters a piece of land in the wrong part of his return, he thereby loses his right to claim rent. The Cess Act is a fiscal Act, and its object is that no land within the estate should escape assessment. It is immaterial for this purpose whether *zerait* land is entered as in the possession of a tenant or the *khas* possession of the *zemindar*; and this is sufficient to satisfy the requirements of section 20. The *zemindar* will be liable to punishment only if he enters land of one class in another class.

Appeals against the decree of the District Judge, Mozaffarpur, dated the 5th August 1911, affirming that of the Munsif, Sitamarhi, dated 18th April 1911.

Babu *Jogendra Charan Ghosh*, for the Appellant.

Babu *Lachmi Narain Singh*, for the Respondent.

JUDGMENT.—It is admitted by the learned Vakil for the appellants that the value of the suit concerned being less than Rs. 100, Second Appeals Nos. 3343, 3344, 3345 and 3346 must fail under section 153, Bengal Tenancy Act. These appeals are, therefore, dismissed with costs.

There remain Second Appeals Nos. 2889 and 3347. The only question argued is whether the suits out of which these appeals arise have been rightly dismissed on account of the provisions of section 20 of the Bengal Cess Act (IX B. C. of 1880). Both Courts have dismissed the suits, holding that it was the plaintiff's duty, when filing in 1898 the cess return concerning that portion of his estate which related to the land in suit, to mention in the return that the lands in suit were in the possession of the tenant defendants.

Now it is admitted by the learned Vakil for the respondents before me that the lands

have been mentioned as the *serait* lands of the proprietor, but it is urged that this was not sufficient and that the omission to enter the lands as in the possession of a tenant brings under the operation of section 20 and debars the plaintiffs from claiming rent. Section 20 does not seem to me to enact that if a proprietor, whether by mistake or otherwise, enters a piece of land in the wrong part of his return he thereby loses his right to claim rent. The Cess Act is a fiscal enactment and its object is that no land within the estate should escape assessment.

It is immaterial for the purpose of the Collector whether the land is entered as in the possession of the tenant or the *khas* possession of the *zemindar*. The learned Vakil for the respondent argues that the Act intends to protect the tenant from the fraud of the *zemindar* and that, therefore, wrong entry detrimental to the tenant ought to bring the *zemindar* within the purview of section 20. I do not accept this interpretation of the law. The *zemindar* is liable to punishment for making a false return if he enters land of one class in another class, but for the purpose of section 20 it is sufficient, as in the present case, that *serait* land in the possession of the defendant was entered in the return merely as *serait* land. Reliance is placed on an unreported decision of Gupta, J., in Appeal No. 241 of 1904, but the facts of the case are not fully before me and I hesitate to accept it as authority in favour of the respondents. The result is that the suits should not, in my opinion, be dismissed on the preliminary ground that section 20, Bengal Tenancy Act, is a bar. The appeals are decreed and the suits are remanded to the lower Appellate Court for disposal according to law. Costs will abide the event.

Appeal allowed.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 62 OF 1912.

October 30, 1914.

Present:—Sir John Edward Power Wallis, Kt., Offg. Chief Justice, and Mr. Justice Seshagiri Aiyar.

M. SWAMINATHA AIYAR—PLAINTIFF—APPELLANT

versus

APPASAMI AIYAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 58 (c)—Sale or mortgage—Sale-deed by mortgagor—Agreement to re-convey by mortgagee within a limited period.

Where a mortgagor executed a deed of absolute sale in favour of his mortgagee who was about to sue on his mortgage, and ten days later the mortgagee executed an agreement to re-convey the property within 18 months if the mortgagor paid the mortgage money:

Held, that under the circumstances of the case the transaction amounted only to an absolute sale with an agreement to re-convey, and not to a mortgage by conditional sale.

Appeal from the decree of the Court of the Subordinate Judge of Kumbakonam, in Original Suit No. 17 of 1910.

Mr. *K. V. Krishnaswami Aiyar*, for the Appellant.

Messrs. *T. Rangachariar*, *R. Kuppuswami Aiyar*, *E. Doraisami Aiyar* and *G. S. Ramachandra Aiyar*, for the Respondents.

JUDGMENT.—This case has been argued yesterday and to-day with great ability by Mr. Krishnaswami Aiyar, but he has not persuaded us that the Subordinate Judge was wrong. The question is whether two documents, one of which (Exhibit B) is in terms a deed of absolute sale and the other (Exhibit A) an agreement to re-convey executed ten days later by the vendee under the previous document, constitute a mortgage by conditional sale. Section 58 of the Transfer of Property Act, clause (*c*), says that where the mortgagor ostensibly sells the mortgaged property on condition that on payment of the mortgage money the buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale. And to see whether the ostensible sale referred to in the section when taken with the agreement for re-conveyance was intended to operate as a mortgage by conditional sale, it is well settled that the surrounding circumstances have to be looked to, as ruled by their Lordships of the Judicial Committee in *Situl Pershad* v. *Inch*.

mi Purshad (1). That does not mean that evidence is to be admitted to contradict the terms of the documents in which the parties have embodied their intentions, namely, the deed of sale and the agreement to re-convey. That, we think, was all that was intended by the decision of the Judicial Commitee in *Balkishen Das* v. *W. F. Legge* (2). Applying these principles to the present case, we have to deal with certain property including a mortgage interest, which was acquired by the mortgagor between the years 1891 and 1898 for nearly Rs. 48,000. The mortgagor, who was carrying on business on a large scale, had executed mortgages on this property to the extent of Rs. 45,000 and he had paid no interest on the mortgages and a little over Rs. 48,000 was due on the date of the transaction, that is to say, a little more than what had been paid for the suit properties by the mortgagor. It is quite clear that the mortgagee, the defendant, was dissatisfied with this state of things and thought the time had come for him to realize his security. Accordingly he expended a sum of over Rs. 1,300 in the purchase of Court-fee stamp paper with the view of suing on his mortgage. Thereupon both parties sought the advice of their Pleaders. This was on the 20th January and on that day the plaintiff, the mortgagor, undoubtedly entered into an agreement to sell the suit property to the mortgagee, the defendant; and it is alleged for the plaintiff, though denied for the defendant, that on the same day the mortgagee undertook to execute an agreement to reconvey. We have come to the conclusion in the plaintiff's favour that on that date the mortgagee did sign an undertaking to execute a proper agreement for re-conveyance in the mortgagor's favour. The next thing that happened was that the mortgagor executed an absolute sale-deed, Exhibit B, in favour of the defendant on the 25th. Some difficulty appears to have arisen at this stage, and the plaintiff was not willing to register the sale-deed executed by him until he got the agreement to re-convey executed by the mortgagee; and the mortgagee apparently was not very ready to execute this agreement, and the matter would appear to have been referred to a Vakil, Panchapakesa Sastri, with certain instructions contained in Exhibit C. This document speaks of a draft (by which appears to be meant the draft of an agreement prepared in pursuance of the mortgagee's undertaking to execute an agreement to re-convey) as having been handed to this Vakil. There was also given him on the same day, *i. e.*, the 27th, a letter by the brother-in-law of the mortgagee undertaking that the mortgagee would execute an agreement for re-conveyance. The sale-deed was then registered on the 28th and on the 5th of February the mortgagee executed an agreement to re-convey, but subsequently refused to register it and registration had to be effected compulsorily. We do not think that these difficulties, which arose in carrying out the original bargain of the 20th January, really make much difference. We think they show a certain reluctance to carry out the terms at first agreed upon; but we think the case must properly be dealt with, as contended for by the plaintiff, as if in fact these two documents had been agreed to be executed on the 20th.

Then what we have got to do is to look to the surrounding circumstances to see whether what was intended was a mortgage or a sale. That is a question to be decided in each case on the particular facts of the case. Here we have a strong indication that what was intended was an out and out conveyance, in the fact that the defendant had taken steps to file a suit for the purpose of realizing his security and put an end to the relation of mortgagor and mortgagee; and we have the further fact that in Exhibit A a very short term of 18 months is given within which the plaintiff was to have the right to re-conveyance on payment of the mortgage money. It has been held in several cases that the fact that only a short period such as this is given, is a very strong indication that it was not the intention to create or perpetuate the relation of mortgagor and mortgagee. The facts here rather suggested that this agreement to re-convey was merely meant as a concession made by the mortgagee to the mortgagor to induce him to save the trouble and expense of litigation. There is a further small indication pointing the same way, and it is this: though in fact the agreement to make a re-conveyance was arrived at on the 20th January, yet in the agreement, Exhibit A, which was executed several days afterwards, a request to execute

(1) 10 C. 30 (P. C.); 18 C. L. R. 382; 10 I. A. 129.
(2) 22 A. 149 (P. C.); 27 I. A. 58; 4 C. W. N. 153; 2 Bom. L. R. 523.

this re-conveyance is said to have been made by the mortgagor "this day", which day was then ten days after the deed of absolute sale; and the deed was executed in this form without objection by the plaintiff. Another point which has also to be considered is whether the price paid was inadequate or not, because when it is shown that the price was clearly inadequate, that raises a strong presumption that what was intended was a mortgage. In this case the price was Rs. 2,000 more than the property had cost in the course of its acquisition between 1891 and 1898. The evidence that it is now worth very much more was treated by the Subordinate Judge as unreliable, and we think that it has not been shown that this was an inadequate price, at any rate, to such an extent as to afford an indication that what was intended was a mortgage rather than a sale. On the whole we think that on the facts of this case the inference is that the mortgagee was never prepared to consent to more than a mere agreement to re-convey and that the transaction only amounted to an absolute sale with an agreement to re-convey and not to a mortgage by conditional sale.

The conclusion arrived at by the Subordinate Judge is, therefore, right and the appeal must be dismissed with costs. Under Order XXXIII, rule 11, the appellant must pay the Court-fee to the Government.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 451 OF 1912.

May 11, 1914.

Present:—Mr. Justice Holmwood and Mr. Justice Chapman.

BAKTA PRAMANIK AND OTHERS—DEFENDANTS—APPELLANTS

versus

KISHORI MOHAN TALPATRA—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), ss. 98, cls. (3) and (7), 108—Common Manager, powers of—Application under s. 108, whether excluded.

The powers of a common Manager under section 98 (3) of the Bengal Tenancy Act are the same as the co-owners jointly might, but for his appointment, have exercised.

Clause 7 of section 98 giving the Manager power to make any application under section 108 does not operate as an exclusion.

Appeal against the decree of the District Judge, Pabna, dated the 18th of November 1911, confirming that of the Subordinate Judge of Pabna, dated the 25th of January 1911.

Dr. *Rash Behari Ghose*, Babus *Dwarkanath Chakravarty* and *Prokas Chandra Mozumdar*, for the Appellants.

Mr. *S. P. Sinha*, Counsel, Babus *Brojo Lal Chakravarty* and *Purna Chandra Roy*, for the Respondent.

JUDGMENT.—This second appeal arises out of a suit brought by the common Manager of the *maliks* of Kooli Salikha or Koir Salikha Debi, Fatehpore, forthe ascertainment of the situation, incidents and boundaries of a certain *saradari jote* under section 158 of the Bengal Tenancy Act. Both the lower Courts have determined that the defendants held a *jote* of 47 *khadas* and 13 *pakhis* with present rental of Rs. 191-4, that they are not permanent tenure-holders and that their rent is liable to enhancement during the continuance of their tenancy. They have determined the situation on finding that the plot C is the only plot found in the actual possession of the defendants, and that as this is 202 *bighas* and odd *cottahs* short of the area originally demised to the defendants, an adjoining 202 *bighas* and odd from plot E to the North East of plot C is added to it to make up the balance.

The defendants have appealed and they contend, *first*, that it is not competent for the common Manager to file an application under section 158; *second*, that this is not a *bona fide* application under section 158, but to all intents and purposes a suit in ejectment, and should not have been admitted under the jurisdiction conferred by section 158 of the Bengal Tenancy Act; *third*, that as far back as 1891 the defendants openly claimed a permanent interest in the land in suit to the knowledge of the landlords and they have, therefore, acquired a permanent right by prescription; *fourth*, that the defendants have all along claimed to be in possession of the whole *mouzah* and as the onus is on the landlord to show what the correct boundaries are of the parcels rightfully in possession of the tenants and he has failed to do so, the landlord cannot eject the tenants as

trespassers from the adjoining land of the *mousah*, which they have occupied by encroachment, though he may be able to claim additional rent. He certainly must show that the encroachment took place within 12 years of the suit; and *fifthly*, there is the further contention that the factum of possession and title has been decided only in reference to the Survey maps, and any entry in such maps as to title to individual lands is inadmissible in evidence.

As regards the first point, it was never taken in either of the lower Courts. Had it been necessary we should have felt it our duty to allow the Manager to amend his plaint by inserting that he was suing on behalf of all the proprietors. It is contended that the objection is not merely of form but of substance, because the proprietors, when they recover the management of their own properties, will be able to re-open the question if the Manager fails in this suit. The objection is based on an ingenious distinction drawn between the powers of a Receiver under the Civil Procedure Code and a common Manager under the Bengal Tenancy Act; and Order XL, rule 1, is referred to. Section 98 (3) of the Bengal Tenancy Act is, it is contended, exhaustive of the powers of a common Manager and clause 7 of that section having especially empowered him to bring a suit under section 103 of the Bengal Tenancy Act, all other suits under the Bengal Tenancy Act are excluded from his initiative. In reply, it is pointed out that the proprietors cannot bring a suit, because *ex hypothesi* they can not agree and it has been held in the case of *Srimutty Sibo Sundari Ghose* v. *Raj Mohan Guho* (1) that the common Manager is competent to sue on behalf of the co-owners for recovery of possession of land. At page 216 the Judges say: "We are not prepared to limit the powers of a common Manager, as set out in section 98 (3) of the Bengal Tenancy Act, in which he is declared to have the same powers as the co-owners jointly might, but for his appointment, have exercised. The sub-section further declares 'and the co-owners shall not exercise any such power.'" We agree with this view as regards suits in general, and we are unable to say that the provision of clause 7 giving the Manager power to make any application under section 103 of the Bengal Tenancy Act operates as an exclusion. It is true that it has been held that applications under section 103 are suits, but the framers of the Bengal Tenancy Act regarded them as in terms applications to Revenue Officers and may have thought it necessary *ex majori cautela* to reserve the power to the Manager to sue before the Revenue Courts as well as the general powers given by clause 3. We, therefore, think that there is nothing in this point.

As regards the second point, this also does not appear to have been taken in the Courts below. But it does appear that the Courts have addressed themselves to the question at issue under section 158, though there is one incidental question about the boundaries which will require further consideration later on in our judgment, and it is not the plaintiff's fault if the defendants raised a defence covering ground which took the case out of the purview of section 158.

Had they established that by encroachment they had acquired more land than that demised to them, or that they had possessed the whole village by virtue of their lease and asserted their title thereto for more than 12 years to the knowledge of the landlord, the plaintiff's case would have been dismissed as not competent under section 158. But the case as laid does not appear to be outside the scope of that section.

This brings us to the third point as to what the actual facts are which govern the alleged assertion by the defendants in 1891 of their right to permanent tenure to the knowledge of the plaintiff. The finding is that two of the *putnidars* of fractional shares of the village brought two rent suits in 1891 and stated in their plaint that the entire *mousah* was included in the *jote*. This, the learned Judge in the lower Appellate Court finds rightly, would not be binding on the plaintiff who did not grant the *putni*, and the finding on evidence, which establishes that the big plot B which is within the survey boundary of the *mousah* never did and never could have belonged to the defendants, inasmuch as it has always been held by tenants of another *mousah* altogether, is fatal to the contention. The statements in the plaint are erroneous in fact and there is nothing to show that the defend-

(1) 8 C. W. N. 214.

ants asserted such a right to the knowledge of the landlord till 1893, and this would be within the period of limitation, the suit having been brought early in 1904. In no previous rent suit is it shown that the defendants ever asserted a right to the whole *mousah* and they were clearly induced to do so by the erroneous report of the Revenue Officer in the suit of 1891. On the proved and admitted facts, therefore, it does not appear that the defendants ever claimed a permanent right either in the whole village, or in the tenure which the plaintiff admits they had, more than 12 years before suit; and the numerous cases which have been cited before us, of which we need only mention *Tekaetnee Goura Coomaree* v. *Musammat Saroo Coomaree* (2), have no application.

As regards the fourth point, we need only point out that this is not a case of encroachment, and the rulings cited to us in this connection also have no application. The question is what was the tenancy demised, its area, incidents and boundaries. The defendants say it was from the first the whole village, and they put forward no case of encroachment. It is found as a fact that not only had they no possession in plot B at any time, but that plots D and E were in the *khas* possession of the *maliks*. It is true that the onus is on the landlord to show the correct boundary, and for this reason apparently the lower Courts have carved out an additional estate out of plot E, which in strict law the defendants were not entitled to. It was found as a fact that the defendants only had possession in plot C, but as this does not make up the full area of the holding admittedly demised to them, the lower Courts held that they must have the balance of their holding from contiguous lands in the possession of the plaintiff as landlord. This might have formed the basis of a cross-appeal by the landlords. But they have not appealed, and we see no reason to interfere with the decision of the Court below which has done substantial justice, though perhaps going beyond the scope of section 158, to give the defendants their full tenancy.

As to the fifth point, we do not find that the lower Courts have decided the question of possession and title on reference to the Survey maps only. There is the evidence of the rent suits, of the dealings of the defendants with their tenants, the pleadings of the parties, and the trying Court says: "On the oral and documentary evidence in the record I am unable to hold that the *jote* includes the entire village." The judgment of the lower Appellate Court is one of affirmance; and although there is one passage in his judgment which at first sight appears to base his finding on the Survey maps alone, he also refers to evidence showing the variation of rent, and he also says: "the oral and numerous documentary evidence in the case abundantly goes to prove that the *jote* in question comprises 47 *khadas* and 13 *pakhis* of land only and not the entire *Mousah* Kair Salikha and that the rest of the village is in the *khas* possession of the *maliks*." This is a finding of fact which we cannot go behind in second appeal.

The result is that the appeal is dismissed with costs. We assess the hearing fee at three gold *mohurs*.

Appeal dismissed.

(2) 19 W. R. 253.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 214 OF 1912.

February 18, 1914.

Present:—Mr. Crouch, A. J. C.

THE MERCANTILE BANK—PLAINTIFFS

versus

TAHILRAM PESSUMAL—DEFENDANT.

Contract Act (IX *of* 1872), *ss.* 128 *to* 145—*Surety, liability of—Contract of guarantee—Loss arising after breach—Unreasonable delay in re-sale—Discharge of broker—Failure to object to statement of accounts—Evidence of correctness.*

A contract of guarantee, being a contract *stricti-simi juris*, the surety is entitled to insist on a rigid adherence to the terms of his obligation by the creditor, and is liable only for such loss as arises directly from a breach of the terms of the contract actually guaranteed.

A guarantee broker is discharged from liability if the seller suffers loss on account of his own unreasonable delay in re-selling the goods after the breach of the contract.

Where a statement substantially affecting a person's material interests is made to him in writing, and the circumstances are such that he would certainly or probably have objected had the statement been incorrect, then his silence can be treated as

an admission, that is, as evidence, but not necessarily as proof, of the correctness of the statement.

Messrs. *T. G. Elphinston* and R. B: *Teckchand Udavdas*, for the Plaintiffs.

Mr. *Kalumal Pahlumal*, for the Defendant.

JUDGMENT.—This is a suit on an account. Defendant acted as guarantee broker of the plaintiffs' Bank for several years, and as such guranteed contracts made with the Bank for the purchase of gold and silver and for telegraphic transfers or demand drafts on Bombay. As collateral security defendant deposited the title-deeds of certain properties described in the plaint. Plaintiffs claim Rs. 3,217-13-2 with costs and interest, and ask for sale of the immoveable properties over which they claim an equitable charge. Defendant, in his written statement and in his written objections to the account sued on, raises certain defences which are embodied in the following issues; he makes a counter-claim of Rs. 2,924-12-1:—

1. Did defendant act as a broker of the plaintiffs from 1900 ?

2. Did the account between the parties commence in 1900, if so, is the suit bad as being on a part of the account ?

3. Is the defendant disentitled from going into the account beyond the year 1909 by reason of his acquiescence ?

4. Did the plaintiffs vary the terms of the contract with Assanmal Rijhumal and Hasomal Moolchand ?

5. Is the suit time-barred ?

6. Is the defendant entitled to any brokerage on all or any of the items shown in schedule A filed by him; if so, to what ?

7. Were contracts referred to in rejoinder E made during the absence of the defendant ? If so, is defeadant entitled to brokerage thereon ?

8. To what brokerage is the defendant entitled on items shown in schedule B filed by the defendant ?

9. Is the defendant's claim time-barred ?

10. On account being taken what is due to either parties ?

Some of these issues have been found during trial to be of little or no importance. On Mr. Elphinston's stating on behalf of plaintiff that the account sued on was a mutual, open and current one and that he no longer contended that defendant's counter-claim was time-barred, Mr. Kalumal withdrew also his plea of limitation. Issues 5 and 9 were consequently struck out.

Nor is the first issue one that requires any lengthy discussion. The first brokerage paid was on the 29th May 1901, and defendant must have commenced working sometime about the end of 1900 or the beginning of 1901. At first he was treated as an ordinary broker, and his earnings were credited in a general brokerage account. Gradually he began to monopolise the business of the Bank, and on the 12th January 1903, when the brokerage account up to date was settled by the payment of the total due, there was opened a current account wherein all brokerage thereafter earned was credited and all loans and sums withdrawn debited. There can be no doubt that the brokerage account as upto 12th January 1903 was settled, and the account with which this suit is concerned ran as from that date. The whole account is filed and forms exhibited.

This disposes of the first two issues.

It has been proved to my entire satisfaction that brokerage was credited to Tahilram as it was earned. In case of telegraphic transfers and demand drafts, the brokerage was considered to have been earned as soon as the transaction was completed; in the case of sale of gold and silver, the brokerage was credited as soon as the last bar was delivered and paid for. Tahilram was in the habit of satisfying himself that all brokerage earned was promptly and correctly credited to his account; he spent several hours every day in the Bank premises and was freely permitted to ascertain from the clerks from day to day how his account stood. He had his own small staff of clerks always on the Bank premises. He was supplied with a pass book which was regularly written up, and each half year he was presented with a statement showing the balance due to him and intimating that if no objection was received it would be taken as correct. Of these facts there can be, I consider, no reasonable doubt.

So far as the record goes, there was no objection made to the correctness of the account until October 1909, after Tahilram

had received notice of dismissal. Mr. Elphinston contends that these facts operate as an estoppel and that defendant is now debarred from contesting the correctness of the account. It is admitted by the Bank that on many occasions the brokerage credited was less than the usual rate and that for many transactions no brokerage at all was credited. This is explained by the assertion that Tahilram would, on occasion, offer to take half brokerage or none in consideration of the Bank making a corresponding reduction in the rate quoted by them; he would thus, at any rate, earn his brokerage from the purchaser and would perhaps introduce a new constituent. I fully believe that such was the practice. But defendant contends that he is entitled to brokerage at the ordinary rate on all admitted transactions, unless the Bank can now prove that he consented to work for half brokerage, or free; he contends also that he was entitled to brokerage on all telegraphic transfer and demand draft business transacted by other brokers, provided that he was engaged at the time on work for the Bank. This is in accordance with the note added by the Manager to Exhibit 1. There were, admittedly, several transactions for which no brokerage has been credited to him because a claim for brokerage was put forward and admitted by some other broker, and Mr. Kalumal states that he is in a position to show that on the same day that certain of these transactions were effected, Tahilram put through some operation for the Bank, and he asks the Court to presume that in all such cases his client was actually engaged in Bank business at the very time when the telegraphic transfer or demand draft transaction was effected.

Hitherto, no evidence has ever been adduced, in any English or Indian Court, to establish that the apparent acquiescence of the customer in the correctness of his account as shown in his pass book amounts to an implied settlement of account. Nor can estoppel be pleaded unless there are facts in evidence which bring the case within section 115 of the Indian Evidence Act. But where a statement substantially affecting a person's material interests is made to him in writing and the circumstances are such that he would certainly or probably have objected had the statement been incorrect, then his silence can be treated as an admission, that is, as evidence, but not necessarily as proof, of the correctness of the statement. The weight that should be given to this evidence depends on the circumstances of each case. And where, as in this case, the person affected was in the habit of scrutinising his account frequently and of promptly objecting to omissions or errors, his acquiescence extending over a long period of years is, in my opinion, at least sufficient to shift the onus of proof. If defendant desires to press his contention that he did not agree to accept half brokerage or to work free in those transactions where he has been credited with only half brokerage or none, he must prove affirmatively that there was no agreement and must explain satisfactorily his acquiescence in the account. Nor in those cases where defendant contends that he is entitled to brokerage, on the ground that he was engaged in the Bank's affairs when the transaction was put through by some other broker, will it be sufficient to merely prove that he transacted some business on the same day, for that is a fact which must have been within his knowledge when he made the admission which has shifted the burden of proof. He must show that he was actually in the bazar working silver, etc., for the Bank at the very time when the direct business was done. This disposes of the third issue, and will constitute sufficient instructions to the Commissioner when taking accounts and dealing with issues 6, 7, 8 and 10.

The only issue remaining to be dealt with at this stage is the fourth, and this embodies the main dispute between the parties. It will be necessary, first of all, to ascertain the precise nature of the contract of guarantee between the Bank and the defendant.

An initial difficulty is presented by the fact that there is no written contract of guarantee offered in evidence by plaintiffs. Tahilram asserts that there was a written contract and that Exhibit 49 is a copy of it. But this document contains no date, and Tahilram is unable to supply it. The clerk who made the copy cannot remember what the original was, and can only suggest that it was a pencil draft prepared at Tahilram's instance. There is no clear reference to this agreement in any document or letter, nor is it mentioned

in the pleadings. None of the many members of the Bank staff who have gone into the witness-box have any knowledge of it. Seth Isardas states that a document was shown to him by Tahilram, but he cannot remember if it was a draft or a completed agreement or whether it was in the form of a letter or a regular contract. It is impossible to hold it proved that Exhibit 49 is a copy of the original contract.

Plaintiffs put in two documents, Exhibit 1 and Exhibit 50. Exhibit 1 is a letter dated 7th May 1903, addressed by Tahilram Pessumal to the Manager, and is as follows:—

EXHIBIT No 1.

Karachi, 7th May 1903.

The Manager,
The Mercantile Bank of India, Ltd.,
Karachi.

Dear Sir,

I beg to hand you title-deeds and *sanad* of property, marked No. 123 in map A-7 in Old Town, duly transfered to the Mercantile Bank of India, Ltd.

This property is to be held by you as security against any loans or advances you may from time to time make to me;

as security against all contracts now outstanding that have been made by me and not yet fulfilld for the purchase or sale of Bar silver or Bar gold;

as security against any further contracts which may be made after this date for the purchase or sale of Bar silver or Bar gold.

And for the due fulfilment of contracts for sales of wire or demand on Bombay.

All such contracts I hereby undertake to guarantee and to refund any loss and all charges incurred by the Bank owing to the failure of any or all such contracts not being duly fulfilld.

It is understood that in the event of any loss the Bank will take the usual legal steps to endeavour to recover, any charges incurred, as mentioned above, will be borne by me.

Signed—Tahilram Pessumal.
Witness - R. Nicoll.

Ag. Manager, Mercantile Bank of India.
Karachi, 7th May 1903.

We agree to allow Tahilram brokerage on all Native T. T. business done direct when he is in the Bazar working silver, etc., for the Bank.

24-4-06. Signed—R. Nicoll,
Manager.

The document bears a stamp of annas 8 only. Having regard to the form of the document and to the stamp, I cannot treat it as anything more than a letter accompanying the deposit of title-deeds, which incidentally contains an admission of some of the terms of the contract already entered into. Exhibit 50 is a similar letter, bearing no stamp, given with reference to old contracts with which we are not now concerned.

As it is admitted that defendant was guarantee broker of the Bank, it has been unnecessary for plaintiffs to prove the bare contract. From Exhibit 1 I can gather that defendant had agreed to guarantee all contracts for the sale of Bar silver and to refund any loss incurred by the Bank owing to any such contracts not being duly fulfilled, and that it was further agreed that, in the event of any loss, the Bank would take legal proceedings for the recovery of such loss, all charges being borne by defendant. No writing other than Exhibit 1 has been put in evidence to prove the terms of the contract of guarantee.

Mr. Kalumal contends that it was a condition precedent to defendant's liability that a decree should be obtained. Exhibit No. 1 does not certainly so state; there is an unconditional guarantee coupled with a declaration that it was understood that the Bank would take the usual legal steps to retrieve the loss. Excluding Exhibit 49 there is no writing in evidence from which we could fairly infer such an agreement. I attach no importance to Rustomjee's statement made in cross-examination and retracted that the Bank was bound to get a decree before debiting the broker.

Exhibit 3 is a form of sold-note issued by the Bank to all purchasers of bar silver, and has been put in as evidence of the terms of the contract effected between the Bank on the one hand, and Hassomal Moolchand and Assanmal Rijhumal on the other. It runs thus:—

To Karachi,

Sir,

We have sold to you through Broker about £. say Bars,

bar silver of 17 or 17½ Betterness at Rs. per 100 tolas, to be shipped from London on or about and delivery to be taken and payment made within fifteen days from the date of arrival here. All duty to be paid by you.

Broker Manager.

On arrival of the silver, notice of arrival was sent in the form Exhibit 4, calling on the purchaser to take delivery within 15 days. A day or so before the expiry of this 15 days, a further notice was sent informing the purchaser that if delivery was not taken on due date, interest would be charged at 1 per cent. over the Presidency rate with a minimum of 7 per cent.

The law applicable is admirably summed up in Volume 15 of Halsbury's Laws of England, pages 439-551, and in sections 128 to 145 of the Indian Contract Act. Now, a surety is ordinarily said to be what is called a favoured creditor and a contract of a guarantee is said to be a contract *strictissimi juris*, that is to say, the surety is entitled to insist on a rigid adherence to the terms of his obligation by the creditor.

But the liability of a surety is co-extensive with that of the principal debtor: hence Tahilram was, under his suretyship contract, liable only to refund any loss which arose in the ordinary and natural course of things from the dealer's failure to take delivery of silver within 15 days after arrival.

He did not, by his guarantee, undertake to refund any loss which might arise from causes other than the bare failure to fulfil the strict terms of the contract guaranteed. Hence, if plaintiff waited an unreasonable time before re-selling and the loss realized arose, wholly or partly, from such unreasonable delay, then defendant is not, under his general contract, liable for such loss, for the simple reason that he did not agree to be.

If the re-sale was postponed with his consent and concurrence, then it would not discharge him. But he was not bound to warn the Bank against doing some action in contemplation, of which he had knowledge and which, if done, would discharge him; nor would mere knowledge of irregularity committed by the Bank necessarily amount to consent. Mr. Teckchand has argued that delay in re-selling would come within the terms of section 137, but a careful distinction must be maintained between variation of the contract, a breach of which forms the condition precedent to the surety's liability, and mere forbearance from extorting payment from the principal debtor after such liability has come into existence. There must be strict fulfilment of the condition precedent, the loss must arise directly from a breach of the terms of the contract actually guaranteed.

If a contract is varied with the surety's consent, the new contract with such variation must be strictly fulfilled or the surety is discharged (Halsbury's Laws of England, Volume 15, page 490). Again if the creditor omits to do anything which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged. (section 139).

* * * * *

I refer the suit to the Court Commissioner for the disposal of the remaining issues. Report within a month.

Suit referred to Court Commissioner.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1488 OF 1912.

May 15, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

Kumar SATYABHUSHAN GHOSAL—DEFENDANT No. 3—APPELLANT

versus

Rai MONMOTHO NATH MITRA BAHADUR—PLAINTIFF AND OTHERS—REMAINING DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 148 (b)—Rent suit—Parties—Plaint—Property in arrears, identification of.

It is not competent to a landlord to choose arbitrarily some out of several representatives of the original tenant and to institute a suit for rent against such selected persons.

Kashi Kinkar Sen v. *Satyendra Nath Bhadra*, 7 Ind. Cas. 840; 12 C. L. J. 642; 15 C. W. N. 191, followed.

Where in a suit for rent the defendant asserts that he is not in possession of the lands for which rent is claimed and that he is not able to identify the properties in arrears, on account of their boundaries not having been set out in the plaint:

Held, that the plaintiff should be made to comply with the requirements of clause (*b*) of section 148 of the Bengal Tenancy Act.

SATYABHUSHAN GHOSAL *v.* MONMOTHO NATH.

Appeal against the decree of the Additional District Judge, 24-Parganas, dated the 18th of March 1912, reversing that of the Munsif, first Court, Alipore, dated the 16th March 1911.

Mr. *B. C. Chatterjee* and Babu *Sarat Chandra Sen*, for the Appellant.

Dr. *Dwarka Nath Mitra*, Babus *Narendra Chandra Bose* and *Mohini Mohun Chatterjee*, for the Respondents.

JUDGMENT.—This is an appeal by the third defendant in a suit for arrears of rent. The case for the plaintiff is that Raja Kristo Chandra Ghosal of Bhukoilas held two tenancies under the predecessor of the plaintiff in the village Dekhin Sherpore in the southern suburbs of Calcutta, namely, an area of 9 *bighas* and 19 *cottas* at an annual rent of Rs. 10-11-12 *gundas* and another area of 28 *bighas* at an annual rent of Rs. 41-10-19 *koras* 1 *krant*. According to the plaintiff, the five defendants are the representatives-in-interest of Raja Kristo Chandra Ghosal and are in possession of the lands of the two tenancies. He consequently seeks to recover rent from them for the period from the beginning of the second half of the year 1310 to the end of the first three-quarters of the year 1313. The first defendant denied all connection with the lands of the tenancies. The third defendant, now appellant before us, stated that as the boundaries of the properties in arrears were not set out in the plaint, he was unable to identify the lands; he added that on inquiry he had ascertained that the village Dekhin Sherpore had ceased to exist from a long time and that he was consequently not liable for rent of lands not in his occupation. The fifth defendant stated that on partition amongst the co-sharers, the lands of the tenancies in suit had not fallen into his share, and that he could not, accordingly, be held responsible for rent. At the trial in the original Court it transpired that some of the defendants were not properly on the record, as the Manager of their estate, which was under the management of the Court of Wards, had not been served. The Court held that it was competent to the plaintiff to proceed as against the third and fifth defendants who were properly on the record. On the merits, however, the Court came to the conclusion that the lands of the tenancy had been acquired for public purposes under the provisions of the Land Acquisition Act and that the defendants were not responsible for the rent. In this view the suit was dismissed. Upon appeal the District Judge has made a decree against the third and fifth defendants. He has held that the defendants had failed to prove that either the tenancy had terminated or that the lands had been acquired under the Land Acquisition Act, because the evidence in this respect was not sufficiently accurate. On the present appeal, it has been argued on behalf of the third defendant that the suit should be dismissed, inasmuch as the plaintiff is not entitled to obtain a decree for the whole rent against two alone out of the several representatives of the original tenant. It has further been contended that on the merits the case has not been properly tried and that the plaintiff should be called upon to furnish the boundaries or such other materials as would enable the defendant to identify the lands in respect of which rent is claimed. In our opinion, both these contentions are well-founded and the suit must be re-tried.

As regards the first question, it is well settled, as was explained in the case of *Kashi Kinkar Sen* v. *Satyendra Nath Bhadra* (1), that it is not competent to a landlord to choose arbitrarily some out of several representatives of the original tenant and to institute a suit for rent against such selected persons. Reference has, however, been made on behalf of the respondents to the cases of *Khetter Mohan Pal* v. *Pran Oristo Kabiraj;* (2) and *Jogendra Nath Roy* v. *Nagendra Narain Nandi* (3) as authorities for the contrary view. The cases mentioned were discussed and explained in the judgment in *Kashi Kinkar Sen* v. *Satyendra Nath Bhadra* (1). It was pointed out that in the first of these cases, the only principle affirmed was that it was not obligatory upon the landlord to join as parties in a suit for rent such of the representatives of the original tenant as had not notified to him the existence of their interest in the land.

(1) 7 Ind Cas. 840; 15 C. W. N. 191; 12 C.L J. 642.
(2) 3 C. W. N. 371.
(3) 11 C. W. N. 1026.

In the second case it was laid down that where *A* and *B* have made themselves jointly responsible for the fulfilment of an obligation in favour of *X*, *X* is entitled to call upon either of them to discharge the entire obligation. The case before us, however, is of an entirely different description. According to the plaintiff there was an engagement between his predecessor on the one hand and Raja Kristo Chandra Ghosal on the other; it is difficult to appreciate on what principle the representatives of the latter can be held jointly and severally liable for the entire rent. There is no suggestion that after the devolution of the interest of the original tenant on the present defendants, they attorned individually to the plaintiff and each of them undertook to pay the entire rent to him. The only inference which can legitimately be drawn is that there is a joint obligation and that such an obligation must be enforced in a suit in which all the representatives of the original tenant are parties. On behalf of the respondent stress has been laid, however, on the fact that as soon as a decree is obtained by the plaintiff in a suit so framed, he is at liberty to execute the decree against any one of the defendants for realisation of the entire judgment-debt. This, in our opinion, does not affect the decision of the question raised. Grave complications might obviously arise, if a landlord were allowed to institute a suit for recovery of arrears of rent against one or more out of the several representatives of the original tenant selected arbitrarily by him. In the first place, if such a suit were allowed to be maintained, in a subsequent suit by the person made responsible for the discharge of the entire obligation against his co-tenants for contribution, the latter would not be bound by the result of the principal litigation, and it would be open to them to defeat the claim for contribution by proof that there was no joint liability for which they could be justly held responsible. In the second place, if separate suits were held maintainable against different representatives of the original tenant, the question as to the nature or the terms of the tenancies might be decided differently on different occasions. In our opinion it is plain that in a case of the description now before us, the principle laid down in *Kashi Kinkar Sen* v. *Satyendra Nath Bhodra* (1) is exactly applicable. But we must add that we are not prepared to go further and to give effect to the contention that the suit was also defective because there were other representatives of the original tenant who had not been joined as parties to the suit. The objection in substance was that necessary parties had not been joined; but the defendant did not in his written statement specify the names of the parties who should have been so joined. The plaintiff has now been apprised by the defendant of the names of the persons who, according to him, should be joined as parties, and he is at liberty to apply for joinder of such parties. But as they are joined on the insistence of the appellant, the latter must be held responsible for costs which may be incurred, if it ultimately turns out that the persons so brought on the record were not interested in the tenancies. The first objection must, therefore, prevail and the plaintiff will be given an opportunity, after the case has been remitted to the Court of first instance, to have the suit properly constituted.

As regards the second question, we are of opinion that the plaintiff should be made to comply with the requirements of clause (*b*) of section 148 of the Bengal Tenancy Act. That clause is in these terms: "The plaint shall contain, in addition to the particulars specified in section 50 of the Code of Civil Procedure, a statement of the situation, designation, extent and boundaries of the land held by the tenant; or where the plaintiff is unable to give the extent or boundaries in lieu thereof a description sufficient for identification." This provision is specially applicable to the case before us. The defendant asserts that he is not in possession of the land for which rent is claimed. His allegation is that the whole village in which the lands of the tenancies were comprised has been acquired under the Land Acquisition Act, and that as no boundaries have been given by the plaintiff he is unable to identify the land. In these circumstances, the plaintiff may properly be called upon either to give the boundaries of the lands for which rent is claimed, or, if the bound-

aries are not available, to give such description as will be sufficient for the identification of the lands. But reliance was placed in the Court below upon the written statement filed by the appellant on the 20th May 1904 in a previous suit for rent, and the allegations in the written statement were construed to mean that the defendant then admitted that he was in possession of the lands. On a careful perusal of that written statement, we have come to the conclusion that this is not a fair interpretation of that document taken as a whole. There was an allegation in the written statement to the effect that the plaintiff had not furnished boundaries of the properties in arrears, and the result was that the defendant was not able to identify the lands. But he conceded that in the suit for partition instituted on the origial side of this Court an area of 10 *bighas* had fallen to his share; this is clearly no admission that he was in possession of the entire land for which rent was claimed.

The result is that this appeal is allowed, the decree of the District Judge set aside and the case sent back to him in order that he may re-hear the case after the parties have been placed on the record and the boundaries or other materials sufficient for identification of the lands have been furnished.

Costs incurred up to the present stage will abide the result.

Appeal allowed; Case remanded.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL Suit No. 374 OF 1913.

February 24, 1914.

Present:—Mr. Boyd, A. J. C.

FATEHMAHOMED HAJI SULEMAN—PLAINTIFF

versus

K. S. RAMZAN KHAN AND ANOTHER—DEFENDANTS.

Partnership—Suit for accounts—Counter-claim—Court-Fees Act (VII of 1870), Sch. I, Art. 1.

In a suit for accounts and to recover money due on a dissolved partnership, the defendant's claim for decree on accounts, is not a counter-claim, and no Court-fee is leviable thereon until the amount has been ascertained.

Mr. *Dipchand Chandumal*, for the Plaintiff.

Mr. *Kalumal Pahlumal*, for the Defendants.

JUDGMENT.—Heard both sides on the preliminary issue No. 5. I find that no stamp is due at present.

Suit for accounts and to recover money said to be due on a partnership, which has already been dissolved. Defendants say nothing is due from them to plaintiff and that, on accounts being taken, it will be found that some money (amount not stated) is due from plaintiff to them. And they ask the Court to give them the amount, expressing their willingness to pay Court-fee on any sum awarded to them.

The question is whether defendants' claim is a set-off or counter-claim and so liable to Court-fee under Article 1 of Schedule I of the Court Fees Act as amended by Schedule 4 of the Civil Procedure Code.

Let it be granted, for the sake of brevity, that their claim is a counter-claim. Still it obviously cannot be taxed unless the amount of it is ascertained. And the Court has no means of ascertaining it now. So it cannot be taxed now. *Lex non cogit ad impossibilia.*

The learned Pleader for the plaintiff urges that the Court can now order defendants to value their claim and draws attention to section 7, clause 4 (*f*), of the Court Fees Act. I do not agree. Under that section the Court can compel a plaintiff to value his claim; but the section is silent on the subject of a counter-claim made by a defendant.

This section was not amended by Schedule 4 of the Civil Procedure Code of 1908. And Order VII, rule 2, of that Code does not apply to a defendant.

The alteration in the law, effected by the said Schedule 4, simply amounted to this—that the amount of a counter-claim is taxable. Assuming that a counter-claim of an amount not ascertained can be made in the pleadings, the Court has not been empowered to ascertain the amount at that time. It follows that no tax can be imposed till the amount has been ascertained, *viz.*, at the end of the trial when account has been taken. Next, it is urged that no vague

counter-claim can be made in the written statement, as Order VIII, rule 6, Civil Procedure Code, contains the only law under which a counter-claim can be made, and that rule allows only a claim for an ascertained amount. Now it is true that a vague counter-claim in a partnership suit cannot be made under the Civil Procedure Code. But it has long been the practice in India in such suits to permit equitable counter-claims of amounts not ascertained. The Court permits such claims as a Court of Equity and not under the Common Law. It is needless to cite decisions in support of this well-known state of things. I, therefore, find that defendants' claim is in order and must be investigated and that no Court-fee can be imposed on them at this stage.

Issue decided.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1919 OF 1913.

January 13, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

KAMINI DEBI—DEFENDANT—APPELLANT

versus

PROMOTHO NATH MUKERJEE AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 2, cl. (2), 97, O. XX, rr. 12 to 18—"Matters in controversy in the suit," meaning of—Preliminary decree—Decision on issues in bar, whether preliminary decree—Appeal—Omission to frame decree, effect of, on right to appeal—Final decree, effect of—Preliminary decree, preparation of, where provided.

The expression "matter in controversy in the suit" in clause (2) of section 2 of the Civil Procedure Code, 1908, refers to the subject-matter of the litigation, and should not be understood in its widest possible sense.

Therefore, a decision in plaintiff's favour on the issue of his *locus standi* to sue is not a decision of a matter in controversy in the suit and, consequently, is not a preliminary decree within the meaning of clause (2) of section 2 of the Civil Procedure Code, 1908, and is not appealable.

If a decision is in reality a preliminary decree, the mere omission on the part of the Court to embody its effect in a formal expression does not negative the right of the party affected to prefer an appeal.

There should be only one preliminary decree in a suit to be followed by one final decree. A preliminary decree ascertains what is to be done, while the final decree states the result achieved by means of the preliminary decree.

The cases where the Legislature contemplated the preparation of a preliminary decree, are specified in rules 12 to 18 of Order XX of the Code.

Appeal against the decree of the District Judge of 24 Parganas, dated the 14th June 1913, affirming that of the Subordinate Judge of 24-Parganas, dated the 15th May 1913.

Babus *Tarakishore Chowdhury, Satis Chunder Mukerji* and *Khitis Chunder Chakrabarty*, for the Appellant.

Dr. *Rash Behary Ghose*, Babus *Ram Chander Mozumdar, Manmatha Nath Mookerji* and *Mohini Mohan Chatterjee*, for the Respondents.

JUDGMENT.—The question for decision in this appeal relates to the competency of an appeal presented to the District Judge. The defendant is a *shebait* of an endowment created by one Ramkamal Mukerjee on the 4th February 1845, the history of which is set out in our judgment in *Aghore Nath Mukerjee* v. *Kamini Debi* (1). The plaintiffs seek a declaration that the defendant is utterly unfit for the post of *shebait*, and they ask accordingly for a decree for her removal and for the appointment of a fit and proper person to the post of *shebait* according to the provisions of the Will of the founder. The plaintiffs also claim an account of the income and expenditure of the endowed properties from the defendant. For the preservation of the property during the pendency of the suit, they also pray for a temporary injunction to restrain the defendant from wasting the estate, or, in the alternative, for the appointment of a Receiver. Finally the plaintiffs seek a decree for damages against the defendant and invite the Court to draw up a scheme for the future management of the endowed properties and the performance of the worship as contemplated by the founder. The defendant resists the claim on the ground, amongst others, that the plaintiffs have no right to maintain the suit. Twenty issues were framed; of these the first was in these terms: "Have the plaintiffs any cause of action? Have the plaintiffs any right to sue?" This was amplified in the seventeenth, eighteenth and nineteenth issues, in which the grounds for the contention that the plaintiffs have no right to sue were specifically set out. The seventeenth issue raised the

(1) 6 Ind. Cas. 554; 11 C. L. J. 461.

question whether the plaintiffs had a right to sue inasmuch as one Aghore Nath Mukerjee was alive. The eighteenth issue raised the question whether the plaintiffs were competent to maintain the suit inasmuch as they were not born during the life-time of the founder. The nineteenth issue raised the question whether, upon a proper construction of the Will of the founder, the plaintiffs were entitled to maintain the suit? The twentieth issue then raised the question whether the defendant was estopped by reason of the doctrine of estoppel from raising the questions mentioned in the three preceding issues.

The Court of first instance first took up these issues in bar and decided them against the defendant. Before the suit could be heard on the merits, the defendant lodged an appeal before the District Judge against the decision of the Subordinate Judge, in which he had held that the plaintiffs were competent to maintain the suit and that the question of its competency could not be raised by the defendant by reason of the decisions in previous suits. Before the District Judge, the objection was taken that the appeal was incompetent inasmuch as there was no decree which could be questioned by way of appeal. The District Judge gave effect to this contention and dismissed the appeal. On the present appeal, it has been argued on behalf of the defendant that the decision of the Subordinate Judge upon the question of the right of the plaintiffs to maintain the suit was a preliminary decree within the meaning of section 2 of the Code of Civil Procedure of 1908 and that the propriety of such a preliminary decree could be questioned by way of appeal to the District Judge. In fact, it has been contended that in view of the provisions of section 97 of the Code, it is obligatory upon the defendant to question the propriety of the decision of the Subordinate Judge at this stage. In support of this view, reliance has been placed upon the cases of *Krishnaji* v. *Maruti Appa* (2) and *Sidhanath Dhonddev* v. *Ganesh Govind* (3).

Clause (2) of section 2 of the Code of Civil Procedure defines the term "decree" to mean the formal expression of adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit, and may be either preliminary or final. It has not been disputed that in the case before us, there is no formal expression of adjudication by the Court of first instance. But the defendant is in no way to be blamed for this circumstance. An application was made to the Subordinate Judge in this behalf and he was invited to draw up a decree. He refused to accede to this application, on the ground that his decision was not equivalent to a preliminary decree. Consequently, if his decision was in reality a preliminary decree, the mere omission on the part of the Court to embody its effect in a formal expression would not negative the right of the party affected to prefer an appeal. The substantial question for examination is, whether the adjudication has in fact determined the rights of the parties with regard to one of the matters in controversy in the suit. It has been contended on behalf of the appellant that one of the matters in controversy in the suit was, whether the plaintiffs were competent to maintain the suit, and that the Subordinate Judge has adjudicated upon this matter. If the expression "matter in controversy" is understood in its widest possible sense, the argument advanced on behalf of the appellant may be supported. But the question remains, whether the expression "matter in controversy in the suit" should be understood in this comprehensive sense. On behalf of the respondents, it has been argued that the expression "matter in controversy in the suit" refers to the subject-matter of the litigation, and that if this view were not adopted, every question in dispute between the parties in the course of litigation may be deemed to fall within the expression "matter in controversy in the suit." In our opinion, the view put forward on behalf of the appellant is unsound and should not be accepted, though it is supported by the decision in *Sidhanath Dhonddev* v. *Ganesh Govind* (3). In that case, the Subordinate Judge gave his decisions on issues relating to misjoinder, limitation and jurisdiction in favour of the defendants and directed the parties to adduce evidence on the merits. He refused to draw up a preliminary decree embodying his

(2) 7 Ind. Cas. 966, 12 Bom. L. R. 762.
(3) 17 Ind. 637; 37 Bom. 66; 14 Bom. L. R. 916.

decision upon the questions of limitation, misjoinder and jurisdiction. The High Court of Bombay held that he committed a material irregularity in the exercise of his jurisdiction. With all respect for the learned Judges who decided that case, we are unable to accept the interpretation they put upon the expression "matter in controversy in the suit." The result of this interpretation is that the parties would be bound, in view of section 97 of the Code, to challenge by way of immediate appeal the decision of the Court upon every one of the points in dispute between them in the course of the litigation, so that the trial of the suit might be interrupted from time to time and might ultimately be extended over many years. We are not prepared to hold that this could ever have been intended by the Legislature. Besides this, if the decision of the Court upon each of the points in dispute is deemed a preliminary decree, there must be a number of preliminary decrees in the suit. But, as was pointed out in the case of *Bharatendu* v. *Yakub Hasain* (4), the intention of the Legislature appears to have been that there should be only one preliminary decree in the suit to be followed by one final decree: *In the matter of Rajah Pertab Chunder Singh* (5). The cases where the Legislature contemplated the preparation of a preliminary decree are specified in rules 12 to 18 of Order XX of the Code; it is not disputed that the case before us is not comprised within any of those rules. It is further clear that the preliminary decree ascertains what is to be done, while the final decree states the result achieved by means of the preliminary decree. If this distinction is borne in mind and is applied to the case before us, what is the position? The decision of the Subordinate Judge, so far as it goes, merely holds in favour of the plaintiffs that they are entitled to maintain the suit. Their right to obtain the reliefs claimed against the defendant has not yet been affirmed. On behalf of the appellants, however, much reliance was placed upon the decision of the Judicial Committee in *Bhup Indar Bahadur Singh* v. *Bijai Bahadur Singh* (6), where their Lordships held that the decision of the Court determining the extent of the period for which the judgment-debtor was liable to pay mesne profits to the decree-holder was a decree within the meaning of the Code. There is plainly no real analogy between the case before the Judicial Committee and the case now before us. The order made by the Subordinate Judge does not decide the extent or character of the liability of the defendant; it does not affirm that she is or is not liable to be removed from the position of *shebait* or to be called upon to render accounts in respect of the trust. Her position now is radically different from what it would have been, if the plaintiffs had obtained a real preliminary decree directing her removal from office or declaring their right to take accounts from her. Should that stage be ever reached, the defendant would undoubtedly be entitled to prefer an appeal against such a decision.

On these grounds, we must hold, upon a construction of section 2 of the Code, that the contention of the appellant is not well-founded and that the appeal preferred by her to the District Judge has been rightly adjudged incompetent. The view we take is in accord with that adopted in the cases of *Shib Sharan Sha* v. *Janaki Nath Dey* (7), *Parsotam Rao* v. *Radha Bai* (8) and *Kashi Nath* v. *Nathu Ram* (9). The case of *Krishnaji* v. *Maruti Appa* (2), on which the appellant relied, is distinguishable on the ground that, in the opinion of the Court, the decision challenged by way of appeal involved a determination of the rights of the parties in regard to the manner in which the account between them should be taken; that is, it embodied a decision upon the question of the rights of the parties in respect of one of the matters in controversy in the suit itself. This clearly cannot be affirmed of the decision of the Subordinate Judge in the present case.

The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs.

Appeal dismissed.

(4) 18 Ind. Cas. 701; 35 A. 159; 11 A. L. J. 120.
(5) 7 W. R. 222.
(6) 23 A. 152; 27 I. A. 209; 10 M. L. J. 290; 5 C. W. N. 52; 2 B. L. R. 978.
(7) 21 Ind. Cas. 387; 18 C. L. J. 78.
(8) 15 Ind. Cas. 506; 10 A. L. J. 78.
(9) 9 Ind. Cas. 1019; 115 P. L. R. 1911; 41 P. R. 1911; 179 P. W. R. 1911.

JESSARAM DHANURAM v. ISARDASS.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT NO. 456 OF 1913.

Present:—Mr. Boyd, A. J. C.

JESSARAM DHANURAM - PLAINTIFF

versus

ISARDASS AND OTHERS—DEFENDANTS.

Partnership—Suit for accounts—Counter-claim—Court Fees Act (VII of 1870), Sch I, Art. 1.

In a suit for accounts and to recover money due on a dissolved partnership, the defendants' claim for decree on accounts is not a counter-claim, and no Court-fee is leviable thereon until the amount has been ascertained.

A suit for partnership accounts is in the nature of a suit in Chancery, and a Court of Equity will not drive the defendant to a fresh suit if the balance turns out to be in his favour.

A set-off is a cross-debt on which a separate action may be sustained.

Mr. *Kalumal Pahlumal*, for the Plaintiff.

Mr. *Kimatram Bhajraj*, for the Defendants.

JUDGMENT.—After hearing both sides, I find that no Court-fee is due from defendants at present.

On this point the arguments were heard with those in Suit No. 374 of 1913. [*Fateh Mahommed* v. *K. S. Ramsan Khan* (1).]

The facts in the two suits are similar, except that in this suit defendants did mention the amount of their claim. As they have ascertained that amount, it seems at first sight that they ought to pay Court-fee on it under Article 1 of Schedule I of the Court-Fees Act.

That is, they must pay if they have made a counter-claim. What claim have they made? They say: "take account of the partnership as plaintiff asks; but at the end you will find a balance of so much in our favour, which please give us." The question is whether this is a counter-claim within the meaning of the Court-Fees Act. It was unnecessary to decide this point in the other suit. But here it must be decided.

The word "counter-claim" is not defined in the Court-Fees Act and is nowhere used in the Code of Civil Procedure, except in Schedule 4.

It is argued for defendants that they were not bound to make any request to the Court, which must anyhow take account and must award the balance due to the party, plaintiff or defendant, who is entitled to it. There is much force in this argument. A suit for partnership accounts is in the nature of a suit in Chancery; and a Court of Equity will not drive the defendant to a fresh suit if the balance turns out to be in his favour: Commentary of Ameer Ali and Woodroffe under Order VIII, rules 6-8, Civil Procedure Code. Once seized of the matter, the Court will settle it once for all. This view is borne out by the wording of the form of a final decree in a partnership suit—No. 22 of Appendix D of the first Schedule, Civil Procedure Code. The form provides for a decree in favour of either party. It might be argued that not even a plaintiff can get relief which he has not asked for, and why should a defendant?

The answer is that he can ask for it at the end of the suit, when the balance has been struck. I do not see why he should not. Suppose that through ignorance (perhaps due to youth or absence or some cause beyond his control) he did not know, at the time of the pleadings, that anything was due to him. In such a case it would hardly be equitable to refuse him his due. And in India all Civil Courts are Courts of Equity. Of course, these remarks would not apply to a suit governed by the Common Law.

In fact a defendant resisting a claim in a partnership suit nearly always does plead that there is a balance in his own favour. But, so far as I see, he is not bound to do so.

It is enough if he says "I deny plaintiff's claim Let account be taken." Here defendants have gone further; for they have said that a definite sum is due to them. Here it is argued that, though they may not have been bound to state a definite or "ascertained" sum of money, still they have done so, and so they must pay Court-fees on their demand. This brings me back to the question whether that is a "counter-claim" or not.

In Webster's Dictionary and in Wharton's Law Lexicon a counter-claim is defined as exactly the same thing as a set-off. I am of opinion that defendants' claim is not a set-off. A set-off is a cross-debt on which a separate action may be sustained. Now any suit brought by defendants would not be separate, but would be the same thing as this suit with the parties transposed. The typical set-off is when *A* sues *B* for a debt due for something and *B* replies that *A* owes him money for something else and asks the Court to subtract one debt from the other. That is not the case here Defendants simply agree to plaintiff's proposal

(1) 27 Ind. Cas. 316; 8 S. L. R. 122.

that account should be taken: and they prophesy that the balance will be in their favour. I think this is not a counter-claim, but merely a statement that something is likely to happen. It follows that no Court-fee is payable at this stage. This result is not unjust and may well have been intended by the framers of the Court Fees Act; for defendants' present statement gives no extra trouble to the Court which (as I hold) is bound, after admitting the plaint, to take account fully, strike a balance and make the debtor pay his debt.

I notice that the above view of the meaning of the word "counter-claim" is not the same as that taken by Ameer Ali and Woodroffe. The learned commentators give the word a meaning which seems more properly to belong to the English word "cross-claim," which of course is a very wide term.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 342 OF 1912.

June 4, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

AJO KOER AND ANOTHER—JUDGMENT-DEBTORS—APPELLANTS

versus

GORAK NATH—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 60—Legal representative of judgment-debtor—Objection that attached property not of judgment-debtor, determination of—Applicability of Order XXI, r. 60.

An objection, raised by a person, who has been brought on the record in an execution proceeding as the legal representative of a deceased judgment-debtor, that certain properties sought to be made liable do not constitute assets available to the decree-holder, must be determined under section 47 of the Civil Procedue Code, 1908.

Obiter dictum.—Where X, in execution of a decree for money against Y personally, attaches property in the possession of Y, which Y alleges he holds not in his own right but as *shebait* of a deity who is not a party to the suit, the question does not arise between the parties to the suit, but between X on the one hand and Y in his capacity as trustee of an endowment on the other hand and should be determined under Order XXI, rule 60, of the Civil Procedure Code.

Appeal against an order of the Judicial Commissioner of Chota Nagpur, dated the 27th May 1912, affirming that of the Subordinate Judge of Ranchi, dated the 1st September 1911.

Babu *Karunamoy Basu* (for Babu *Kshetra Mohan Sen*), for the Appellants.

Babu *Sunil Madhub Mullick*, for the Respondent.

JUDGMENT.

MOOKERJEE, J.—This is an appeal by the judgment-debtors against an order of the District Judge, by which he has dismissed an appeal against an order of the Subordinate Judge in the matter of execution of a decree for money. The decree had been obtained by the respondent against one Kripal Narayan Tewari. Before the decree could be executed in full, the judgment-debtor died. The decree-holder thereupon took out execution against his widow, Ajo Koer, as his legal representative. The widow took objection to the attachment of four of the properties against which the decree-holder sought execution as the assets of the original judgment-debtor in her hands. She contended that the properties in question were her own properties and did not form part of the estate of her husband. The Subordinate Judge investigated the matter and overruled the objection, on the ground that the disputed properties belonged not to the lady but to her husband. The widow then appealed to the District Judge. A preliminary objection was taken that the appeal was incompetent, because the order was not under section 47 of the Code but under rule 61 of Order XXI. The District Judge gave effect to this contention and dismissed the appeal without determination of the merits of the question in controversy between the parties. On the present appeal, the order of the District Judge has been assailed as based upon an erroneous view of the scope of section 47. It is plain that the order under appeal cannot be supported.

In the case of *Punchanun* v. *Rabia Bibi* (1) it was unanimously held by a Full Bench of this Court that an objection, taken by a person who has become the representative of the judgement-debtor in the course of the execution of a decree, to the effect that the property attached in satisfaction thereof is his own property and not held by him as such representative, is a matter cognizable only under section 244 of the Code of Civil Procedure, 1882. This decision is binding upon this Court, and is in no way affected by the

(1) 17 C. 711.

decision of the subsequent Full Bench in *Kartick Chandra Ghose* v. *Ashutosh Dhara* (2). That case affirms the proposition that when *X*, in execution of a decree for money against *Y* personally, attaches properties of which *Y* alleges that he is in possession, not in his own right but as *shebait* of a deity to whom the property has been dedicated and who is not a party to the suit, the question raised falls, not within section 244, but within section 278 read with section 280 of the Code of 1882. This principle does not contravene the rule laid down in *Punchanun* v. *Rabia Bibi* (1) and has no application to the case before us. When, as here, *X*, in execution of a decree for money against *Y*, proceeds against *Z* as the legal representative of *Y* in respect of property in the possession of *Z*, and *Z* contends that the property belongs to him and never formed part of the estate of *Y*, the question arises whether such property is assets in the hands of *Z* and is liable to be seized in execution of the decree against *Y*. Such question is plainly a question relating to execution of the decree obtained by *X* against *Y* and arises between the plaintiff-decree-holder *X* on the one hand and the representative *Z* of the defendant-judgment-debtor *Y* on the other hand. The question consequently must, under section 47, be determined by the Court executing the decree and not by a separate suit. The position is entirely different when *X*, in execution of a decree for money against *Y* personally, attaches property in the possession of *Y*, which *Y* alleges he holds not in his own right but as *shebait* of a deity who is not a party to the suit. The question raised is, no doubt, a question relating to the execution of the decree obtained by *X* against *Y*, but does it arise between the parties to the suit? Clearly not. The decree has been made in a suit between *X* on the one hand and *Y* in his personal capacity on the other hand. The question in execution arises between *X* on the one hand and *Y* in his capacity as trustee of an endowment on the other hand. *Y* has a twofold capacity: in one character he is party to the suit; in the other, he is a stranger to the suit. The position is precisely what it would have been if *Z* had been the *shebait* and had claimed the property as such when attached by *X* in execution of his decree against *Y*. It is further plain from an examination of the terms of Order XXI, rule 60, that while it applies to the class of cases of which *Kartick Chandra Ghose* v. *Ashutosh Dhara* (2) may be taken as the type, it cannot, by any stretch of language, be made to cover the class of cases of which *Punchanun* v. *Rabia Bibi* (1) is the leading example. In the former class of cases, the judgment-debtor objects that he is in possession as trustee, and not on his own account, within the meaning of Order XXI, rule 60; in the latter class of cases, the representative of the judgment-debtor objects that the property in his hands is not assets available to the decree-holder. The objections in the two classes of cases are obviously of fundamentally different kinds. Reference may in this connection be made to the elaborate judgment of Wilson, J., in *Rajrup Singh* v. *Ramgolam Roy* (3), which was approved by the Full Bench in *Punchanun* v. *Rabia Bibi* (1). The view taken by the Full Bench has now been adopted by all the Indian High Courts: *Seth Chand Mal* v. *Durga Dei* (4); *Kali Charan* v. *Jewat Dube* (5); *Murigeya* v. *Hayat Saheb* (6); *Gokulsing* v. *Kisansing* (7); *Vengapayyan* v. *Karim Panakal* (8). In this view, the objection raised by the widow of the original judgment-debtor, who has been brought on the record as his legal representative and who contends that four of the properties sought to be made liable in execution of the decree against her husband do not constitute assets available to the decree-holder, must be determined under section 47 of the Code.

The result is that this appeal is allowed, the order of the District Judge set aside and the case remanded to him in order that the appeal may be heard on the merits. The appellants are entitled to their costs both here and in the Court of Appeal below. We assess the hearing fee in this Court at five gold *mohurs*.

(2) 12 Ind. Cas. 162; 14 C. L. J. 425; 16 C. W. N. 26; 39 C. 296.

(3) 16 C. 1.
(4) 12 A. 313 (F. B.); A. W. N. (1890) 137.
(5) 28 A. 51; A. W. N. (1905) 180.
(6) 23 B. 237 at p. 242.
(7) 7 Ind. Cas. 457; 34 B. 546; 12 Bom. L. R. 539.
(8) 26 M. 501.

MUNISAMY MUDALY v. ABBU REDDY.

BEACHCROFT, J.—I agree to the proposed order on the ground that the matter is concluded by the decision of the Full Bench in the case of *Punchanun* v. *Rabia Bibi* (1).

Appeal allowed : *Case remanded.*

MADRAS HIGH COURT.
FULL BENCH.
FIRST CIVIL APPEAL No. 40 OF 1909.
January 20, 1913.
Present:—Sir Charles Arnold White, KT., Chief Justice, Mr. Justice Miller and Mr. Justice Sadasiva Aiyar.
MUNISAMI MUDALY—DEFENDANT No. 2 —APPELLANT
versus
ABBU REDDY AND OTHERS—PLAINTIFFS AND DEFENDANTS NOS. 1 AND 3 TO 7 RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 22 —Cross-objections, whether can be taken against a co-respondent.

A respondent can claim relief against a co-respondent by way of memorandum of objections.

Appeal from the decree of the District Court of Chingleput, in Original Suit No. 17 of 1907.

The case came on for hearing before Sir Charles Arnold White, Kt., Chief Justice, and Mr. Justice Bakewell on the 18th November 1912, and they made the following

ORDER OF REFERENCE.

WHITE, C. J.—In this case the plaintiff sued on a mortgage. The 2nd defendant pleaded failure of consideration to the extent of Rs. 700. The 7th defendant impeached the mortgage altogether on the ground of fraud. The District Judge held the mortgage was good, that there had been no partial failure of consideration, and gave the plaintiff a decree for the amount of his claim. The 2nd defendant appealed. The 7th defendant did not appeal, but put in a memorandum of objections in which he asked for a declaration that the mortgage was fraudulent and not binding on him.

As regards the appeal of the 2nd defendant, I think the District Judge was right for the reasons stated in the judgment of my learned brother, which I have had the advantage of reading. I think his appeal should be dismissed with costs.

Objection was taken to the memorandum of objections on the ground that the 7th defendant, not having appealed, could not in the appeal by his co-defendant, the 2nd defendant, against the decree on the ground that there had been a partial failure of consideration, obtain relief by way of memorandum of objections on the ground that the mortgage was bad *in toto*. The further point was taken that if it was open to the 7th defendant to put in a memorandum of objections, he could only do so on payment of the proper Court-fee.

The objection which has been taken raises the question, can a respondent proceed by way of memorandum of objections against a party to the appeal other than the appellant?

In Calcutta the decisions under section 561 of the Civil Procedure Code of 1882 are to the effect that the procedure by way of cross-objections can, as a general rule, only be adopted where the cross-objections are raised as against the appellant. See *Bishun Churn Roy Chowdhry* v. *Jogendra Nath Roy* (1). A different view has been taken by this Court. In *Kulaikada Pillai* v. *Viswanatha Pillai* (2) Subramania Aiyar, J., observed (page 235): "According to the decisions of this Court such a memorandum may legally be filed even when the question arises between co-respondents only."

The wording of Order XLI, rule 22, differs from that of the section which it reproduces in certain respects. The word "cross-objection" is used instead of "objection." The words "the party who may be affected by such objections" are used instead of the word (1) "appellant." The word "cross-objection" seems appropriate as regards a question between the appellant and a respondent; inappropriate, as regards a question between two co-respondents.

On the other hand, the substitution of the words "the party who may be affected by such objection" for the word "appellant" would seem to indicate that the Legislature intended to bring questions between co-respondents within the scope of the Rule.

(1) 26 C. 114.
(2) 28 M. 229; 15 M. L. J. 212.

MUNISAMI MUDALY v. ABBU REDDY.

The point raises an important question of practice, and it seems desirable to have an authoritative decision in the matter.

I would refer to a Full Bench the question, whether under the Civil Procedure Code of 1908 and the rules, a party to an appeal can claim relief against a co-respondent by way of memorandum of cross-objections.

BAKEWELL, J.—This is a suit by the assignee of a mortgage for sale of the mortgaged property, in which the 2nd defendant (appellant), one of the mortgagors, has pleaded that Rs. 700, part of the mortgage moneys, were not paid by the original mortgagee; and the 7th defendant (7th respondent), who attached the land in execution of a decree against one of the defendants, has pleaded that the whole mortgage is void as against him. The District Judge decided both these points in favour of the plaintiff, and the 2nd defendant has presented this appeal against his decree, and the 7th defendant has presented a memorandum of cross-objections by which he seeks to reverse the finding against his plea. The decree is the usual mortgage decree for sale.

Upon the question of fact raised by the appellant, I am of opinion that the evidence supports the finding of the lower Court. The mortgage, Exhibit C, shows that part of the consideration was the settlement of certain debts of the mortgagor, and Exhibits Q, Q1 and E, produced by the mortgagee, show that moneys were due by the 2nd defendant to one Ratna Mudali; and Exhibit E bears an endorsement by the latter acknowledging the receipt of money from the mortgagee. There is no evidence that this endorsement is not genuine, and it is supported by the accounts, Exhibits H and J (1), and the contemporaneous statement on behalf of the mortgagee in Exhibit G (1). Exhibit N contains a distinct admission of the mortgage for the full amount by the 2nd defendant, which is confirmed by his statement in Exhibit O and by the fact that for a period of 10 years no claim appears to have been made by him for the balance of the loan. The whole case of the 2nd defendant rests upon his day-book, Exhibit I (a), since the ledger, Exhibit II (a), is quite unreliable, and Exhibit III merely shows an intention to discharge a mortgage of Ratna Mudali. These documents only go to show that three years prior to the mortgage, Exhibit C, certain moneys had been paid by the sale of land of the 2nd defendant in respect of a mortgage to Ratna Mudali, and do not contradict the plaintiff's evidence above referred to.

With respect to the memorandum of objections, a preliminary point has been raised that the 7th defendant should have come to this Court by way of appeal, and that it is not open to him under cover of an appeal by another party upon different grounds to attack a decree in favour of his co-respondent.

It is well settled that a Court will not ordinarily give relief to a defendant in a suit and will not travel beyond the limits of the plaint, and it seems to me that the same general principle should ordinarily be applied to appeals, to which the same rules apply as in suits (see Civil Procedure Code, section 107, clause 2). An appellate Court has now full power to do justice between the parties, although they may not have filed any appeal or objections (Order XLI, rule 33), and, therefore, if it thinks fit to reverse or vary a decree, it may make any order necessary to protect the interests of all parties.

The question, therefore, appears to me to be one, not of the jurisdiction of the Court, but of practice, that is, as to the manner in which a party aggrieved by a decree should ordinarily place his case before the Appellate Court, and whether the Legislature intended by Order XLI, rule 22, to provide that in addition to his remedy by memorandum of appeal, which is the method prescribed by Order XLI, rule 1, a respondent should have a further remedy by memorandum of cross-objections.

I think the wording of Order XLI, rule 22, shows that the Legislature intended to define the position of a respondent as against the appellant and to make it clear that he can avail himself of any defence or attack in order to meet the appellant's case; thus, he can not only change front and refute his arguments in the lower Court, this is the 1st part of the rule, but can also deliver a counter-attack by bringing into debate a matter which the appellant has not included in his appeal. I think that the Legislature had in

view the case where a party has for reasons of expediency not thought fit to appeal, but has been forced into Court and wishes to avail himself of all his means of offence and defence. Hence a memorandum of objections is in effect a cross-appeal, and notice must be given not only to the appellant but to all parties affected, sub-rule (3), and the former cannot defeat the attack by withdrawing from his appeal, sub-rule (4). I am unable to conjecture what object the Legislature may have had, upon the 7th respondent's construction of this rule, in giving a respondent two separate remedies, one by a regular appeal and one contingent upon another party appealing on a totally different matter.

Turning now to the authorities, it has been held in a long series of decisions of the Calcutta High Court, under section 561 of the Civil Procedure Code of 1882, that as a general rule the right of a respondent to urge cross-objections should be limited to his urging them against the appellant [see *Bishun Churn Chowdhry* v. *Jogendra Nath Roy* (1)] and by this Court that the section did not contemplate such a limitation [*Timmaya* v. *Lakshmana* (3). and see *Kulaikada Pillai* v. *Viswanatha Pillai* (2), per Subramania Aiyar, J.]. Since the date of those decisions and presumably in view thereof, the Legislature has amended the rule by the introduction of the word "cross" before objection; and I am of opinion that the intention was to adopt the construction of the Calcutta High Court. A respondent cannot now take objection generally to a decree; but only "cross-objections," that is objection to the appellant's case. In *In re Cavander's Trusts* (4) Jessel, M. R. points out that an appeal on a point which does not affect the original appellant cannot be a cross-appeal, and a respondent who desires to bring forward a case with which the appellant has nothing to do must give a notice of appeal. I agree with the learned Chief Justice that the question stated by him should be referred to a Full Bench.

Messrs. *D. V. Nilamuga Chariar* and *V. Narasimha Aiyangar* (for Mr. *T. Rangachariar*), for the Appellant.

Mr. *E. Doraiswami Aiyar*, (for Mr. *T. R. Venkatrama Sastriar*), for the Respondent.

Mr. *S. Subramania Aiyar*, for the 7th Respondent.

OPINION OF THE FULL BENCH.

It seems to us that the answer to the question which has been referred to us should be in the affirmative.

This is in accordance with the practice which appears to have prevailed in this Court under section 561 of the Code of 1882, and we do not read Order XLI, rule 22, as indicating that the framers of the rules intended to make it clear that the practice should be otherwise.

With all respect to the learned Judges who dealt with the question in *Jadunandan Prosad Singha* v. *Koer Kallyan Singh*(5), a case which was decided under Order XLI, rule 22, it seems to us more convenient to follow a fixed rule than to decide the question with reference to the particular facts of the case in which the question is raised.

We answer the question in the affirmative.

After receipt of the opinion of the Full Bench the memorandum of objections came on for final hearing before Mr. Justice Bakewell and Mr. Justice Kumaraswami Sastri, who on the 5th November 1914 delivered the following

JUDGMENT.—We are both of opinion that the question of consideration has been already decided in proceedings to which the 7th respondent was a party and in which he had the opportunity of arguing the point, and that this question is *res judicata* and cannot be re-opened upon the hearing of the memorandum of cross-objections. There is no evidence of fraud on the part of the mortgagee, or that the transferees of the mortgagee from him had notice of any fraud.

The memorandum of objections is dismissed with costs. The time for redemption will be three months from this day.

(3) 7 M. 215; 8 Ind. Jur. 78.

(4) 16 Ch. D. 270; 50 L. J. Ch. 292; 29 W. R. 405.

(5) 13 Ind. Cas. 653; 15 C. L. J. 61 at p. 63; 16 C. W. N. 612.

KARACHI MUNICIPALITY *v.* KHATANMAL HIRANAND.

SIND JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPEAL No. 26 OF 1913.

March 16, 1914.

Present:—Mr. Crouch, A. J. C.

THE KARACHI MUNICIPALITY—APPLICANTS

versus

KHATANMAL HIRANAND—OPPONENT.

Bombay District Municipal Act (III of 1901), s. 160 (3)—Compensation, award of—Boom in prices, whether to be considered in estimating market-value—Value of portion of land enhanced owing to acquisition of part of it—Compensation for that portion, whether allowed on severance.

In awarding compensation for acquisition of land under section 160 (3) of the Bombay District Municipal Act if a boom in prices of lands exist owing to certain extraordinary circumstances, it must be considered in estimating the market-value of the land to be acquired.

Where a portion of a land acquires a fancy value owing to the acquisition of a part of it for widening a street, no compensation is allowed for the severance of the same.

Mr. *Rupchand Bilaram*, for the Applicants.

Mr. *Wadhumal Oodharam*, for the Opponent.

JUDGMENT.—This is an application under section 160 (3) of the Bombay District Municipal Act, III of 1901. The Municipality have acquired 22 square yards from plot No. 65 A-5, Old Town Quarter, belonging to opponent Khatanmal Hiranand; the matter was referred to a *Panchayat*, the members of which failed to give a decision within one month from the date of their appointment. The Court is asked to ascertain and determine the compensation due to opponent.

In his letter of 4th February 1913 Khatanmal claimed Rs. 125 a square yard, stating that he had purchased the plot about 12 months before at Rs. 100 a yard.

The plot in question at date of acquisition, 3rd December 1912, consisted of 30 square yards and had standing on it an old building worth about Rs. 150. It is situate at the corner of Gowsuttiani Street and Atmaram Lane, the width of Gowsuttiani Street being about 10 feet and that of Atmaram Lane about 8 feet. The result of the acquisition is to widen both the streets and the lane by 5 or 6 feet. The old building had a shop on the ground-floor, which is said to have been let at Rs. 5 a month, and a couple of rooms on the first floor occupied by a relation of the owner, who was nominally a tenant at Rs. 3 per mensem, but paid nothing actually. The building was assessed at Rs. 5 a month. Only 8 square yards now remain; a building worth about Rs. 300 has been erected consisting of a shop with a room overhead. The shop lets for Rs. 6 a month, but the room being less than 80 square feet is not, under the Municipal rules, considered fit for residential purposes (Exhibit E and Exhibit XX).

Khatanmal asks, in addition to Rs. 125 a square yard for the land acquired, 15 per cent. compensation and also half the value of the 8 square yards, say Rs. 500 for severance. The Chief Engineer values it at Rs. 55 a square yard inclusive of 15 per cent. compensation, or at about Rs. 48.

* * * *

In December 1911, it was announced that the Capital was to be transferred to Delhi, and it is alleged that, as a consequence of this, the market value of land in Karachi leapt up. Mr. Lea states that this rise was purely speculative, having no reference to the letting value, and it is probable that those who bought at high price did so with the intention of re-selling before the boom ended. Since the Bank failures there has been a re-action and prices are again normal, though somewhat higher than in 1911. But, if the boom still continued in December 1912, it must be considered in estimating the then market value.

Now, in January 1912 a contract was entered into for the sale of A-5 No. 96 consisting of 64 square yards with three shops, bringing in Rs. 12 to Rs. 13 a month, at Rs. 4,500 or Rs. 70-4-0 a square yard. It would seen that the immediate result of the boom was to temporarily raise the market value of property in Daryalal Street by about 25 per cent.

What, then, was the value of No. 65 at the end of January? The owner would in view of the contract just referred to almost certainly ask Rs. 70, for though the position is not, in some respects, so good as that of A-5—96, the plot is a corner one and suitable for retail business purposes: and the boom in land values would stimulate speculation, and attract purchasers even at extreme prices. But 22 yards had already been marked out for acquisition by the Municipality, and

when land is so acquired it has been the custom to take the last sale, if a recent one, as the basis of calculation and add 15 per cent. Twenty-two yards would, therefore, have a potential value of Rs. 1,765. But the street would, by such asquisition, become greatly improved; a new shop could be erected out of the old materials for Rs. 150 to Rs. 200 and let for Rs. 6 a month, and for such shop there was, during the boom, a chance of getting a price that represented 20 years' purchase, or Rs. 1,440, or even more, so that the owner might have fairly calculated its potential value at Rs. 2,955; and a speculative purchaser might not unreasonably have expected to clear Rs. 100 or so, if he gave only Rs. 2,800 for there was at least a chance of getting from the Municipality a fancy rate.

In February 1912, the plot in question is said to have actually changed hands at Rs. 2,800, and two months later was sold at 2,900 to the present claimant. An endeavour has been made to show that these sales did not, as a matter of fact, take place, and that there was a collusive fraud practised with a view to obtain a fancy rate on acquisition. But after very carefully considering all the evidence, the utmost I feel justified in saying is that the sale and re-sale are suspicious; they have not been proved to be fictitious, and it is quite possible that they were genuine, though highly speculative transactions. It is to be noted, in support of the theory which I have put forward as to the method adopted for settling the value, that the owner now values the 8 and 9 yards and shop at Rs. 1,500 and has refused an offer of Rs. 1,000.

Early in 1912, Tikamdas (Exhibit S S) gave Rs. 1,100 for 11 square yards' in Naumal Lane with a shop yielding Rs. 5 a month and re-sold it at Rs. 1,200. This transaction shows that a price up to 20 years purchase may be realised by a very small plot with a shop on it, even though the rate works out at over Rs. 100 a square yard. In such cases the purchaser buys, not only a plot of land, but the potentiality of making business profits.

Plot A-5—100 was, in June 1911, worth no more than about Rs. 57 a square yard; but after a portion of it had been acquired and the street widened, the price naturally rose. Early in 1912, 28 yards were sold for Rs. 1,974 or Rs. 70-8 a square yard. A few weeks later it was purchased by a syndicate of speculators for Rs. 2,200 and then sold to one of their number (Exhibit SS) for Rs. 2,700, and by him, after the erection of two shops with upper storeys, sold in March 1913 at Rs. 4,500. Now, these transactions indicate that the widening of a street enhances values, and again illustrate the rule that very small sites with shops on them will fetch a price equivalent to their gross rent capitalised at 5 per cent. A shop with 14 square yards and an upper room in Daryalal Street would probably fetch Rs. 8 or Rs. 9, and this at 20 years purchase would indicate Rs. 2,250 as the selling price, or Rs. 4,500 for the two. I consider that these transactions also indicate that the booms in land and speculative purchases which commenced early in 1912 continued up to the end of that year. The extent to which the value of a plot per square yard is limited by the rent that can be realised is shown by the sale in July 1912 of a portion of the same plot A-5—100, when 53 square yards were sold for Rs. 2,000.

There is not, I consider, sufficient evidence to show that, after the transfer of the Capital had had its effects on prices, the rates rose materially during 1912, but there has undoubtedly been a steady and almost continuous rise in what may be termed the normal price of land throughout Karachi, independently of the speculative rise.

I am of opinion, then, that in December 1912 the boom still prevailed and speculative purchasers were willing to give big prices, and, had there been a question of selling plot 65 to a private purchaser as it then stood, the owner would willingly have taken Rs. 70 per yard but would not have taken less, and that a speculative purchaser would have considered it worth while to give Rs. 70 but would not have given more. The price which Khatanmal paid represented, not only the value of the plot as it stood, but the then realisable value of the land, plus the chance of getting fancy compensation from the Municipality for 22 yards and plus the potential increased value of

the 8 square yards after the streets had been widened. Had the date of acquisition been delayed until the boom caused by the transfer of the Capital had been practically neutralised by the Bank failures, the proper rate would, I think, have been about Rs. 60.

I cannot allow anything for severance, for the 8 square yards remaining have acquired a fancy value per square yard by the mere process of reducing the area. Though the upper room cannot be used for sleeping purposes, it must provide useful accommodation to the tenant of the shop, and so add materially to its letting value.

I award Rs. 1,540 for the 22 yards and 15 per cent. compensation, and interest on the whole amount awarded at 6 per cent. per annum from the date of taking possession, namely, 2nd December 1912.

The question of costs presents some difficulty. Neither party can be specially blamed for the case coming into Court. Though Khatanmal's claim was excessive, the offer of the Municipality was not sufficiently generous. The necessity for coming to Court has arisen from the desire of the Municipality to acquire the land, and I see no reason why the owner should be forced into heavy law expenses merely because he is compelled to sell his land and endeavours to get the best price possible. The Municipality must, therefore, bear all costs.

Suit allowed.

CALCUTTA HIGH COURT.

CIVIL APPEAL FROM ORDER No. 184 OF 1910.

June 5, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

UPENDRA NATH KALAMURI AND ANOTHER—OBJECTORS—APPELLANTS

versus

KUSUM KUMARI DASI—APPLICANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 60—Execution of decree—Legal representative of judgment-debtor, objection by—Attached property not of judgment-debtor—Determination of such question—Appeal.

Where a decree-holder in execution of a decree for money against a judgment-debtor personally attaches and proceeds to sell properties, of which the judgment-debtor alleges that he is in possession not in his own right but as *shebait* of a deity to whom the properties have been dedicated, the case does not fall within section 47, but under Order XXI, rule 60, of the Civil Procedure Code.

When a decree has been passed in a suit against a *shebait* as representing an idol, it is binding on the succeeding *shebait*, provided it has been passed without any fraud or collusion. But where a decree has been passed against a person in his capacity as *shebait*, execution can be taken out only against the properties of the endowment in his hands.

Per *Beachcroft, J.*—If the claim of an objector, who has been brought on the record as the legal representative of the judgment-debtor, is really in his own interests as representative of the judgment-debtor, the case will come under section 47 of the Civil Procedure Code, 1908, but if the claim is adverse to his interests as representative, it will not.

Appeal against an order of the Subordinate Judge of Midnapur, dated the 11th February 1910, confirming that of the Munsif of Midnapur, dated the 13th September 1909.

Mr. *S. P. Sinha* and Babu *Mohini Mohan Chatterjee*, for the Appellant.

Dr. *Rash Behary Ghose* and Babu *Kshetra Mohan Sen*, for the Respondent.

JUDGMENT.

MOOKERJEE, J.—This appeal is directed against an order by which the Subordinate Judge has confirmed an order of the Court of first instance for execution of a money decree. On the 7th April 1904, the respondent obtained a decree for money against one Gobardhan Kalamuri, described as the *shebait* of the goddesses Lakshmi and Bhagabati. Before the decree could be executed in full, the judgment-debtor died. On the 28th July 1909, the decree-holder applied for execution of the decree by the sale of an one-fourth share of 260 *bighas* of land within certain boundaries. She stated in her petition that the judgment-debtor was dead, that he had left five nephews (sons of different sisters) as also three paternal uncles, that one or more of these persons had succeeded as *shebait* of the endowment, but that as plaintiff had not been able to ascertain who was the *shebait*, she prayed that execution might proceed after service of notice on all these persons under rule 22 of Order XXI of the Civil Procedure Code, 1908. Notices were issued accordingly. The nephews of the original judgment-

debtor took no notice of the proceedings, but on the 19th August 1909, two of the uncles filed a petition of objection, in which they urged, amongst other things, that the properties sought to be attached had not been dedicated to the goddesses named but were private secular properties of the objectors, though under a deed dated the 29th June 1877 a part of the income of these properties had been directed by the then proprietor to be applied for religious purposes. It transpired at the same time that the other uncle of the judgment-debtor, who had not entered appearance, had died on the 10th August; the decree-holder thereupon applied that the two objectors who had appeared might be treated as the representatives of the deceased; this was granted. The Court then proceeded to investigate the objection, and on the 13th September 1909 came to the conclusion that the properties sought to be attached had been dedicated to the goddesses named; in this view, the Court overruled the objection and directed execution to proceed. The objectors then appealed to the Subordinate Judge. When the appeal came on for hearing, a preliminary objection was taken by the decree-holder-respondent that the appeal was incompetent, as the order could not be deemed to have been made under section 47 of the Code. The Subordinate Judge expressed himself in favour of this view, but as he felt doubtful whether the appeal was really incompetent, he considered the case on the merits and ultimately confirmed the order of the original Court. The objectors have appealed to this Court and have contended, *first*, that the appeal to the Subordinate Judge was competent, and, *secondly*, that he has misunderstood the legal effect of the deed of the 29th June 1877.

To determine whether the appeal to the Subordinate Judge was competent, it is necessary to ascertain whether the order of the primary Court falls within the scope of section 47. The answer to the question whether an order in execution proceedings is within the scope of this section, depends upon its nature and contents. If it decides a question relating to the execution, satisfaction or discharge of the decree, and if the decision has been given between the parties to the suit or their representatives-in-interest, the order of the Court falls within the scope of this section, is a decree within the meaning of section 2, and as such is appealable under section 96: *Raghubar Dayal Sukul* v. *Jadu Nandan Misser* (1), *Joytara* v. *Ram Krishna Seal* (2). It cannot be disputed that the order of the original Court decided a question relating to the execution of the decree held by the respondent, namely, whether the decree could be executed by attachment and sale of the property specified in the application of the decree-holder. But the point remains whether this question arose between the plaintiff-decree-holder on the one hand, and the defendant-judgment-debtor or his representative on the other hand. It is plain that if and in so far as there was an endowment, the objectors were the legal representatives of the judgment-debtor, within the meaning of that expression as defined in section 2, clause (2), of the Code; the original defendant had been sued in a representative character as the *shebait* of the two goddesses named; the objectors had succeeded to the office of *shebait*, and the estate held by the deceased as *shebait* had devolved on his successors in office. This view is in accord with the elementary rule that when a decree has been passed in a suit against a *shebait* as representing an idol, it is binding on the succeeding *shebait*, provided it has been passed without any fraud or collusion: *Prosunno Kumari* v. *Golab Chand* (3); *Tulsidas* v. *Bejoy Kishore* (4); *Manikka* v. *Balagopalakrishna Chetty* (5). But when a decree has been passed against a person in his capacity as *shebait*, execution can be taken out only against the properties of the endowment in his hands; for as Subrahmania Ayyar, J., observed in *Venkatasami Pillai* v. *Kuppayee Ammal* (6), the private property of an individual cannot be taken in execution of a decree made against him in his capacity as manager or trustee of an endowment, just as

(1) 13 Ind. Cas. 365; 15 C. L. J. 89; 16 C. W. N. 736.

(2) 7 Ind. Cas. 709, 13 C. L. J. 257; 15 C. W. N. 512.

(3) 2 I. A. 145; 14 B L. R. 450, 23 W. R. 253; 3 Sar. P. C. J. 449.

(4) 6 C. W. N. 178.

(5) 29 M. 553; 16 M. L. J. 415.

(6) 14 M. L. J. 377.

the property of the endowment cannot be taken in execution where the decree against him is in respect of his personal debt. The two capacities are fundamentally distinct, and the individual constitutes two distinct juristic persons from the two different points of view. In the present case, the decree-holder seeks to proceed against the property on the assumption that the appellants hold it as part of the endowment of the two idols named. The objectors, on the other hand, assert in their personal capacity that this is their private property and is not available to the decree-holder for satisfaction of her decree. That decree is essentially against the *debutter* estate, though, as pointed out by their Lordships of the Judicial Committee in *Jagadindranath Roy* v. *Hemanta Kumari Debi* (7), the suit was bound to be brought against the *shebait* as such, because it is only in an ideal sense that an idol, though regarded as a juristic person, can hold property. The true position, consequently, is that the question raised by the objectors calls for decision between the decree-holder, who is a party to the suit, and two persons who are not, for this purpose, representatives of the original defendant, as they raise the objection, not in their capacity as *shebaits*, but in their private individual capacity. This view is supported by the decision of the Full Bench in *Kartick Chandra Ghosh* v. *Ashutosh Dhara* (8). There it was ruled that when *X*, in execution of a decree for money against *Y*, personally attaches and proceeds to sell properties of which *Y* alleges that he is in possession, not in his own right but as *shebait* of a deity to whom the properties have been dedicated, the case does not fall within section 244 of the Code of 1882 or section 47 of the Code of 1908. The principle recognised by the Full Bench is that there is a fundamental distinction between a right acquired or liability incurred by *Y* in a personal capacity, and a claim advanced or defence interposed by the same individual in his capacity as *shebait* of a deity. If this distinction is borne in mind, the inference follows that when *X* in execution of a decree for money against *Y* as *shebait* of a deity attaches and proceeds to sell properties of which *Y* or his successor-in-office alleges that he is in possession, not as *shebait* of the deity, but in his own right, the case does not fall within the scope of section 47. *Y* in his character as *shebait*—the only character in which he is a party to the suit—cannot rightly be deemed the same person in his character as a private individual. We may add that the decision of the Full Bench in *Panchanan* v. *Rabia Bibi* (9), on which reliance was placed by the appellants, is not directly in point and does not assist their contention. That case is an authority only for the proposition that when *X*, in execution of a decree for money against *Y*, seeks to proceed against *Z* as the legal repesentative of *Y*, who is liable only to the extent of the assets of *Y* in his hands; and a question arises, whether a particular property does or does not constitute such assets, it must be determined by the execution Court under section 47 of the Code. Nor is the contention of the appellant supported by the cases of *Maharaj Kumar Bindeswari Charan Singh* v. *Thakur Lakpat Nath Singh* (10) and *Umeshananda Dut* v. *Mohendra Prosad* (11). The former case shows that where a party has obtained an order in his favour on the footing that the Court was competent to deal with the matter and make the order under section 47, he cannot, when the validity of the order is challenged by way of appeal, impugn the appeal as incompetent on the ground that the order could not have been made under section 47. The latter case is an authority for the proposition that where a decree has been obtained against a person who had been really removed from the office of *shebait* on the erroneous assumption that he is still the *shebait*, and upon application made to execute such decree against his successor-in-office, an objection is raised that there is no valid decree capable of execution against the properties of the endowment, the question falls within section 47, because a question was raised, who was the representative of the judgement-debtor which could be determined only under clause (3) of that section. Reference was finally made to the decisions of their Lordships of the Judicial Committee in *Chowdhry Wahed*

(7) 32 C. 129; 31 I. A. 203; 3 Bom. L. R. 765; 1. A. L. J. 585; 8 C. W. N. 809.

(8) 12 Ind. Cas. 163; 39 C. 296; 14 C. L. J. 425; 16 C. W. N. 26.

(9) 17 C. 711.

(10) 18 Ind. Cas. 26; 15 C. W. N. 725.

(11) 11 Ind. Cas. 280; 14 C. L. J. 337.

Ali v. *Jumajee* (12) and *Abidunnissa* v. *Amirunnissa* (13) neither of which lays down any principle contrary to the view I propose to take. The first case affirms what must now be regarded as incontestable, namely, where a decree against a person in a representative capacity has been properly passed and proceedings have been taken thereunder to obtain execution against him in his representative character, he is a party to the suit with respect to any question which may arise between him and the other parties relating to the execution of the decree. The second case shows that section 11 of Act XXIII of 1861 (which with important modifications now stands as section 47 of the Code of 1908) was not intended to apply to cases where a serious contest arose with respect to the rights of persons to an equitable interest in a decree.

It follows that the order of the original Court was not made under section 47 and was not a decree liable to be challenged by way of appeal. It must be taken to have been made under rule 60 of Order XXI, although it may be difficult to make the language of that rule fit in precisely with a case in which the defendant has been sued in a representative capacity and prefers a claim in his personal capacity. The rule, however, recognises a broad distinction between the representative character and the personal character of the same individual. In this view, the appeal to the Subordinate Judge was incompetent, and no opinion need be expressed on the question whether the objection is well-founded on the merits. The appeal is consequently dismissed with costs. We assess the hearing fee at three gold *mohurs*.

BEACHCROFT, J.—In this case a very real difficulty is raised by the decisions in the cases of *Punchanun* v. *Rabia Bibi* (9) and *Kartick Chandra Ghosh* v. *Ashutosh Dhara* (8). Both are decisions of a Full Bench. In the first of these two cases it was decided that an objection by the representative of the judgment-debtor in execution, to the effect that the property attached was his own and not held by him as such representative was cognisable only under section 244 of Act XIV of 1882 (section 47 of the present Code). *Prima facie* that decision would seem to cover the present case. The appellant has been brought on the record as the representative of the original judgment-debtor, and his claim is that the property is his own and that he does not hold it as *shebait*. In the second of the above cases it was decided that when the objector alleges that he is in possession not in his own right but as *shebait* of a deity to whom the property has been dedicated, the order passed is one under section 278 of the old Code (now Order XXI, rule 58). The ground on which the decision proceeded was that while the objector was a party to the suit in one capacity the claim was advanced by him in another, and consequently the question did not arise between the parties to the suit in which the decree was passed and, therefore, was not one to be determined under section 244.

Now if this be taken to be the underlying principle to be applied in cases of this nature, it might also have been applied in the case of *Punchanun* v. *Rabia Bibi* (9), for while the objector claimed the property as her own in her personal right, she was a party to the suit only because she was the widow of the original judgment-debtor and, therefore, liable to the extent of the assets which had come into her hands.

So far then as the principle was recognised in one case and ignored in the other, the two cases would seem to be in conflict. But the learned Judges who decided the later case distinguished it from the earlier one on the ground that it dealt with the converse question. If that be a real ground of distinction, it might be said that the present case being also the converse to the case of *Kartick Chandra Ghosh* v. *Ashutosh Dhara* (8) is not concluded by that decision, but should follow that in *Punchanun* v. *Rabia Bibi* (9). The distinction, however, fails when it is attempted to apply it to the facts of the case before us, for here we again have one person in a dual capacity, a state of things which was the foundation of the decision in *Kartick Chandra Ghosh* v. *Ashutosh Dhara* (8).

Can then the two cases be reconciled? One possible view occurs to me. It is this: if the claim of the objector is really in his own interests as representative of the judgment-debtor, the case will come under section 244; if the claim is adverse to his interests as representative, it will not. If this be a correct

(12) 11 B. L. R. 140; 18 W. R. 185.
(13) 4 I. A. 66; 2 C. 327; 1 Ind. Jur. 172 (P. C.).

test it will satisfy the conditions in the case of *Punchanun* v. *Rabia Bibi* (9), for the widow's claim in her personal right was in her interests as representative of the judgment-debtor. It will satisfy the conditions in *Kartick Chandra Ghosh* v. *Ashutosh Dhara* (6), for the objector's claim as *shebait* was adverse to his interests as representative of the judgment-debtor. Applied to the present case it provides a feature distinguishing it from the case of *Punchanun* v. *Rabia Bibi*(9), and a solution in accord with the principle underlying the case of *Kartick Chandra Ghosh* v. *Ashutosh Dhara* (8).

I, therefore, agree in dismissing the appeal.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1013 OF 1911.

February 5, 1914.

Present:—Mr. Justice Rattigan and Mr. Justice Scott-Smith.

SUNDER DAS—DEFENDANT—APPELLANT

versus

MANAK CHAND—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 104 (2)—Sch. II, r. 20—Appellate Court allowing award to be filed—Appeal—Revision.

An order passed by an Appellate Court under rule 20 of the second Schedule to the Code of Civil Procedure, 1908, allowing an award to be filed and directing the first Court to pass a decree in accordance therewith is not open to appeal.

It is exceedingly doubtful whether a revision of such an order is permissible.

Second appeal from the order of the Divisional Judge, Lahore, dated 17th May 1911, reversing that of the Additional District Judge, Lahore, dated the 24th February 1911, rejecting the respondent's application.

Mr. *Kanwar Narain*, for Mr. *Broadway*, and Malik *Muhammad Hussain*, for the Appellant.

Lala *Dhanpat Rai*, for the Respondent.

JUDGMENT.—Plaintiff applied, under rule 20 of the second Schedule of the Civil Procedure Code, to have an award filed in Court. The Additional District Judge rejected the application on the ground that the award determined matters not referred to arbitration. Plaintiff appealed to the Divisional Judge, who accepted the appeal and directed that the award should be filed and a decree in accordance therewith be passed by the first Court.

From this order defendants have preferred a second appeal to this Court, but it is quite clear from section 104 (2), Civil Procedure Code, that no appeal lies from that order passed on appeal. We were then asked to treat the memorandum of appeal as an application for revision, but we saw no reason for acceding to this request.

It is exceedingly doubtful whether revision of an order of the kind under consideration is permissible, but whether it be so or not, there are no grounds in the present case for interference. The Divisional Judge has given his best consideration to the question involved and has construed the agreement to refer in a manner which, whether right or wrong, can certainly not be described as unreasonable.

We accordingly dismiss this appeal with costs.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL MISCELLANEOUS APPLICATION No. 61 OF 1913.

May 5, 1914.

Present:—Mr. Crouch, A. J. C.

LEKHRAJ VISUMAL AND OTHERS—PLAINTIFFS

versus

ASSAMAL TARUMAL AND OTHERS—DEFENDANTS

Limitation Act (IX of 1908), s. 10, applicability of—Composition deed—Absolute transfer of property by debtor to trustees—Resulting trust—Suit for surplus moneys.

Section 10 of the Limitation Act has a very limited application and has no reference to trusts which are merely founded on an unexpressed but implied intention of the party creating them, or to trusts which are raised by construction of Equity without any reference to the intention of the parties.

Where, therefore, certain debtors entered into a composition deed with their creditors whereby they transferred absolutely to trustees all their property for the benefit of the creditors in order to obtain a discharge from all liabilities:

LEKHRAJ VISUMAL v. ASSAMAL TARUMAL.

Held, that no resulting trust was created in favour of the debtors and that they had no cause of action to sue for surplus moneys.

Obiter dictum:—Where property is vested in a trustee under a Will, he holds it as express trustee, not only for the devisees and legatees named therein, but as regards any undisposed of residue, for the heir-at-law and next-of-kin; the trust is said to arise on the face of the instrument itself.

Mr. *Hirdaram Mewcaram*, for the Plaintiffs.

Mr. *Rupchand Bilaram*, for Defendants Nos. 1 and 4.

Mr. *Kimatrai Bhojraj*, for Defendant No. 2.

JUDGMENT.—By deed bearing date the 28th June 1895 and made between Bhawandas Jethanand and his sons, Vishindas and Pitumal, (therein referred to as the debtors) of the one part, twenty-one firms and persons therein specified being creditors of the said debtors of the 2nd part, and four persons therein named (being referred to as the trustees) of the 3rd part, after reciting that the debtors were unable to pay their debts in full and that the creditors had agreed to enter into a composition deed with them, the debtors thereby transferred absolutely to the trustees all their property whatsoever, moveable or immoveable, and also all property thereafter found to belong to the debtors, and all properties which the debtors might become entitled to in any manner thereafter, on trust to sell the same in any manner they might think fit, and after defraying costs of realisation and management, to divide the assets between the creditors in the proportion therein set forth; and it was declared that on payment of the last dividend the debtors should be discharged from all their liabilities to the creditors.

Plaintiffs are the four sons of Visumal or Vishindas, sole surviving members of the debtors.

Defendants No. 1 (*a*) to (*d*) are sons of Tarumal, one of the four trustees. Defendant No. 2 is also the son of the trustee Assanmal.

Defendants No. 3, the firm of Khemchand Issardas, is sued because Chetomal Parmanand, one of the original trustees, was manager of that firm.

Defendant No. 4 is alleged to have acted as trustee in place of his deceased brother.

It is alleged that Assanmal Chandiram bought certain trust properties in the name of his son defendant No. 2, and that Basrio, Fadoo also purchased certain properties in the name of his nephew Mooso or of his firm.

Plaintiffs claim an account of the trust properties, pray that the surplus moneys be handed over to them and that it be declared that the trust properties purchased by Assanmal and Basrio are the property of plaintiffs.

Plaintiffs are suing in *forma pauperis*. If the suit is barred by the Law of Limitation, they have no cause of action and the suit cannot be entertained. *Prima facie* the suit is time-barred; but plaintiffs rely on section 10 of the Limitation Act; if this section has no application, the suit is admittedly time-barred.

Now, section 10 has a very limited application; it is available only as against persons in whom property has become vested in trust for a specific purpose, that is, for a purpose which is specified or expressed by the author; it has no reference to trusts which are merely founded on an unexpressed but implied intention of the party creating them, or to trusts which are raised by construction of Equity without any reference to the intention of the parties.

An immediate reply to plaintiffs' contention is furnished by the terms of the deed itself. The property of the debtors was, in clear terms, transferred absolutely for the benefit of creditors; no resulting interest whatever was reserved. The deed embodied an agreement under which, in return for an absolute discharge for their debts, the debtors handed over everything they possessed.

Mr. Hirdaram contends that if the whole circumstances of the case be gone into, it will be discovered, or rather may possibly be discovered—for no definite particulars are known—that, contrary to expectation, the debtors' estate realised a considerable surplus, that if the debtors had anticipated this, they would have made due provision for it in the deed and that Equity should, therefore, not only read into the deed such a provision, but should institute an inquiry in order to ascertain whether or not property ever did become vested in the defendants in trust for plaintiffs.

A bare statement of plaintiffs' case seems to render it obvious that it does not come under the provisions of section 10, for his case depends on proof of facts and events which happened many years ago. As stated by

Bowen, L. J., in *Soar* v. *Ashwell* (1): "In such cases conflicts of evidence are possible or probable, and to deny to the person to be charged the shelter or benefit of a period of limitation would be obviously dangerous and unjust." Mr. Hirdaram places reliance on this case. Ashwell was a solicitor to certain trustees; as such solicitor he had received and retained a certain sum of money forming part of the trust funds, on which he had regularly paid interest to the beneficiaries. It was held that Ashwell held the money on an express trust for the trustees, and that a suit by surviving trustee was not barred. The case comes clearly within the terms of section 10 of the Indian Limitation Act.

The only other case cited by Mr. Hirdaram, which requires notice, is *Salter* v. *Cavanagh* (2). This case establishes that, where property is vested in a trustee under a Will, he holds it as express trustee, not only for the devisees and legatees named therein, but as regards any undisposed of residue, for the heir-at-law and next of kin; the trust is said to arise on the face of the instrument itself.

The principle thus enunciated seems to form an exception to the general rule, but it was accepted as good law by Lord St. Leonards and by Mr. Lewin, and in 1889 was followed in *Patrick* v. *Simpson* (3); but no inclination has been shown to extend the principle to trusts created by deeds of composition.

The case of *Smith* v. *Cooke* (4) appears to be on all fours with the present one. It was held on the language of the particular deed that the assignees divested themselves of all interest in the property for the benefit of their creditors, not that they put the property in trust for a special and limited purpose, but that they abandoned it and gave it up altogether, and that, therefore, there could be no room for any resulting trust.

The application is, therefore, dismissed with costs as no cause of action is disclosed.

Application dismissed.

(1) (1893) 2 Q. B. D. 390 at p. 396; 69 L. T. 585; 42 W. R. 165; 4 R. 602.
(2) (1838) 56 R. R. 222; 1 Dr. & Wal. 668.
(3) (1889) 24 Q. B. D. 128; 59 L. J. Q. B. 7; 61 L. T. 686.
(4) (1891) A. C. 297; 60 L. J. Ch. 607; 65 L. T. 1; 40 W. R. 67.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2648 OF 1912.

February 23, 1914.

Present:—Mr. Justice Mullick.

NIRDOSH MUNDA AND OTHERS—DEFENDANTS—APPELLANTS

versus

JAKARIA MUNDA—PLAINTIFF—RESPONDENT.

Contribution, suit for—Joint tenancy—Payment of rent by one—Liability of other joint tenants to contribute—Decree, form of—Contract Act (IX of 1872), ss. 43, 70.

When several persons hold a tenancy jointly, the liability for rent is joint and several under section 43 of the Contract Act, and where one of these persons pays the whole rent, he can sue the others for contribution under section 70 of the Contract Act and is entitled to a decree to recover jointly from the others.

Appeal against the decree of the Judicial Commissioner of Chota Nagpur, dated the 13th April 1912, reversing that of the Munsif and Sub-Divisional Officer at Khunti, dated the 22nd March 1911.

Babus *Biraj Mohan Mojumdar* and *Dhirendra Krishna Ray*, for the Appellants.

Babu *Nogendra Nath Ghose*, for the Respondent.

JUDGMENT.—The plaintiff and defendants are members of a village, Khunt, in Chota Nagpur. The plaintiff alleges that he has paid the whole rent due upon the holding and he sues the defendants for contribution. The Munsif finds that contribution was never paid before and has dismissed the suit. The Judge, on appeal, finds that contribution is due on the footing that the liability of the tenants in respect of the holding was joint and several, and he has given the plaintiff a decree for three-eighths of the total rental for the area in suit. He has apportioned the share of each set of defendants at one-eighth. In second appeal by the defendants the first point urged is that the payment made by the plaintiff was gratuitous and that, therefore, no suit for contribution lies. This contention, in my opinion, is not well founded. There is a distinct finding of fact by the District Judge that the defendants hold the tenancy jointly with the plaintiff; so under section 43, Contract Act, the liability for rent is joint and several. The plea of the defendants to the effect that by private partition the plaintiff took the three *pahans* of land in excess of his share and as a consideration

agreed to pay the whole of the rent has not been established. The District Judge is clearly of the opinion that the payment by the plaintiff was not voluntary. I think that the plaintiff's payment was not voluntary and I also think the case is clearly covered by section 70 of the Contract Act. The next point taken is that the District Judge was wrong in his apportionment of the rent. Although the District Judge does not explain how he arrived at the fraction one-eighth in respect of each set of defendants, it seems upon the admission of the defendants that the plaintiff holds five *pahans* out of the total eight *pahans* in the holding. He has, therefore, been rightly held liable by the District Judge to pay five-eighths of the rent, but I cannot see on what evidence the apportionment as between the three sets of defendants has been made equally. In this Court they expressly deny that they hold the same number of *pahans* each. The proper decree, therefore, will be to allow the plaintiff to recover jointly from the defendants and to set aside that part of the District Judge's order which relates to apportionment. The appeal is allowed without costs and the District Judge's decree modified accordingly.

Appeal allowed; Decree modified.

BOMBAY HIGH COURT.

ORIGINAL SIDE CIVIL APPEAL No. 8 OF 1914.

August 18, 1914.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Davar.

FAZULBHOY JAFFER—PLAINTIFF—APPELLANT

versus

THE CREDIT BANK OF INDIA, LTD.—DEFENDANT—RESPONDENT.

Companies Act (VI of 1882), s 45—Share-holder—Minor, whether can be share-holder—Receipt of dividends—Estoppel by conduct—Estoppel—Registered holder of share, rights and liabilities of.

A share-holder of a limited Company, who was a minor at the date of allotment of shares to him, but after attaining majority received dividends and raised no objection to his name being included in the register of members, is estopped by his conduct while a person *sui juris* from denying as between himself and the Company's representative that he is a share-holder.

A minor may be a member of a Company under the Companies Act of 1882.

A registered holder of shares in a Statutory Company is a person with a vested interest in property, which may be burdened with an obligation to pay calls in the future. The registered member cannot keep the interest and prevent the Company from having it and dealing with it as their own without being bound to bear the burthen attached to it.

FACTS of the case appear from the following order of Mecleod, J., appealed against:—

This is an application by a share-holder to be struck off the list of contributories on the ground that he was an infant at the time he applied for the shares, and that, therefore, his contract with the Company was void. The applicant may be considered to be in the same position as a share-holder whose name has been put upon the register, either without his consent or without any application on his part. As soon as he becomes aware of the fact he may refuse to accept the ownership of the shares within a reasonable time, but if he allows his name to remain on the register without doing anything he must be taken to have acquiesced. In *Constantinople and Alexandria Hotels Co., In re*; *Ebbetts, Ex parte* (1) a minor made a similar application, and Giffard, L. J., remarked: "I do not rely on the transfer which he executed, but on the ground that he acquiesced for a lengthened period in being on the register."

Again in *Yeoland Consols, In re* (2) the applicant was put upon the register when a minor without any application on his part. On an application to remove his name from the list of contributories on the winding-up Stirling, J., said: "Being on the register of the Company for the shares he is *prima facie* entitled to them. Shares are property which may turn out to be valuable, and may on the other hand turn out to carry with them only a very serious liability. The law assumes that where property is assigned

(1) (1870) 5 Ch. App. 302; 39 L. J. Ch. 679; 22 L. T. 424; 18 W. R. 394.

(2) (1888) 58 L. T. 932; 1 Meg. 89.

to a person the assignee accepts it, but he may refuse to accept it if he does so within a reasonable time." The present applicant knew he was on the register for the shares. From his coming of age in July or August 1912 till the winding-up order was made in November 1913, he must be taken to have known that his name was on the register and since he chose to allow his name to remain there without doing anything, it cannot now be removed."

Mr. *Kanga*, for the Appellant.

JUDGMENT.—The appellant appeals from an order of the Chamber Judge including him in the list of contributories of the Credit Bank of India, a limited Company now being wound-up by the Court. The appellant applied for fifty shares in this Company, which were allotted to him on the 8th of January 1910 on payment of Rs. 10 per share, the nominal value being Rs. 50. If he has been rightly included among the contributories, he will be liable for Rs. 40 per share. He contests his liability on the ground that he was a minor at the date of the allotment. It is not disputed that he attained majority in August 1912. He has received dividends at the rate of six per cent. per annum on the sums paid upon his shares twice in each of the years 1911, 1912 and 1913, and he has raised no objection to his name being included in the register of members until January 1914. Under these circumstances it cannot be doubted that he has intentionally permitted the Company to believe him to be a share-holder and in that belief to pay him dividends on his shares since he attained majority. He is, therefore, estopped now by his conduct while a person *sui juris* from denying as between himself and the Company's representative that he is a share-holder.

This is sufficient to dispose of the appeal; but we will express our opinion upon the point made in the excellent argument of Mr. Kanga. His contention was that the matter must be decided according to the law contained in the Contract Act under which a minor is not competent to contract and, therefore, it cannot be said that he has agreed with the Company to become a member, which is one of the conditions of membership under the Companies Act of 1882, section 45. This argument would be more convincing if the words used in section 45 were "has contracted with the Company," for under the Cantract Act it is not every agreement that is a contract. Moreover, it appears from the Satutory Article - 45 in Table A of the Companies Act that a minor may be a member of a Company under that Act.

It has been settled law in England for many years that a registered holder of shares in a Statutory Company is a person with a vested interest in property, which may be burdened with an obligation to pay calls in the future. The registered member "cannot keep the interest and prevent the Company from having it and dealing with it as their own without being bound to bear the burthen attached to it": *London & North Western Railway Company* v. *M'Michael* (3).

This view of the position of a share-holder pleading minority when registered was taken by Stirling, J., in *Yeoland Consols, In re* (2) and the learned Chamber Judge has, we think, rightly adopted it in the present case. The same principle underlies section 248 of the Contract Act. *Qui sentit commodum, sentire debet et onus.*

Appeal dismissed.

Attorneys for the Appellant: Messrs. *Jehangir, Sirrai, Minocheher and Hiralal.*

Attorneys for the Respondents: Messrs. *Payne & Co.*

(3) (1851) 20 L. J. Ex. 233; 6 Ex. 278; 6 Railw. Cas. 496.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2057 OF 1913.

September 29, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

RAMA AIYAR—PLAINTIFF—APPELLANT

versus

VANAMAMALAI AIYAR—DEFENDANT No. 2—RESPONDENT.

Sale—Consideration—Full consideration not paid—Vendee not entitled to possession without payment of whole consideration—Civil Procedure Code (Act V of 1908), O. XLI, r. 33—Power of High Court.

ABRAHAM SERVAI *v.* RAPHIAL MUTHIRIAN.

In a suit for possession of the property purchased, the vendee who has not paid the full consideration cannot be allowed in a Court of Equity to recover possession except on the condition of his paying the balance of the purchase-money.

Under Order XLI, rule 33, of the Code of Civil Procedure the High Court is entitled to pass any decree which is in accordance with justice, whatever the decision of the first Court or the lower Appellate Court may have been.

Second appeal against the decree of the Court of the Subordinate Judge of Tinnevelly, in Appeal Suit No. 335 of 1912, preferred against that of the Court of the District Munsif of Tinnevelly, in Original Suit No. 381 of 1910.

Mr. *T. Rangachariar* (for Mr. *V. Narasimha Aiyangar*), for the Appellant.

Messrs. *M. O. Parthasarathy Aiyangar* and *C. V. Ananthakrishna Aiyar*, for the Respondent.

JUDGMENT.

SADASIVA AIYAR, J.—This second appeal has arisen out of a suit connected with the suit out of which the Second Appeal No. 694 of 1913, in which judgment was just now pronounced, [*S. Ramasawmy Aiyar* v. *Vanamamalai Aiyar* (1)] arose. The plaintiff in this case is the 1st defendant in the other suit, while the 2nd defendant in this suit is the plaintiff in the other suit. For reasons set out in my judgment in the former suit, I hold that the sale-deed to the plaintiff by the 2nd defendant's father in 1896 cannot be set aside in whole or in part, as that question is *res judicata* by the decision in the former suit of 1906 between the same parties which refused to set aside that said sale-deed of 1896. As, however, it is the vendee (the plaintiff) who has brought the suit for possession and as it was found in the former suit that a part of the purchase money had not been paid by the vendee (plaintiff), he cannot be allowed in a Court of Equity to recover possession of the alienated property till he pays the balance of the purchase money.

In the former suit, it was found that out of the purchase money Rs. 3,000 mentioned as consolidated price for the houses in dispute in this suit and for the lands in dispute in the former suit, Rs. 1,995-8-0 alone had been paid by the vendee and the remaining Rs. 1,004-8-0 had not been paid. This finding is *res judicata* between the parties.

(1) 26 Ind. Cas. 873.

The lower Appellate Court's finding in this case that only Rs. 1,000 and odd of Rs. 3,000 was paid and formed part of the antecedent debts, cannot be accepted as the point is, as I said above, *res judicata*. The value of the houses alone was on the date of the sale Rs. 700 according to the findings of the lower Courts. Out of this Rs. 700 the plaintiff must be deemed to have paid Rs. 700 *into* 1995¼ *by* Rs. 3,000, that is about Rs. 465. He has not paid the balance of purchase money, Rs. 235. As neither the 2nd defendant nor his father was paid this Rs. 235 and as the father is dead leaving the son as his sole heir and survivor, the 2nd defendant is entitled to obtain the whole of this Rs. 235 in equity before he could be called upon to give up possession of the houses in dispute to the plaintiff. In the result, and as under Order XLI, rule 33, of the Civil Procedure Code, this Court is entitled to pass the decree which is in accordance with justice, whatever the decision of the 1st Court or the lower Appellate Court in the suit has been, I would award to the plaintiff (in supersession of the decrees of the lower Courts) possession of the properties sued for, on condition that the plaintiff deposits into Court for payment over to the 2nd defendant Rs. 235 within three months of this date. The parties will bear their respective costs throughout.

NAPIER, J.—I concur.

Appeal allowed in part.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 834 OF 1912.

November 12, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Tyabji.

S. P. ABRAHAM SERVAI—DEFENDANT—PETITIONER

versus

RAPHIAL MUTHIRIAN—PLAINTIFF—RESPONDENT.

Contract Act (*IX of* 1872), *s. 43—Joint promisors—Creditor's claim against one barred—Decree against other—Contribution.*

A joint promisor, whose liability to the promisee kept alive beyond three years from the date of the promissory note and who is consequently compelled

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to pay by a decree of the Court more than his proportion of the debt to the promisee, can sue his joint promisor for contribution, though the decree exonerated that other joint promisor from payment on the ground that the debt as against him was barred by limitation.

Wolmershausen v. *Gullick*, (1893) 2 Ch D. 514 at p. 529; 62 L. J. Ch. 773; 3 R. 610; 68 L. T. 753; *Gardner* v. *Brooks*, (1907) 2 Ir. Rep. 6; 3 Irish Law Reports 238, *Ramskill* v. *Edwards*, 31 Ch. D. 100; 55 L. J. Ch. 81; 53 L. T. 949, 34 W. R. 96, referred to.

Subramania Aiyar v. *Gopala Aiyar*, 7 Ind. Cas. 898; 33 M. 308; 20 M. L. J. 633; 8 M. L. T. 321; *Putti Narayanamurthi* v. *Marimuthu Pillai*, 26 M. 322; *Periasami Mudaliar* v. *Seetharama Chettiar*, 27 M. 243; 14 M. L. J. 84, distinguished.

Per *Tyabji*, J.—The duty to contribute is clearly distinct from the duty to pay to the promisee. The first is to the promisor, the second is to the promisee, the right of each joint promisor to claim indemnity does not consist merely of being subrogated to the right of the original promisee: for, though the promisee's rights may have been released the responsibility to the joint promisor is not annulled.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif of Srirangam, in Small Cause Suit No. 623 of 1912.

Mr. *C. Madhavan Nair*, for the Petitioner.

Messrs. *M. O. Parthasarathy Aiyengar* and *K. S. Ganesa Iyer*, for the Respondent.

JUDGMENT.

OLDFIELD, J.—The plaintiff and the defendant in this case were joint executants of a promissory note. It is common ground that each received part of the sum borrowed, and the correctness of the lower Court's finding as to its division between them and the amount re-paid by each cannot be disputed. They were, however, sued by their creditor for the balance due; and a decree was passed against the plaintiff for the whole, the defendant being exonerated on his plea of limitation. The plaintiff satisfied the decree and sues the defendant for contribution. The lower Court held that, notwithstanding the defendant's exoneration, it was equitable that he should contribute towards the discharge of the common debt. This civil revision petition has been urged against that decision. It has been referred to a Bench by a learned Judge sitting in the Admission Court.

As pointed out by the learned Judge, the facts in *Marrivada Chinna Ramayya* v. *Veerapurani Venkatappiah* (1), on which the lower Court relied, differed materially from those now in question, because in it there was no decision on limitation or any other ground, such as there is here, against any of the defendants, and some had not been sued by the creditor. The principle there recognised is merely that liability for contribution between co-contractors is enforceable, although the suit to enforce it is brought after a suit on the original liability would be barred. Here the point is that the original liability was held unenforceable against the defendant, not only before the present suit was brought, but also before the plaintiff was held liable or made any payment.

The argument, apart from any authority, has been presented as follows. The defendant has been exonerated; and the debt must have been kept alive against the plaintiff by some act on his part, for which it is not suggested that the defendant is responsible. Whether the plaintiff is regarded as the defendant's joint contractor or, as he contends that he should be, as his surety in respect of the amount which he has had to pay on the defendant's behalf, is immaterial, because he could not affect the defendant's position in either capacity. The debt having been held unrecoverable from the defendant directly, it is unjust that it should be recovered from him indirectly in consequence of the plaintiff's conduct, which he did not authorise. This treats the defendant's liability as originating in, or at least as depending on, the fact that a decree preceded the plaintiff's payment. But on the other side, it is contended that it should be placed on a broader basis with reference to an earlier stage in the transaction, the separate contract between the parties, when the debt was incurred, to indemnify each other for any excess payment made by one for the other, which was independent of the creditor's suit and its result. We have to decide which of these views is correct.

There is, so far as we have been shown, no direct Indian authority. But *Subramania Aiyar* v. *Gopala Aiyar* (2) is relied on by the plaintiff, though one portion of the judgment certainly supports the defendant. It is, therefore, necessary to ascertain what was

(1) 8 Ind. Cas. 1102; (1910) M. W. N. 839; 9 M. L. T. 212.

(2) 7 Ind. Cas. 898; 33 M. 308; 20 M. L. J. 633; 8 M. L. T. 321.

really decided in it. The plaintiff, a trustee, sued the sons of his predecessor in the trusteeship for damages on account of their father's misfeasance. The limitation applicable was that which would have been applicable to a suit against him; *Periasami Mudaliar* v. *Seetharama Chettiar* (3). The suit against them was, therefore, barred. The plaintiff also, however, sued certain sureties, against whom (so far as the report shows) the suit was still in time, solely because they had given land as security. It was held that they had not been discharged by the fact that the remedy against their principal had been lost, since his liability, and therefore theirs, to plaintiff were still subsisting. That is intelligible. But the question there was between the creditor and his debtors, principal and surety, directly, whereas here it is only between the latter: and the case, therefore, gives no support to this part of the plaintiff's argument. He relies here in fact on an identification of the defendant's liability to the creditor, which no doubt is unaffected by the latter's loss of his remedy, with his distinct liability to the plaintiff, which has not been shown to be legitimate and is irreconcilable with the other cases he has cited. The relation between the sureties and their principal debtor is in fact dealt with in *Subramania Aiyar* v. *Gopala Aiyar* (2) only *obiter* in the words at page 311: "It has been argued that the surety will be prejudiced if he is liable to be sued when he cannot have any remedies against the debtor after a suit against him has become barred. The answer is he is himself to blame. He can easily avoid the risk and clothe himself with all the creditor's rights by payment or performance as soon as the debtor becomes liable. Section 140 of the Indian Contract Act." This, no doubt, supports the view for which the defendant contends. The question, however, was not before the learned Judges directly, and the authorities relevant to it were not referred to; and if the hardship involved and the means of avoiding it are to be considered, it may respectfully be suggested that there is no more reason for penalising the surety for not paying and for failure to acquire the right to sue the principal debtor, than the debtor for not paying what he primarily was bound to pay.

(3) 27 M. 243; 14 M. L. J. 84.

The other cases are *Wolmershausen* v. *Gullick* (4) and *Gardner* v. *Brooke* (5). They are directly relevant and are in the plaintiff's favour. In the first the question arose between co-sureties and is dealt with very shortly. The Court inclined to the belief that the Statute did not begin to run until the plaintiff made his payment, but was not obliged for the purpose of the case to decide between that date and the date on which the amount of his liability was ascertained. That point, however, was placed beyond doubt as regards this presidency by *Putti Narayanamurthi* v. *Marimuthu Pillai* (6) and is not left open in the second case above mentioned, in which the discussion is full and the parties, like those before us, were joint makers of a promissory note. The reasons for the decision in the plaintiff's favour were that the defendant's liability rested on grounds of equity, independent of the original contract with the creditor, and was based on the payment made in discharge of the common obligation and had no existence till that payment was made. These decisions are directly in point, and in the circumstances must be followed in preference to the *obiter dictum* above referred to though it occurs in a judgment of this Court. In accordance with them the conclusion must be in the plaintiff's favour. The civil revision petition is, therefore, dismissed with costs.

TYABJI, J.—The question before us is, whether a joint promisor, whose liability to the promisee was kept alive beyond three years from the date of the promissory note and who was consequently compelled to pay by a decree of the Court more than his proportion of the debt to the promisee, can sue another joint promisor for contribution though the decree exonerated that other joint promisor from payment, on the ground that the debt as against him was barred by limitation.

The facts are as follows:—

The plaintiff and the defendant executed a joint promissory note on 25th June 1903. In or before January 1905 the defendant sent Rs. 20 to the plaintiff for part payment to the promisee and the plaintiff paid this

(4) (1868) 2 Ch. D. 514 at p. 529; 62 L. J. Ch. 773; 3 R. 610; 68 L. T. 753.
(5) (1897) 2 Ir. R. 6; 3 Irish Law Reports 288.
(6) 26 M. 322.

sum together with Rs. 58 on his own account. Subsequently the promisee sued both the plaintiff and the defendant for the balance still due. A decree was passed on the 5th August 1911, in which the whole balance was ordered to be paid by the present plaintiff and the present defendant was exonerated from all payment, the suit on the promissory note having become barred at the time as against the present defendant. On the 9th March 1912, the plaintiff paid the whole of the amount decreed and in the same year sued for contribution from the defendant. His suit was allowed by the District Munsif. This petition raised the question whether the District Munsif was right.

Being a suit for contribution between joint promisors (there being no express contract for indemnity between the joint promisors), the case must be governed by sections 42-44 of the Indian Contract Act, the effect of which for the present purpose may be stated as follows: Where two or more persons have made a joint promise, in the absence of a contract to the contrary,

(1) as between the joint promisors and the promisee,

(*a*) all the joint promisors must fulfil the promise (section 42):

(*b*) the promisee may compel any one to perform the whole promise (section 43):

(*c*) a release by the promisee of one joint promisor does not discharge the other or others (section 44, first part).

(2) As amongst the joint promisors themselves, each joint promisor may compel every other joint promisor to contribute equally with himself to the performance of the promise (section 43, paragraph 2).

Three incidents connected with the right of contribution are expressly laid down:

(*a*) if any one joint promisor makes default in contributing, the other must bear the loss (section 43, paragraph 3);

(*b*) section 43 does not derogate from the rights of a surety to recover from his principal payments made on behalf of the principal, and

(*c*) the release of a joint promisor by the promisee does not free the joint promisor so released from responsibility to the other joint promisor or joint promisors (section 44, second part).

The right to contribution (as between joint promisors) is referred to in the part of the Act directly applicable as a right "to compel contribution *to the performance of the promise.*"

This may, at first sight, appear to make the liability to contribute coincident with the performance of the promise. But the duty to contribute is clearly distinct from the duty to pay to the promisee: the first is to the promisor, the second to the promisee: the right of each joint promisor to claim indemnity does not consist merely of being subrogated to the right of the original promisee: for though the promisee's rights may have been released, the responsibility to the joint promisor is not annulled (section 44). Following, therefore, the wording of the Act it may be stated that the right of each joint promisor to compel every other joint promisor to contribute equally with himself to the performance of the promise, is unaffected by the mode in which the promisee exercises or fails to exercise his rights (*a*) to compel all the joint promisors to fulfil the promise (section 42) or (*b*) to compel anyone of them to do so (section 43) or (*c*) to release one, without discharging the other (section 44). An express release by the promisee cannot (on principle, even apart from section 44) affect the right of a third person (the joint promisor). The direct liability on the joint promise may thus be expressly annulled, without affecting the collateral liability. It is difficult then to conceive how the promisee's mere omission to sue during the statutory period—an omission which does not destroy even his own right, but merely bars his remedy by suit *Subramania Aiyar* v. *Gopala Aiyar* (2)—can affect the joint promisor's collateral right.

It seems to me, therefore, that the District Munsif was right.

The result at which I have arrived agrees with the view of a strong Court of Appeal in Ireland, in *Gardner* v. *Brooke* (5), upholding the concurrent decisions of O'Brien, C.J., and the Division Court. In that case the right of contribution from a joint promisor was thus referred to: "The right comes, in equity, originally and absolutely, by the payment in discharge of a common burthen, and has no existence whatever, inchoate or complete, till the payment is made. It

is not, therefore, affected by what affects the contract... .. .. ..The principle came into English from the Civil Law, where it pursues exactly the same consequences and distinctions that are found in equity, all based on community of burthen and benefit from payment, and none from agreement." In the same case Gibson, J., said: "Contribution is not limited to cases of guarantee, but extends to all cases where one is compelled to pay more than his proportion of a joint liability: *Ramskill* v. *Edwards* (7). The question here is, what is the extent of the obligation of the joint makers to one another? Is it an unqualified liability, according to the proportionate shares of each to indemnify any joint maker who may, at any time, be legally compelled to pay more than his share? or does the duty depend on the co-debtor, who has paid in excess of his share, being merely subrogated into the creditor's rights? or does the obligation only bind a party so long as he himself remains liable to the creditor, and, therefore, may himself require the benefit of indemnity against the others? The first view is, I think, plainly the true one. When they signed the note, the parties must have contemplated that it would be paid, and that the burden should be shared equally. The fact that one happens to escape from legal liability to the creditor, without the consent of his associates, and perhaps even without their knowledge, cannot be allowed to disturb the original obligation between the co-debtors, or to alter the proportions of liability or contribution, which must be ascertained from the note at the time that it was made. The duty to conbtribute here binds all, so long as any one remains legally liable by virtue of the joint contract."

The facts of the case last cited are exactly similar to those now before us, except in two particulars: (1) there the payment in respect of which contribution was brought was not made in execution of a decree; (2) there was no decree exonerating the defendant from liability on the contract.

The first of these particulars does not distinguish the case in favour of the defendant.

(7) 31 Ch. D. 100; 55 L. J. Ch. 81; 53 L. T. 949; 34 W. R. 96.

With reference to the second, the defendant before us contends that by being exonerated from payment in the previous suit he is exonerated from the duty to contribute. But the decree gave effect to the direct liability arising from the contract as between the promisee and the joint promisors, in so far as that liability could be enforced by suit. It did not affect the collateral liability as between the joint promisors themselves, arising not from the contract which was the cause of action in the first suit, but from the payment consequent on the decree.

Another argument addressed to us was that the acts of the plaintiff, keeping the debt alive against himself after the promissory note became barred as against the defendant, made in effect a new contract between the plaintiff and the promisee, that the defendant was not privy as a joint promisor to this new contract. Such may conceivably be the case where a joint promisor against whom the debt is barred pays the debt; a payment so made may conceivably be taken as a payment not on account of any legal liability, but made out of honour: and a person making such a payment cannot in honour ask another to contribute to the maintenance of his honour, where under such circumstances an attempt is made to compel contribution. Mr. Justice Sadasiva Iyer's fears (expressed in his referring judgment) that the first payment might in fact have been made in collusion with the promisee might be well founded. But in the present case there is no suspicion of collusion and no basis for saying that a new contract for payment was made between the plaintiff and the promisee. The final payment was made because there was a decree against the plaintiff, and it would appear that at least one of the earlier payment, which kept the debt alive was made on behalf of the defendant.

It seems to me, therefore, that alike on the construction of the section, on principle and on authority, the plaintiff ought to succeed in the suit.

Before concluding I must refer to two decisions of this Court. *In Putti Narayanamurthi Aiyar* v. *Marimuthu Pillai* (6), section 145 of the Indian Contract Act was referred to as though it directly governed a joint

promisor's right of contribution. It seems to me that though the joint promisor's right is analogous to the surety's right of indemnity under section 145, there are distinctions between the two. The right of indemnity referred to in section 145 and the connected sections 126, 131, 133—147 inheres in a person who contracts with the promisee himself expressly and solely as surety; in such a case the right to indemnity is implied, section 145. *Next* there is the case of a person who is a principal joint promisor as between himself and the promisee, but as between himself and another, the joint promisor is (expressly or impliedly) only a surety, the promisee not being privy to the contract of the suretyship between the promisors *inter se*: section 132. *Thirdly*, there is the case of an express contract of indemnity (section 124) as distinct from a promise to indemnify implied by section 145 in a contract of guarantee. All these rights and liabilities are analogous to the one with which we have to deal. But if and in so far as the direct rules contained in sections 42—44 are not a sufficient guide, resort should be had, it seems to me, in the first instance, to section 124, which refers to the rights under an express contract to indemnify similar to that which section 43 implies amongst joint promisors: rather than to section 145 which refers to a contract for indemnity implied between a person who contracts expressly and solely as a surety on the one hand and the principal debtor on the other hand. In order to make section 145 applicable to joint promisors, the contractual liability of each joint promisor as principal debtor must be assumed to have reference only to a proportionate part of the debt, an assumption that is opposed to section 42.

The next case is *Subramania Aiyar* v. *Gopala Aiyar* (2), which has been already referred to. The question there before the Court was whether a surety's liability to the creditor (as defined in section 126) was discharged by the fact that the creditor's suit against the principal debtor was barred by limitation. That question was answered in the negative. The ground for decision was that though the surety's liability continues only so long as "there is no act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor," yet it could not be said that the legal consequence of the creditor's forbearance to sue the principal debtor during the period of limitation and the consequent loss of his remedy was a "discharge" of the principal debtor. In dealing with an objection to the result of this reasoning, it seems to have been assumed by the Court that the surety's right against the principal debtor had become barred at the time of the decision, *i. e.*, before the surety had made any payments. It is unnecessary to consider whether this assumption was consistent with the terms of section 145 of the Indian Contract Act and with the ruling in *Putti Narayanamurthi Aiyar* v. *Marimuthu Pillai* (6), where it was held that the cause of action under section 145 does not arise until actual payment by the surety. See also *Marrivada Chinna Ramayya* v. *Veerapurani Venkatappiah* (1), *Wolmershausen* v. *Gullick* (4). For the remark in *Subramania Aiar's* case (2), based on the assumption just referred to, was purely *obiter*, dealing not with the rights of the creditor against the surety which were being adjudicated upon, but dealing with the remedy of the surety which might or might not have been barred as against the principal debtor. The circumstances alluded to on page 304 of the report and the fact that some property was given as security, seem to have brought about the result that the creditor's remedy was barred against the principal debtor, but enforceable against the property given as security. It seems to me that it would be going beyond all the limits of the doctrine of *stare decisis* to consider ourselves bound by an assumption as to a question which is not before the Court, an assumption made merely for the purpose of dealing with an argument that was not accepted.

I agree that the petition should be dismissed with costs.

Petition dismissed.

BOMBAY HIGH COURT.

ORIGINAL CIVIL SIDE APPEAL No. 20 OF 1914.

August 28, 1914.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Davar.

G. K. MALVANKAR—PLAINTIFF—APPELLANT

versus

THE CREDIT BANK OF INDIA, LTD.—DEFENDANT—RESPONDENT.

Companies Act (VI of 1882)—Security deposit mixed with funds of Bank by agreement of parties—Payment of interest—Deposit to be treated as ordinary debt in liquidation.

In the case of a going Bank, the Bank is entitled to treat a security deposit as ear-marked for a particular purpose and refuse to deal with it for any other purpose, but in a liquidation of an insolvent Bank if the occasion for realising the security has not arisen and if the money has, with the consent of the giver of the security, been received by the Bank and mixed with its funds in consideration of an agreement to pay interest on it, the Bank is only a debtor and not a trustee.

Where an agent of a Bank deposited a certain sum as security for the faithful discharge of his duties and agreed that the Bank should receive and hold the money paying interest at 6 per cent. for its use the money being repayable, if not forfeited for losses occasioned through the agent's default upon his ceasing to be the Bank's agent.

Held, that in liquidation proceedings the agent could only rank as an ordinary creditor and could not take preference over other creditors of the Bank.

FACTS of the case appear from the following Order of Macleod, J., appealed against:

This is a summons taken out by one G. K. Malvankar, the agent of the Ahmedabad branch of the above Bank against the Liquidator calling upon him to show cause why he should not be directed to hand over the amount of the security deposit placed by the said G. K. Malvankar and lying with the Credit Bank of India in liquidation.

On the 2nd July 1910, Jaffer Jusab, the Manager of the Bank, wrote to Malvankar informing him that he had been appointed Branch Manager at Ahmedabad on a salary of Rs. 75 a month subject to the approval of the Head Office, and that he would have to give as security Rs. 5,000 to be deposited with the Bank and also a further security from the Bank of Bombay for Rs. 10,000 and if the Head Office Manager thought it necessary a fidelity guarantee policy for Rs. 15,000.

Malvankar thereupon deposited Rs. 4,500 with the Bank and acted as Branch Manager until the winding-up order was made.

According to his affidavit after he had sent Rs. 4,500 to Bombay, the Manager wanted to place the amount in fixed deposit. Whereupon Malvankar came to Bombay to protest. He was eventually given a receipt as follows on 10th July 1912 :—

"Received from G. K. Malvankar Rs. 4,500 only as a security deposit subject to the service regulations of this Bank, bearing interest at the rate of 6 per cent. per annum."

He now contends that he is entitled to be paid the said sum in full in preference to the creditors of the Bank, as he paid the said sum to the Bank as his employee and did not pay it to the Bank as a customer.

His story is not quite accurate in detail. From the affidavit of the Liquidator it appears that as a matter of fact Malvankar paid to the Bank Rs. 2,000 on the 8th July 1910, Rs. 2,000 on the 9th July 1910 and Rs. 500 on the 17th December 1910. The said sums were entered in the Fixed Deposit Ledger to the credit of Malvankar as fixed deposits for twelve months at 6 per cent. interest. Subsequently the whole amount of Rs. 4,500 was transferred to the Security Deposit Account and a receipt given as above on the 10th July 1912. Interest was paid from time to time to Malvankar up to the 30th June 1913. In the half yearly balance-sheet the said sum was included in the item of Current Savings Bank and other deposits The said sum was not kept separate or invested in any particular securities, but was mixed with the other moneys of the Bank. Mr. Jinnah argued that the Rs. 4,500 was paid to the Bank to be held by them upon trust, that his client was entitled to follow the trust fund in the hands of the Bank, and that, if the Bank had mixed the trust money with its own moneys, whatever moneys were found with the Bank at the date of liquidation up to Rs. 4,500 must be considered as trust money.

That argument, I think, is perfectly sound. If Malvankar had given Rs. 4,500 to the Bank to be held by the Bank during the period of his employment as security for his honesty and fidelity, the Bank would have been bound to keep that sum separate, and if they mixed it with their own moneys, he would be entitled to recover it out of the

cash balance of the Bank at the termination of his employment. But unfortunately for him this was not the arrangement he made with the Bank. He agreed in effect that the Bank should treat his Rs. 4,500 in the same way as money deposited by a customer. He was to receive interest on it at six per cent. as long as he remained in the employment of the Bank. If that ceased he would be entitled to recover the principal with interest to date, provided that the Bank had no claim against him in respect of defalcation or otherwise. The Bank was entitled to invest the money in any way they pleased, as no stipulation was made regarding the method of investment. Supposing, for instance, it had been agreed that the money should be invested in Port Trust Bonds and at the date of liquidation the Bank had Port Trust Bonds for that amount, Malvankar would be able to claim those as belonging to him, but as the case stands I can see no difference between him and an ordinary depositor, except that the deposit was not for a fixed period but for the time he remained in the employment of the Bank. I discharge the summons, but under the circumstances without costs. The Liquidator can have his costs out of the estate.

Mr. *Setalvad*, for the Appellant.

Mr. *Kanga*, for the Respondent.

JUDGMENT.—The appellant's claim is that he should be paid in full by the Liquidator of the Bombay Credit Bank the amount deposited by him in 1910 as security for the faithful discharge of his duties as the agent of the Bank's branch at Ahmedabad.

The money was originally placed by the Bank Manager to an ordinary Fixed Deposit Account bearing interest at six per cent., but upon objection being made by the appellant it was transferred in 1911 to the Security Deposit Account bearing interest at the same rate as before. There was a separate ledger kept by the Bank for such accounts, and after 1911 a counterfoil receipt book, specially made out for Security Deposit Accounts, was prepared and from it a receipt was given to the appellant for his money held at interest.

The Liquidator contends, and the learned Chamber Judge has held, that the appellant can only rank as an ordinary creditor in the liquidation. The appellant contends that the money is earmarked and must be treated as trust property in the Liquidator's hands. That in the case of a going Bank, the Bank is entitled to treat a security deposit as earmarked for a particular purpose and refuse to deal with it for any other purpose cannot be disputed, but in a liquidation of an insolvent Bank the question is whether the Security Fund can be identified and followed by the giver, if the occasion for realizing the security has not arisen. If the money has, with the consent of the giver of the security, been received by the Bank and mixed with its funds in consideration of an agreement to pay interest on it, the Bank is only a debtor and not a trustee.

We have no doubt that this is the position in the present case. The appellant agreed that the Bank should receive and hold the money, paying interest at 6 per cent. for its use, the money being re-payable, if not forfeited for losses occasioned through the appellant's default, upon his ceasing to be the Bank's agent. So thoroughly did the parties realise that the Bank and the appellant were debtor and creditor, that the appellant at the desire of the Bank's Manager used in rendering his accounts of his management to debit the Bank with the interest on his deposit. This has been admitted by the appellant himself.

The appellant, therefore, can only rank as an ordinary creditor. We affirm the order of the learned Judge, which was without costs, and dismiss this appeal also without costs, as it is a test case governing several others in this liquidation.

Appeal dismissed.

Attorneys for the Appellant: Messrs. *Hiralal & Co.*

Attorneys for the Respondent: Messrs. *Payne & Co.*

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 9 OF 1911.

May 6, 1914.

Present:—Mr. Hayward, J. C., and Mr. Crouch, A. J. C.

GULRAJMAL AND OTHERS—DEFENDANTS —APPELLANTS

versus

PAMANMAL AND OTHERS—PLAINTIFFS —RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 105, *O. VI*,

GULRAJMAL *v.* PAMANMAL.

r. 17 — *Amendment of plaint, when allowed—Objection against amendment, when to be made—Misjoinder of causes of action—Limitation extending time, how pleaded—Sale of partnership business—Contract Act (IX of 1872), s.* 253 (7).

No amendment should be allowed which includes a claim which could not, under the law of limitation, be made the subject of a first suit, nor one that introduces a completely new cause of action.

Although no appeal lies against an order allowing an amendment, objection as to amendment can properly be raised in appeal against the decree in the suit.

Anything on which the plaintiff relies for extending the period of limitation must be specifically alleged in the plaint.

When some of the partners sell the partnership business without the knowledge or consent of the other partners, the partnership is thereby dissolved.

A suit for declaration that the sale of a partnership business is fraudulent, null and void as regards plaintiffs and for recovery of the assets from the purchasers and also for an account of the partnership business from the other partners is bad for misjoinder.

Appeal from the decision of the Sub-Judge, Sukkur.

Mr. *Isardas Oodharam*, for the Appellants.

Mr. *Mathradas Ramchand*, for Respondents Nos. 1 to 8.

Mr. *Dipchand T. Ojha*, for Respondent No. 9.

JUDGMENT.

CROUCH, A. J. C.—Plaintiffs are alleged to constitute a firm known by the name of Udhomal Gaganmal doing business, or at any rate residing, at Radhan.

Plaintiffs and defendants Nos. 1 and 2 formerly carried on business in partnership at Tharri Mehar also in the name of Udhomal Gaganmal. The latter firm had a branch shop also at Tharri in which defendants Nos. 3 and 6 and one Bhawandas, now deceased, had shares. On the 5th January 1904, defendants Nos. 1 and 2 sold the branch Karkhana to defendants Nos. 3 to 6, without the knowledge or consent of plaintiffs, by means of a private award, and this transaction was confirmed by a decree dated 27th January 1904 in Suit No. 56 of 1904 in the District Court, Sukkur-Larkana; to this suit plaintiffs were not parties.

On the 22nd March 1906 plaintiffs filed Suit No. 17 of 1906 for winding up both Karkhanas, *viz.*, the one at Tharri and the branch shop, but on it being held by this Court, on the 1st April 1909, that there should be separate suits in respect of each cause of action, Suit No. 17 of 1906 was continued in respect of the main Tharri Karkhana, and this suit was filed in respect of the branch business

In the original plaint, filed on the 20th December 1909 but amended and re-filed on the 15th January 1910, the plaintiffs were described as "The Karkhana known by the name of the Udhomal *tealad* Gaganmal, the persons being interested in it being: (8 persons named)—by the manager, plaintiff No. 3, Kirpaldas Udhomal. The plaintiffs prayed for declaration that the petty Karkhana was still a part or branch of the main Karkhana and that decree in Suit No. 56 of 1904 was fraudulent, and null and void as regards plaintiffs.

To this plaint defendants raised three preliminary objections.—

(1) That the form of the suit was bad, all plaintiffs should join in the plaint.

(2) That there was misjoinder of parties and causes of action.

(3) That the suit could not be maintained until the sale of the Karkhana and the decree thereon had been set aside. On the 27th January 1910, an amended plaint was filed in which plaintiffs prayed that the branch shop business might be wound up, and, if there was loss, it might be recovered from the parties according to their shares.

From the order dated the 18th April 1910, it appears that plaintiffs contended that the firm had been dissolved when the branch Karkhana was fraudulently sold to defendants Nos. 3 to 6, that no relief was asked for or desired as against defendants Nos. 4 and 5; all that they desired was that they should be bound by the findings. The Court ordered that the plaint should be amended so as to show distinctly what relief was required as against each set of defendants and also that each plaintiff should sign the plaint.

On the 28th April 1910, a further amended plaint was put in, signed by all the plaintiffs. The heading still describes the plaintiffs as the Karkhana known by the name of Udhomal *tealad* Gaganmal, the persons interested in it being so and so. In this amended plaint, plaintiffs pray that the petty Karkhana be dissolved, debts paid and the assets after paying defendants Nos. 3 to 6, according to their shares, be paid to the main Karkhana of plaintiffs and defendants Nos. 1 and 2, that any loss should, after recovering from defendants Nos. 3 to 6, according to their shares, be recovered from the main Karkhana, and that

as defendants Nos. 4 and 5 had no interest in the Karkhana, they be directed to hand over all the partnership property and outstandings that may have come to their possession.

The preliminary objection that the suit was bad for misjoinder of parties and causes of action was again taken. The Court held that the cause of action was the taking of accounts and the division of assets after expulsion of trespassers: that no relief was asked as against defendants Nos. 4 and 5, they being merely joined as trespassers who must hand over the property: and held that there was no misjoinder.

By the final judgment, it was held that the suit could be maintained without first suing to set aside the decree on the award, that the suit was within time, that the plaint had been properly presented in December 1909, that the assignment by defendants Nos. 1 and 2 had been fraudulently made with intent to injure the plaintiffs, that defendants Nos. 4 and 5 were trespassers and in collusion with the other defendants, and that they were bound to hand over the Karkhana, property, books, etc., with them. It directed that the Karkhana be dissolved and wound up and that a Commissioner be appointed to take accounts as prayed in the plaint.

Against this preliminary decree defendants Nos. 3 to 6 have appealed, and Mr. Lalchand for appellants has asked for findings on three issues :—

(1) Was the plaint properly framed and properly presented in December 1909?

(2) Was the suit barred by limitation?

(3) Is the suit bad for misjoinder?

The case is a complicated one, we will endeavour to clear it up step by step.

When, on the 5th January 1904, defendants Nos. 1 and 2 sold the petty Karkhana and its assets to defendants Nos. 3 to 6, without the knowledge or consent of plaintiffs, the petty partnership carrying on the branch shop was thereby dissolved. For defendants Nos. 3 to 6 had withdrawn from it [see Contract Act, section 253(7)], and the whole business had been bodily transferred to another firm. This was the position deliberately taken up by plaintiffs when the order of 18th April 1910 was passed.

Now, this petty partnership was thus constituted at the time of its dissolution :—

The Tharri firm of Udhomal Gaganmal	... 6	shares.
Gulrajmal	... 2½	,,
Popatmal Menghomal	... 2	,,

But the Tharri firm of Udhomal Gaganmal consisted of plaintiffs and defendants Nos. 1 and 2. Plaintiffs desired two things : they wanted the accounts of the branch shop to be settled up and anything due to the Tharri firm of Udhomal Gaganmal to be paid, and they wanted also for it to be declared that the transfer of the assets of the petty Karkhana to defendants Nos. 3 to 6 was fraudulent and that the latter should be compelled to either make restitution or give compensation. They endeavoured to combine these two perfectly different causes of action in one suit, notwithstanding that the plaintiffs and defendants in each case were necessarily different. The attempt to accomplish the impossible has led to serious complications.

In the amended plaint of the 15th January, plaintiffs confined themselves to the second cause of action and asked for a declaration that the assets which defendants Nos. 1 and 2 had fraudulently and collusively purported to transfer were still the property of the firm of Udhomal Gaganmal; no accounts of the petty Karkhana were asked for, no winding-up order.

It has been argued that this plaint was not properly presented inasmuch as it was signed only by plaintiff No. 3 ; but the plaintiffs were in fact the Radhan firm of Udhomal Gaganmal and could sue as a firm. The confusion arose from the fact that the Tharri firm, consisting of plaintiffs and defendants Nos. 1 and 2, was also known as Udhomal Gaganmal, and it was this Tharri firm which in the original plaint was treated as one unit in the partnerships which it was sought to wind up.

But plaintiffs very quickly resiled from the restricted position taken up in the plaint of the 15th January. In their amended plaint of the 27th January 1910 they asked for an ordinary winding-up order, seeking no declaration at all as to the assets said to have been fraudulently transferred, and asking for no relief as against defend-

ants Nos. 4 and 5. The cause of action was completely changed. In the plaint of the 28th April, they again concentrated their attention on the first cause of action, the taking of accounts of the petty partnership; but as against defendants Nos. 4 and 5, they included a prayer which was so vague that it could, at convenience, be treated either as negligible or as a prayer for substantive and effective relief.

Defendants were not served with a summons until after the amendment of 27th January, and they immediately raised the objection of limitation.

Now, as regards the claim for winding-up the partnerships the cause of action arose on the 5th January 1904 and, even excluding the period from 22nd March 1906 to 1st April 1909 (3 years and 9 days), the suit would have been barred on the 15th January 1910.

On the 27th January, when the amended plaint was presented it was certainly open to the Court to refuse it on the ground of limitation. But the Court accepted the plaint so amended and held that the suit as for winding-up was not time-barred.

Under Order IV, rule 17, the Court may, at any stage of the proceeding, allow either party to amend the pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for determining the real questions in controversy between the parties. This rule has two obvious limitations: *Firstly*, no injustice may be done to another party; no legal right must be violated by the amendment and the Court cannot, under cover of enforcing a rule of adjectival law, deprive a party of substantive rights or re-confer on a party substantive rights of which the law has already finally deprived him. Generally speaking, no amendment should be allowed which includes a claim which could not, under the law of limitation, be made the subject of a fresh suit. *Secondly*, the fresh questions which can be introduced into a suit by amendment must be questions which come reasonably and fairly within the scope of the plaint as originally presented. Generally speaking, therefore, no amendment should be allowed which introduces a completely new cause of action.

The amendment with which we are now dealing offends against both these rules and should not, in my opinion, have been allowed. Though, after the amendment was once allowed, the question of limitation was properly considered in the general issue—Is the suit within time? and that issue was properly determined by a reference to the date of the original plaint in accordance with the rule laid down in *Patel Mafatlal Narandas* v. *Bai Parson* (1), we can nevertheless deal with the order permitting amendment under the provisions of section 105 (1) Civil Procedure Code. In my opinion that order was wrong and should be set aside.

In *New Fleming Spinning and Weaving Company Ltd.* v. *Kessowji Naik* (2), a case decided in 1885 by a single Judge on a reference under section 617, Civil Procedure Code, there is a *dictum* which suggests that, if an amendment has once been admitted by the original Court, it must be accepted even by the Appellate Court as part of the original plaint and as counting from the institution of the suit, even though such amendment includes a new cause of action which at date of amendment was barred by limitation. But this *dictum* has never been embodied in any reported decision, and we consider that it should not be regarded as a fixed rule of law.

Mr. Mathradas, at a late stage, pleads that plaintiffs should be allowed to exclude the time between the date of the award and the date of the order making the award a decree of the Court, on the ground that plaintiffs were, by fraud of defendants, kept ignorant of the award and of the dissolution of partnership. But no such fraud was originally alleged in the plaint, and it certainly should have been alleged, had it been relied on. It is impossible to deal with the allegation until the pleadings have been amended, the fraud duly defined, and a fresh issue drawn. No such amendment can be allowed at this stage.

If the amendment of the plaint be disregarded, we have nothing left but a vague prayer for relief as against defendants Nos. 4 and 5. But for relief as against them

(1) 19 B. 320
(2) 9 B. 373 at p. 402.

the suit is not properly instituted. The proper plaintiffs would be the present plaintiffs and defendants Nos. 1, 2, 3 and 6 or a Receiver appointed in a suit for winding-up.

The appeal must be allowed and the suit dismissed with costs throughout.

HAYWARD, J. C.—The plaintiffs' suit for the settlement of the main Karkhana at Tharri Mahbut has been decided in First Appeal No. 19 of 1911. The plaintiffs' suit for settlement of the branch Karkhana at Tharri Mahbut is the subject of this appeal. The plaintiffs were directed on the 1st April 1909, to bring separate suits with regard to the main Karkhana described as A and with regard to the branch Karkhana described as B in the decision of this Court reported as *Parchomal Vasandmal* v. *Pamandas Alamchand* (3). The plaintiffs accordingly on the 20th December 1909 brought this suit for the declaration that the main Karkhana A included the branch Karkhana B and that the sale of the branch Karkhana B was fraudulent to another set of people described as the Karkhana C in the decision published in *Parchomal Vasandmal* v. *Pamandas Alamchand* (3). The plaintiffs, on the 15th January 1910, amended their plaint, as it had been returned to them to show how their suit was in time. The amendment showed that they claimed a period of three years and nine days owing to the previous litigation and dated their cause of action as the date of the sale award decree of the branch Karkhana B, alleged to have been fraudulently made in favour of the Karkhana C and they supported their amendment by reference to section 14 of the Limitation Act. The plaintiffs again amended their plaint on the 27th January 1910, as it had been returned to them for the purpose of adding consequential relief. Their amendment proceeded in a direction entirely different from their claim, and instead of asking that the Karkhana A might be ordered to recover the Karkhana B asked that there should be winding-up order for the Karkhana B, and at the same time left standing all the allegations that the sale of the Karkhana B had been made fraudulently in favour of the Karkhana C. The plaintiffs again amended their plaint on the 28th April 1910 as it had been returned to them for signature of all instead of their Manager only and for stating expressly that no relief was claimed as regards the alleged fraudulent sale award decree against any members of the Karkhana C. The plaintiffs had distinctly stated that they did not want any such relief against any members of the Karkhana C, but, nevertheless, by their amendment they expressly claimed to recover the Karkhana B from certain members of the Karkhana C. This apparent misjoinder of causes of action was disposed of by the remark that notwithstanding the words as finally amended, no relief was really asked for against any members of the Karkhana C. It was at the same time remarked that there was only one cause of action for winding-up the Karkhana B and for the expulsion of the trespassers, namely, the members of the Karkhana C. It is difficult to understand what exactly was meant by the lower Court. Eventually, however, a preliminary decree directing the winding-up of the Karkhana B and declaring as trespassers certain members of the Karkhana C was passed by the lower Court.

The appellants appeal against this preliminary decree and have raised two main points—one relating to the date of the cause of action and the other to the actual date of suing—which bear upon the question of limitation. With regard to the date of cause of action, it would appear to me *prima facie* to have been on the 5th January 1904, the date of dissolution of the Karkhana B by the sale award under which the selling partners practically withdrew from the partnership within the meaning of section 253, sub-sections (6) and (7), of the Contract Act.

The selling partners were *prima facie* bound by the sale award and their relations with their purchasers would have to be decided upon that sale award even without any formal filing of the award as a decree in Court. The sale award could have been sued on. The sale award,

(3) 4 Ind. Cas. 600; 3 S. L. R. 108.

when filed on the 27th January 1904, could have been executed as a decree of the Court. But the relations of the parties could have been the same whether the sale award was given effect to by suit or by execution through the Court. The period of limitation would, therefore, ordinarily have expired on the 5th January 1907 *i.e.*, three years from the dissolution as provided by Article 106 of the Schedule of the Limitation Act. But in this particular case the period of limitation would be extended to 14th January 1910, if the three years and nine days claimed on account of previous litigation should be excluded under section 14 of the Limitation Act. It would no doubt have been possible for them to have claimed further time by showing that the dissolution effected by the sale award was not known to them and had been kept secret from them by the fraud of the parties concerned in that sale award. But that plea was never raised and would depend upon evidence very probably no longer available. It would, therefore, be too late to allow such a plea to be raised now under section 18 of the Limitation Act.

With regard to the date of suing, the question is whether it should be taken to have been either on the 20th December 1909 or the 15th January 1910, when the plaintiffs sought the declarations that the main Karkhana A included the branch Karkhana B and that the sale of the branch Karkhana B had been made fraudulently to the Karkhana C, or either on the 27th January 1910 or 28th April 1910 when the plaintiffs sought the winding-up of the Karkhana B and the declaration that the sale of the Karkhana B had been made fraudulently to the Karkhana C. There is no doubt that the date of the suit ordinarily would have been taken as the date when the original plaint was filed regardless of the dates of the subsequent amendments. But then no amendments would be permissible which would have the effect of entirely changing, as in this case, the nature of the suit, more especially when the change would be to a suit already time-barred at the date of the amendment. The amendments affecting that change in this suit were allowed *ex parte*, but were objected to by the other side on the first opportunity when they claimed that the suit as amended was time-barred. No appeal would lie against the order allowing amendments under section 104 and Order XLIII of the Schedule of the Civil Procedure Code. The objection as to amendments could, however, properly be raised in appeal under section 105, Civil Procedure Code. Such objection has apparently been raised in this case by paragraphs 1 and 3 to 5 of the memorandum of appeal and it is, therefore, open to us to consider those amendments and to decide that they ought never to have been allowed. The proper course would have been to dismiss the declaratory suit for want of proper amendment ordered, namely, by adding the proper consequential relief, which would have been recovery of the Karkhana B from the members of the Karkhana C. It was altogether improper and irregular to allow an entirely different amendment from that which was ordered and which had the effect of changing the nature of the suit from one for the recovery of partnership property to one for winding-up of the partnership. Those amendments must, therefore, in my opinion, be regarded as disallowed and the suit for mere declarations as dismissed for want of proper amendment. The amendments eventually made could at most be regarded as new suits for winding-up the partnership and for declaring fraudulent the alienation of certain property of the partnership. But those new suits would obviously be time-barred from the dates already given, whether instituted on the 27th January 1910 or the 28th April 1910, and must be dismissed. It does not matter, therefore, whether the amended plaint of the 27th January 1910 was or was not properly signed by the Manager. But it seems to me at the same time that no objection could properly be taken to such signature as the Manager represented one unit against two other units, defendants Nos. 1 and 2, the three units together forming the Karkhana B. There seems no reason why the one unit should not be properly represented by its Manager, though where members of one unit are arrayed on different sides the members of the unit could not on either side properly be represented by the Manager of the whole unit under Order XXX, Schedule I, of the Civil Procedure Code, It

would appear, therefore, that the amended plaint of the 27th January 1910 was properly signed by the Manager and that there was no need to return it for signature of all the members of the unit on the amended plaint of the 28th April 1910. It is also unnecessary in the above view to decide the question of misjoinder of causes of action, that is to say, whether the claim for winding up the Karkhana B could properly be combined with the claim for the declaration that the sale of Karkhana B was fraudulent to Karkhana C. But it may be as well to observe in this connection that there would appear no objection to a decree for winding-up Karkhana B including also a declaration that certain property belonged to the Karkhana B and not to other persons, namely, Karkhana C, provided that, as in this case, no decree be passed for the recovery of the property from those 3rd parties, the Karkhana C.

The fruitless result of this lengthy litigation is much to be regretted. But it is obviously due to the negligence of the parties or their Pleaders. There was considerable delay in re-commencing proceedings after the appellate decision published in *Parchomal Vasandmal* v. *Pamandas Alamchand* (3), and thereafter those responsible for the course of the litigation insisted in blundering blindly in their previous mistaken course, in order apparently to save a few rupees in Court-fees and absolutely refused to be guided by specific directions of the Appellate Bench, reported in *Parchomal Vasandmal* v. *Pamandas Alamchand* (3), and the rules as to precise pleadings contained in the new Civil Procedure Code. We must, therefore, reverse the decree of the lower Court and dismiss the suit with costs in all Courts.

Decree reversed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 798 OF 1913.

August 26, 1914.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Davar.

MADHAVRAO MORESHWAR PANT AMATYA—PLAINTIFF—APPELLANT

versus.

RAMA KALU GHADI—DEFENDANT—RESPONDENT.

Provincial Small Cause Courts Act (*IX of* 1887), *Sch. II, Art.* 13—*Suit to recover sums payable by a* khatedar *to an* inamdar *in respect of immoveable property—Jurisdiction of Small Cause Court—Civil Procedure Code* (*Act V of* 1908), *O. VIII, r.* 6.

A suit for the recovery by an *inamdar* of sums payable by a *khatedar* in respect of certain immoveable property held by him under the *inamdar* as his superior holder, is not cognizable by a Court of Small Causes. In such a suit the claim of the defendant to set off the stipend payable by the plaintiff to certain *pujaris* of a temple, of whom defendant was one, could not be allowed, as he was claiming in a different capacity, in a different category to that in which he held as tenant or *khatedar* of the plaintiff.

Second appeal from the decision of the Additional First Class Subordinate Judge at Ratnagiri, in Appeal No. 134 of 1912, confirming the decree passed by the Subordinate Judge at Malvan, in Civil Suit No. 180 of 1911.

Mr. *G. - S. Rao*, (with him Mr. *S. Y. Abhyankar*), for the Appellant.

Mr. *A. G. Desai*, for the Respondent.

JUDGMENT.—This is a suit for the recovery by an *inamdar* of sums payable by a *khatedar* in respect of certain immoveable property held by him under the *inamdar* as his superior holder. It is contended that being for an amount less than Rs. 500, and cognizable by a Court of Small Causes, no second appeal will lie. The question is whether it is cognizable by a Court of Small Causes. We have been referred, on the part of the appellant, to Article 13 of Schedule II of the Provincial Small Cause Courts Act, IX of 1887, which excepts from the cognisance of a Court of Small Causes a suit to enforce payment of dues when the dues are payable to a person by reason of his interest in immoveable property. Now the sums payable by an inferior holder to a superior holder in the Bombay Presidency are in another Act of the Imperial Legislature characterised as dues [see Revenue Jurisdiction Act, X of 1876, section 5, clause (c)]. The moneys claimed, therefore, in this suit

may appropriately be described as dues payable to the plaintiff by reason of his interest in immoveable property held by the defendant, and, therefore, Article 13 of the Schedule of the Small Cause Courts Act applies, and this was a suit not cognizable by a Court of Small Causes. We, therefore, overrule the preliminary objection.

The defendant does not contest the right of the plaintiff to payment of his dues as superior holder, but claims to be entitled to set off the stipend, payable by the plaintiff to certain *pujaris* of a temple, of whom defendant was one. That stipend was payable to the defendant and his *bhaubands*. He, therefore, claims a set-off in a different capacity in a different category to that in which he holds as tenant or *khatedar* of the plaintiff, and he cannot have the set-off, having regard to the provisions of Order VIII, rule 6. We, therefore, set aside the decree of the lower Appellate Court which allowed the set-off claimed by the defendant. The plaintiff is entitled to Rs. 41-4-10 (Rs. 39-6-8, the amount of his claim, *plus* Rs. 1-14-2, the amount of costs incurred in the Revenue Court), with further interest upon Rs. 41-4-10. We do not think that he is entitled to his costs because this suit appears to us to have been unnecessarily filed having regard to the fact that he had already obtained decree in assistance suits.

No order as to costs throughout.

Decree set aside.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL MISCELLANEOUS APPLICATION NO. 20 OF 1914.

June 19, 1914.

Present:—Mr. Crouch, A. J. C.

KASARCHAND KESHAVJI AND ANOTHER —DEFENDANTS—APPLICANTS

versus

LAKHAMSI RAISI AND OTHERS—PLAINTIFFS — OPPONENTS.

Limitation Act (IX of 1908), Sch. I, Art. 164—Application to set aside ex parte decree—Summons not served—Sufficient time—Defendant, rights and liabilities of.

A defendant who has been duly served cannot get an *ex parte* decree set aside unless he can show that he acted diligently and was prevented from appearing at the adjourned hearing, and he is barred by Article 164 of Schedule I of the Limitation Act, 1908, if he fail to make proper use of the 30 days following the decree. There is no justification for construing "duly served" in Article 164 as excluding a case where a summons was not served in sufficient time.

Mr. *Kalumal Pahlumal*, for the Applicants.

Mr. *Kimatrai Bhojraj*, for the Respondents.

JUDGMENT.—This is an application to set aside an *ex parte* decree. For plaintiffs, Mr. Kimatrai raises the preliminary objection that the application is time-barred.

The suit was instituted on the 1st February 1913 against six defendants who were alleged to be members of a joint Hindu family The applicant Mulji was at the date of suit a student in the Wilson College, Bombay. He was personally served in Bombay on the 9th June, and signed an acknowledgment on the back of the original summons.

The applicant Kasar Chand was, at the date of suit, in the employment of the Junagarh State.

The summons was duly served on the 21st June, and due service was certified by the Administrator of the State. Mr. Kalumal contends that on the 21th June the summons was served on applicant's superior officer only and that applicant himself did not receive the summons until the 29th June, but there is no evidence of this on the record. The hearing was fixed for the 3rd July, but on that date, the summonses not being returned, the case was adjourned.

On the 27th June Mulji wrote to the Court from Bombay stating that he could not be able to leave College until November and asking for an adjournment until December. He asserted, and no doubt quite truly, that he was a boy at school when the liability was incurred and was completely ignorant of the facts of the case. He suggested that his personal appearance in Court was unnecessary, and stated that he was too poor to engage a Pleader. This letter was received on the 1st July and filed.

On the 29th June, Kasarchand wrote that he could not possibly reach Karachi by the 3rd July and asked for a posponment until December. He also alleged that he was a schoolboy when the account sued on was incurred and knew nothing whatever about it. This letter was received on the 8th July and filed. It is clear from the fact that a letter could travel from the place where

Kasarchand was to Karachi in 8 days that he also could have done so.

From the letters of the applicants it may, *firstly*, be inferred that they had no intention of appearing to contest the suit and that no good purpose could have been served by their doing so.

On the 28th August 1913, an *ex parte* decree was passed against all the defendants.

The present application was filed on the 6th April 1914.

Under Article 164, such application is barred after 30 days running from the date of the decree, or, where the summons was not duly served, when the applicant had knowledge of the decree.

Now "duly served" means, in my opinion, "duly served" within the meaning of Order V, rule 19, Civil Procedure Code, and there can be no doubt that both applicants were so served. The application seems, therefore, *prima facie* to be barred.

Further, Under Order IX, rule 13, the Court can set aside the *ex parte* decree only if satisfied that the summons was not duly served, or that applicant was prevented by some sufficient cause from appearing when the suit was called on for hearing. It is to be noted that the mere fact that applicant was prevented by sufficient cause from appearing on the date mentioned in the summons does not avail: there must be evidence that he acted energetically and did his best to put in an appearance on the actual date of hearing. Both applicants had plenty of time to communicate with their friends and instruct a Pleader before the 28th August.

Mr. Kalumal points out that if, on the date of hearing, the defendant does not appear and the Court finds that the summons was not served in sufficient time to enable defendant to appear and answer on the day fixed in the summons, the Court is bound to postpone the hearing and give notice to defendants of the fresh date. But, even if the Court fail to perform its duty under this rule, a defendant who has been duly served cannot get an *ex parte* decree set aside unless he can show that he acted diligently and was prevented from appearing at the adjourned hearing, and he is barred by Article 164 if he fail to make proper use of the 30 days following the decree. There seems to me no justification for construing duly served in Article 164 as excluding a case where a summons was not served in sufficient time. The application must be rejected.

Application rejected.

CALCUTTA HIGH COURT.

FIRST CIVIL APPEAL No. 130 OF 1912.

July 21, 1914.

Present:—Mr. Justice Fletcher and Mr. Justice Richardson.

KUNJA LAL ROY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

UMESH CHANDRA ROY AND OTHERS—DEFENDANTS—RESPONDENTS.

Occupancy holding—Will—Custom—Bengal Tenancy Act (VIII of 1885), ss. 26, 183.

An occupancy-*raiyat* has no power to bequeath by Will his holding unless a special custom to do so is proved.

Amulya Ratan Sarcar v. *Tarini Nath Dey*, 27 Ind. Cas. 235; 18 C. W. N. 1290, followed

Dayamayi v. *Ananda Mohan Roy Chowdhury*, 27 Ind. Cas. 61; 18 C. W. N. 971; 20 C. L. J. 52, referred to.

Appeal against the decree of the Subordinate Judge, Murshidabad, dated the 27th of January 1912.

Babus *Ram Chandra Mozumdar*, *Chandra Sekhar Banerjee* and *Atul Chander Bose*, for the Appellants.

Babus *Mohini Mohan Chatterjee*, *Peary Mohan Chatterjee* and *Probodh Chander Datta*, for the Respondents.

JUDGMENT.

FLETCHER, J.—This is an appeal by the plaintiffs from the judgment of the learned Subordinate Judge of Murshidabad, dated the 27th of January 1912.

The plaintiffs, as the executors of the Will of one Anandamoyee, brought the suit against the defendants to recover certain moveable and immoveable property. The property in question formerly belonged to one Digambar Ray who by his Will, dated the 14th *Bhadra* 1304, bequeathed all his properties absolutely to his wife, Anandamoyee. By her Will, dated the 29th of *Bhadra* 1314, Anandamoyee appointed the plaintiff and one Atul Behary Roy (since

deceased) to be her executors and gave the whole of her property for the maintenance of the worship of an idol to be established after her death. Anandamoyee died on the 2nd *Aswin* 1314, corresponding with the 19th of September 1907, and after her death her Will was duly proved.

The defendants having dispossessed the plaintiffs of the property, they brought the present suit to recover the same. The defendants claimed as heirs of Digambar after the death of Anandamoyee. The learned Subordinate Judge decreed the suit in part, but dismissed it with respect to certain *jotes* held with a right of occupancy by Digambar, holding that such *jotes* were not capable of being bequeathed by Will. Against this decision the plaintiffs have appealed to this Court.

Section 26 of the Bengal Tenancy Act, 1885, enacts: "If a *raiyat* dies intestate in respect of a right of occupancy, it shall, subject to any custom to the contrary, descend in the same manner as other immoveable property."

This section standing alone no doubt suggests that a right of occupancy is immoveable property and, if it be so, I should have thought that the holder would have the right to bequeath it by his Will.

For, by section 46 of the Indian Succession Act, 1865 (which is incorporated in the Hindu Wills Act), it is provided that "every person of sound mind and not a minor may dispose of his property by Will."

It has not been argued before us, nor could it be, that in no circumstances can a *raiyat* make a Will in respect of a right of occupancy. Section 26 of the Bengal Tenancy Act speaks of a *raiyat* dying "intestate" in respect of occupancy, and must, therefore, contemplate that in such cases a *raiyat* should die "testate" in respect of a right of occupancy. It has been urged, however, that an occupancy *raiyat* can only dispose of his right by Will when there is a special custom enabling him to do so. In support of this argument reference was made to sections 11 and 18 of the Act authorising a tenure-holder and a *raiyat* holding at fixed rates to dispose of their holdings by Will.

It is said, therefore, that as the Act is silent as to the power of an occupancy-*raiyat* to dispose of his holding by Will, the only power that an occupancy-*raiyat* has of disposing by Will of his holding under section 183 is in the event of there being a special custom in that respect. This principle of construction was applied by the Full Bench of this Court in the case of *Lakhan Narain Das* v. *Jainath Panday* (1) with respect to the heritability of non-occupancy *raiyats*. In a recent case, Second Appeal No. 2740 of 1911 [*Amulya Ratan Sarkar* v. *Tarini Nath Dey* (2)], the judgment in which was given on the 30th of January 1914, Mookerjee and Beachcroft, JJ., held that an occupancy-*raiyat* had no power to bequeath by Will his holding unless a special custom to do so was proved. This decision is binding on us, unless it has been affected by the recent decision of the Full Bench reported as *Dayamayi* v. *Ananda Mohan Roy Chowdhury* (3). That decision, however, did not deal with the power of an occupancy-*raiyat* to bequeath his holding.

The case appears to me to be concluded by the authorities I have cited above. The present appeal, therefore, fails and must be dismissed with costs.

RICHARDSON, J.—The law is admittedly in an unsatisfactory condition, the question of transferability of occupancy rights having been dealt with in the Bengal Tenancy Act rather by way of suggestion than by way of positive legislation.

I agree that on the authorities as they stand, occupancy rights are not capable of being made the subject of testamentary disposition.

Appeal dismissed.

(1) 34 C. 516; 11 C.W.N. 626, 5 C. L J. 457; 2 M.L. T. 219 (F. B.)
(2) 27 Ind Cas. 235; 18 C. W. N. 1290.
(3) 27 Ind. Cas. 6'; 18 C. W. N. 971, 20 C. L. J. 52.

AMAR CHAND PAL v. SECRETARY OF STATE.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 101 OF 1912.

October 23, 1913.

Present:—Mr. Stuart, A. J. C., and Mr. Kanhaiya Lal, A. J. C.

AMAR CHAND PAL—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, THROUGH THE DEPUTY COMMISSIONER OF LUCKNOW, AND OTHERS—DEFENDANTS—RESPONDENTS.

Government grant free of payment of land revenue, sale of, in execution of a mortgage decree—Government refusing sale—Suit against Secretary of State, the judgment-debtor and the subsequent transferee, maintainability of—Specific Relief Act (I of 1877), s. 42—Jurisdiction of Civil Court—Hearing of case on merits, necessity of, before granting declaration.

The plaintiff-appellant obtained a mortgage decree entitling him to bring to sale certain lands held by the mortgagor under the terms of a Government grant free of payment of land revenue. In execution of the mortgage decree the plaintiff-appellant applied for sale of the land, but the Local Government refused sanction to the sale, on the ground that in view of the terms of the grant the property was inalienable. The plaintiff-appellant then instituted the present suit against the Secretary of State, the judgment-debtor and a subsequent transferee praying for a decree against the Secretary of State declaring that the right, title and interest of the other defendants in the land in question were liable to be sold in execution of his decree, and that the judgment-debtor had an alienable interest in the property. The Subordinate Judge dismissed the suit, holding that the Civil Court had no jurisdiction to take cognizance of such a suit, that the suit was not maintainable and that he should not in the exercise of his discretion give such a declaration:

Held, that although the Local Government as an executive authority had an unfettered discretion to refuse sale in such a case, yet the declaration made by it in the same order as to the terms of the grant must be treated to have been made in its capacity of a grantor and could be challenged, and the suit was maintainable in respect thereof;

Held, further, that the Civil Court had jurisdiction to hear the suit;

Held, also, that the question of discretion possessed by the Court in the matter of granting declarations could not be considered until the case had been heard upon its merits.

Appeal against the decree of the Subordinate Judge, Lucknow, dated 30th April 1912.

Dr. *Satish Chander Banerji* and Babu *J. K. Banerji*, for the Appellant.

Rai Bahadur *N. N. Ghoshal*, for the Respondents.

JUDGMENT.—The facts of this case are simple. The plaintiff-appellant had obtained a mortgage decree entitling him to bring to sale, amongst other property, a certain area of land in the village of Faizullahganj, which is held by Mirza Muhammad Husain under the terms of a Government grant dated the 15th of January 1861 free of payment of land revenue. In execution of this mortgage decree the plaintiff-appellant applied for the sale of the land in question, and the decree was transferred for execution in the ordinary course of law to the Deputy Commissioner of Lucknow as the property was ancestral property. After certain delays occasioned by circumstances immaterial to the merits of the present suit, the Local Government refused sanction to the sale of this property, on the ground that in view of the terms of the grant the property was inalienable. The plaintiff-appellant then instituted a suit against the Secretary of State, Mirza Muhammad Husain and a subsequent transferee, in which he requested that a decree should be passed against the first defendant declaring that the right, title and interest of the second and third defendants in the land in question was liable to be sold in execution of the decree for sale and that the second defendant had an alienable interest in the property. The learned Subordinate Judge has dismissed this suit upon two preliminary points, the first being that a Civil Court has no jurisdiction to take cognizance of such a suit, and the second point being that the suit is not maintainable. The reasons guiding his decision are that, inasmuch as the Local Government has unfettered discretion in refusing permission to the sale of ancestral property under the provisions of section 20 of Act XVIII of 1876, the order refusing sanction for sale is final, and that the reasons guiding the Local Government in arriving at this decision are immaterial in view of the fact that the decision itself is final. He further decided that a declaratory decree of the nature desired could not be of any use to the plaintiff-appellant, that if he obtained such a decree he could not thereby compel the Local Government to alter its decision, and that he could gain no advantage of any kind if he obtained the decree which he desired. The learned Subordinate Judge further considered that he should not, in exercise of the discretion given to Courts in cases of this nature, give such a declaration.

AMAR CHAND PAL *v.* SECRETARY OF STATE.

The learned Counsel, who appeared in support of the appeal, argued that the learned Subordinate Judge had misapprehended the attitude of the plaintiff. The plaintiff, according to his instructions, had not attempted to challenge the fact that the Local Government had an unfettered discretion to refuse sale in such a case. He agreed that, if the plaintiff's suit were successful, the Local Government could still refuse to sanction the sale without giving any reasons, and his obtaining such a decree would give him no legal right towards the alteration of the decision of the Local Government. But he argued that acceptance of this position did not affect the question as to whether the Court had or had not jurisdiction. The Local Government, according to his argument, was acting in two capacities. It was both grantor of the grant under which the property was held and the authority which could give or withhold sanction to a sale in exercise of an unfettered discretion. He urged that, if the Local Government in the same order made a declaration as to the terms of the grant which prejudiced the interests of his client and refused sanction in exercise of an unfettered discretion, it was open to his client to separate the two portions of the order and, while not attempting to challenge the validity of the latter portion, to ask for a declaration with regard to the former. He pointed out that it was possible that a declaration as to the non-alienability of the property could operate to the prejudice of his client as mortgagee, and that he might gain some advantage in obtaining the decision of a Court upon that point by using such decision, if favourable to him, in order to persuade the Local Government to alter its decision. With regard to the question of jurisdiction his case was that the mortgagee had a right to ask for a declaration as against the grantor, and that thus the Court had jurisdiction to hear the suit.

The learned Counsel for the respondents has, in our opinion, been unable to meet these arguments. We consider that the Court has certainly jurisdiction to hear the suit. The next question that arises is with regard to the maintainability of the suit. Such a suit can, in our opinion, undoubtedly be brought and is maintainable under the provisions of section 42 of the Specific Relief Act. With regard to the point taken by the learned Subordinate Judge that a Court has discretion to give or refuse a declaration, we are of opinion that the question of discretion does not fall under the head of maintainability. The learned Subordinate Judge has dismissed the suit without going into the merits. Before he can be in a position to know whether he should or should not exercise his discretion, it will be necessary for him to try the case upon its merits and to arrive at findings as to the alienability of the property. This is a case where a grantor has interpreted the terms of a grant in a manner which may be prejudicial to the interests of the transferee of the grantee. The transferee has a legal right to seek an opportunity of obtaining a judicial decision as to the correctness of the grantor's view, and he does not suggest that he has a legal right to compel the Local Government, not in its capacity of grantor, but in its capacity of supreme executive authority to do as he wishes. We do not say that the Court has no discretion to refuse to grant such a declaration, but before it can be in a position to exercise this discretion it is necessary for the Court to hear the case upon its merits. We, therefore, consider that the decision of the learned Subordinate Judge cannot be maintained and that the suit cannot be dismissed *ab initio* upon the preliminary objection raised. We, of course, express no opinion as to the merits.

The result is that we allow this appeal and reverse the decree upon a preliminary point, and direct under the provisions of Order XLI, rule 23, that the suit be re-admitted under its original number in the register of civil suits and that the learned Subordinate Judge shall proceed to determine it upon its merits. The costs of this appeal will follow the result.

Appeal allowed

BHAGWAT BHASKAR *v.* NIVRITTI SAKHARAM.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 504 OF 1913.

August 20, 1914.

Present:—Mr. Justice Beaman and Mr. Justice Hayward.

BHAGWAT BHASKAR KORANNE—

PLAINTIFF—APPELLANT

versus

NIVRITTI SAKHARAM BHADULE—

DEFENDANT—RESPONDENT.

Hindu Law—Widow—Pious obligation to pay her husband's debts, whether applicable to debts repudiated—Agreement by husband on certain conditions to re-convey within certain time property purchased—Conditions not fulfilled—Husband denying obligation to re-convey—Widow, whether bound to fulfill the agreement—Alienations by widow upheld—Legal necessity.

In 1869 *A* sold his property to *B*, who passed a contemporaneous agreement to reconvey it to the vendor, if the latter paid him Rs. 100 every year for six years. So matters stood till after the death of *B*. In 1883 his son *D* was sued by the representatives of *A*. The suit took the form of a redemption suit, and he, in his written statement, denied that the agreement had been complied with, or could now be enforced, and at the same time alleged that the transaction was not a mortgage. The defence succeeded and the suit was dismissed. In 1894 after the death of *D* his mother, who was in life enjoyment of the estate, was again sued for redemption. The suit again failed as barred by the rule of *res judicata*. Shortly after this the widow sold the property to the representatives of *A*:

Held, (1) that the widow was under no pious obligation to do for the last male-holder of the estate what he had emphatically declined to do for himself;

(2) that the alienation was not justifiable and ought not to be sustained against the reversioners;

(3) that the only solid ground upon which alienations by a widow are justified and made good against reversioners is legal necessity.

Second appeal from the decision of the First Class Subordinate Judge at Sholapur, in Appeal No. 78 of 1910, confirming the decree passed by the Second Class Subordinate Judge at Pandharpur, in Civil Suit No. 158 of 1907.

Mr. *P. B. Shingne*, for the Appellant.

Mr. *D. A. Tuljapurkar*, for the Respondent.

JUDGMENT.—The material facts are that in 1869 Appa, the original owner of this property, sold it to Ramchandra and Ramchandra passed a contemporaneous agreement, Exhibit 87 in the case, under which he agreed that if the vendor Appa paid him Rs. 100 every year for six years, he would re-convey the land. So matters stood till after the death of Ramchandra. His son Dattatraya was sued in 1883 by the representatives in interest of the original owner, Appa. The suit took the form of a redemption suit, because had it been upon the agreement, merely as an agreement, it is obvious that it would have been time-barred. Dattatraya resisted this suit. His written statement shows that he denied that the agreement had been complied with or could now be enforced, and at the same time alleged that the transaction was not a mortgage. The defence succeeded and the suit was dismissed.

In 1894 after the death of Dattatraya, Jankibai, who as widow of Ramchandra and mother of the last male-holder Dattatraya, was in life enjoyment of the estate, was again sued by the representatives-in-interest of Appa for the redemption of this mortgage. The suit again failed on the very obvious ground that the claim was *res judicata*.

Immediately after this the widow Jankibai appears to have entered into what is called a compromise before the Conciliator and allowed a consent decree against herself for the sale of this land to the representatives of Appa for the sum of Rs. 650. It is this transaction which the plaintiff, who is the reversioner of Dattatraya's estate, seeks to have set aside.

The learned Judge of first appeal, relying upon a current of authority, the effect of which simply is that a Hindu widow is under a pious obligation to pay her deceased husband's debts even though they may be time-barred, held, by what we suppose he meant to be a parity of reasoning, that the widow Jankibai here was under the pious obligation to do for the last holder of the estate what he had emphatically declined to do for himself. Now none of the authorities cited by the learned Judge in support of his proposition has the least bearing upon the facts we have to deal with; nor is there any true analogy between the principle underlying those cases and any principle which could be applied here. Put upon purely ethical, not legal, ground the reasoning of those cases is clear. The Courts have held that a widow is entitled to sell part of the ancestral immoveable property to discharge the just debts of her husband even though those debts might be time-barred, and this is based doubtless upon the moral duty of discharging the debts of her husband; and again on the

assumption that had the husband lived he would, as a moral and upright man, have discharged them himself. In not one of those cases is to be found the slightest indication that the deceased husband had ever repudiated the debts before his death which the widow paid after his death.

The case here is, therefore, totally different upon moral principles as well as upon its own facts. There is no question of any debt here at all; nor could it be seriously contended that in acting, as she did, the widow was doing what the last male-holder would have done had he been alive, nor can we say that there was the least moral obligation upon the widow to restore this property to the representatives-in-interest of Appa upon payment of the sum for which it had been sold in the year 1869. That, as soon as the terms of the agreement were exhausted, has been held by the Courts to have been an out and out sale. That was the view which Dattatraya himself took of the transaction when he successfully resisted the attempt of the representatives-in-interest of Appa to redeem the property; and if that were so, we are unable to see that the bargain was originally an unfair one or that the last male-holder, Dattatraya, was acting in any way dishonestly in insisting upon adhering strictly to the conditions of the original bargain. So that we are unable to find here the slightest ground for applying the principle upon which alone the learned Judge below appears to have thought that this alienation by the widow was justifiable and ought to be sustained against the reversioner.

It has never been contended that there was any legal necessity for this sale in the ordinary sense of those words; and but for a general expression used in the case of *Chinnaji Govind Godbole* v. *Dinkar Dhondev Godbole* (1) that a widow may deal with the property finally, provided that she is dealing fairly by the expectant heirs, we do not think that the learned Judge would have been misled into the line of reasoning which he has finally adopted. A general expression of that kind can hardly take the place of the settled principles upon which the law governing this class of cases has long been established. Such terms as "dealing fairly by the expectant reversioners" are much too loose and general in our opinion to be made the ground of law governing the widow's powers of disposition, during her life-time, of ancestral immoveable property. The only solid ground upon which such alienations are justified and made good against reversioners will be found on analysis in every case to be what is known as legal necessity. Here there is nothing in the least like legal necessity. We are, therefore, forced to the conclusion that the learned Judge below who has, we think, written a very able and careful judgment, has nevertheless entirely misconceived the law, and has, therefore, misapplied it to the facts of the case before him.

We must, therefore, reverse his decision on issue No. 1 and remand the case to the learned Judge below to dispose of upon the remaining points awaiting his decision in the light of the foregoing remarks. In doing so we must observe that the case of the 6th defendant has not been dealt with in the Court of first appeal. The learned Judge should inquire into and decide upon the alleged legal necessity of the mortgage under which the defendant No. 6 claims to hold the property from the widow, Jankibai. Costs will abide the final result.

Decree reversed; Case remanded.

(1) 11 B. 320.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 52 OF 1911.

June 26, 1914.

Present:—Mr. Fawcett, J. C., and Mr. Boyd, A. J. C.

HASSOMAL MURIJMAL—PLAINTIFF—APPELLANT

versus

Sheikh GHULAM MAHOMED AND OTHERS—DEFENDANTS—RESPONDENTS

Caste Disabilities Removal Act (*XXI of* 1850)—*Right of convert's son to inherit—Exclusion of* kafir *under Muhammadan Law—Burden of proof—Admission on point of law.*

A convert's son must be put in the position in which he would have been if his father had not changed his religion. The words "any right of

HASSOMAL MURIJMAL *v.* GHULAM MAHOMED.

inheritance" in Act XXI of 1850 refer to any right of inheritance accruing to any person, which right is not affected by conversion.

Therefore, a Hindu son is entitled to inherit the property of his father who was converted to Muhammadanism.

Though, under the Muhammadan Law, a son is *prima facie* entitled to a share yet the fact of his being a Hindu shifts the burden of proof on him to show that he is not excluded as a "*kafir*".

A party is not bound by the erroneous admission on a point of law made by his Pleader in the lower Court.

Appeal from the decree of the Assistant Judge, Hyderabad.

Mr. *Rupchand Bilaram*, for the Appellant.

Mr. *T. G. Elphinston*, for Respondent No. 1.

Mr. *Wadhumal Oodharam*, for Respondents Nos. 2 and 4.

Mr. *Kalumal Pahlumal*, for Respondent No. 3.

JUDGMENT.

BOYD, A. J. C.:—Plaintiff is and always has been a Hindu. His father Murijmal became a Muhammadan in 1891. About that time there was a family partition, one result of which was that Murijmal took away with him his separate share in the family property. About this share the present dispute arose when Murijmal died in 1907. Plaintiff claims to inherit 2/9ths of it. His claim is denied by defendants Nos. 1 and 2, the other sons of Murijmal. They also became Muhammadans with their father.

These defendants first attack plaintiff's claim on the ground that he cannot inherit under Muhammadan Law, being an infidel. The learned Judicial Commissioner has dealt with this point in a separate judgment; and I entirely agree with him that the ordinary Muhammadan Law would exclude plaintiff from inheritance but for the operation of Act of 1850.

The learned Assistant Judge in first appeal has held that plaintiff cannot benefit by that Act, which applies, he thinks, only to the convert (or apostate) himself and not to his unconverted son. He declines to follow the decision in *Bhagwant Singh* v. *Kallu* (1), partly because it is in apparent conflict with other decisions and partly because it does not directly cover the case of a Hindu claiming to inherit from a Muhammadan.

But it is clear that the principle underlying the judgment of Sir John Edge applies exactly to the present case. The one simple question is, whether the words "any right of inheritance" in the Act refer to any right of inheritance accruing *to any person* or whether they should be limited to the right of the convert (or apostate) himself. The learned Chief Justice, finding the words of the Act slightly ambiguous, interpreted them with the aid of the preamble. The result was that he found that the convert's son must be put in the position in which he would have been if his father had not changed his religion. According to this view of the law, plaintiff must succeed; for as a Hindu son he is entitled to a 2/8th share of what his father left. As it happens, he only claims a 2/9th share; and so he will not get more than he claims.

Regarding the effect of the Act it is unnecessary for us to say much, as we have arrived at the conclusion that we ought to follow the above decision, and we adopt *in toto* the reasoning on which it is based, to which we have nothing to add. The Chief Justice's reasons are easy to understand; and the judgment contains a transcription of the whole Act and its preamble. We think one of the objects of the Act is that a man's change of religion should not affect the right of inheritance either of himself or of anyone else. We fully realise that a Court's business is not to legislate, but to interpret Statutes. But where the language of the operative portion of an Act is ambiguous, it is allowable to consult the preamble, *vide* Maxwell on the Interpretation of Statutes, 5th Ed., page 69, and a number of cases cited in Chapter II, section 3, of a book on the Interpretation of Indian Statutes, by Ghose and Ghosh, Edition 1904.

Speaking for myself, I do not see any ambiguity about the wording of the operative part of the Act. I see no reason to limit the words "any right of inheritance" to the right of the particular person referred to in the 3rd line of the section. *Prima facie* the words "any right" mean "any right of any person." I

(1) 11 A. 100; A. W. N. (1888) 288.

would allow plaintiff's claim without referring to the preamble at all.

It is true that a contrary opinion has been expressed by Ameer Ali in his volume 2, page 103, 3rd Edition. But the opinion of a commentator, however eminent, is not an authority which a Court is bound to follow. And it may be observed that on the present point another most distinguished jurist disagreed, taking the view which we adopt, *vide* Wilson, page 295, 3rd Edition.

While granting that the *reductio ad absurdum* is not always a good argument in cases governed by personal and religious laws, I cannot refrain from pushing it in this case, not as a basis of our decision, but to show its justice. It is obviously unfair that one should lose anything by his father's change of religion. The unfairness is not so great in a case like this, of a converted Hindu. But take the case of a Christian or Buddhist whose father becomes a Muhammadan. The son has in him no vested rights (like a Hindu) in any part of the family estate and will lose everything if he cannot inherit from his father; and that would be the result, if the defence argument in the present case is right. It would be a cruel injustice—more than the most fanatical convert would desire. In such a case can it be supposed that the same Government, which framed Act of 1850, intended the unconverted child to starve? I think clearly not.

Both sides have discussed the judgment of the Privy Council in *Khunni Lal* v. *Kunwar Gobind Krishna Narain* (2). But that decision, though most instructive, does not seem to be relevant in the present case. In that case there was no question whether Daulat should succeed Ratan Singh, whom he predeceased. The plaintiffs, who claimed through Daulat, said that Ratan Singh by becoming a Muhammadan had lost all his rights in his Hindu family property. And their Lordships held that it was not so, in view of section 9 of Bengal Regulation VII of 1832. The ultimate decision of the case was based upon a compromise between the various parties interested. There was no dispute between Ratan Singh's Muhammadan heirs on one side and his Hindu heirs on the other side. He had no Muhammadan heirs. The dispute was between his grandson and Daulat's daughters. All were Hindus. It was unnecessary to go into the question which has arisen in the present case. And their Lordships did not go into it and did not notice the decision in *Bhagwant Singh* v. *Kallu* (1).

It is true that in *Subbaraya* v. *Ramasami Pillai* (3) the learned Judges do seem to have taken a view different to the Allahabad decision, which however they did not mention. It is unnecessary to discuss the Madras case in detail. The decision was almost entirely based on other grounds; and, though the head-note says the present point was decided, I find nothing clear or definite about it in the judgment. In that case the defendant was bound to fail; for the woman Virayi had lost her right of inheritance, not because of her expulsion from caste but in consequence of her adultery, which disqualified her under the ordinary Hindu Law. I refer to the penultimate paragraph of the judgment. It was unnecessary to discuss Act of 1850 in any detail; and the few remarks at the foot of page 176 of the report throw no light on the question now before us.

In the earlier Madras decisions and in *In the goods of Kamineymoney Bewah* (4) the Act did not come into play at all. So those cases do not help us.

It is brought to our notice that plaintiff first sued as a Hindu son and then later contended that he could inherit under Muhammadan Law Now he claims to inherit either under Hindu or Muhammadan Law, whichever may be held applicable, though (as already said) he only demands a 2/9ths share. The plaint was never amended; and it would be unduly technical, in my opinion, to hold that he cannot succeed because the wrong arguments were put forward for him in the lower Courts.

I would reverse the decree of the District Court and record a finding that plaintiff is entitled to succeed to 2/9ths of the intestate property left by Murijmal *alias* Sheikh Ahmed.

(2) 10 Ind. Cas. 477; 33 A. 356; 15 C. W. N. 545 (P. C.); 8 A. L. J. 552; 13 Bom. L. R. 427; 13 C. L. J. 575; 10 M. L. T. 25; 21 M. L. J. 645; (1911) 2 M. W. N. 432; 38 I. A. 87.

(3) 23 M. 171.
(4) 21 C. 697.

We cannot go further and decide what that property is, as the District Judge has not recorded a finding on his second issue. So I would propose to remand the suit for decision making defendant No. 1 pay all costs of this appeal: other costs to be costs in the cause.

In arriving at a final conclusion, the District Judge will have to remember that the property of Murijmal was under the management of the Manager, Sind Encumbered Estates, and was after some time restored to him by the Manager.

It will be necessary to inquire how much property was acquired by Murijmal after that restoration and of property so acquired how much was gifted to defendant No. 1.

FAWCETT, J. C.—The admitted facts in this case are as follows. Murijmal, father of all the parties, was originally a Hindu *zemindar*. In 1891 he became a convert to Muhammadanism, taking the name of Sheikh Ahmed. Thereupon one of his sons, Gurmukhdas, filed a suit for his share in the family property, and a consent decree was passed whereby the property was partitioned and a 1/5th share was assigned to Sheikh Ahmed and each of his sons, Gurmukhdas and Hossomal, who remained Hindus, and Sheikh Ghulam and Mahomed Sidik, who embraced Muhammadanism with their father. Sheikh Ahmed and Sheikh Ghulam continued to hold the lands assigned to them jointly, but the District Judge states that the evidence shows that they separated in 1901. Sheikh Ahmed died in 1907. Hassomal then in 1909 filed the suit out of which the present appeal arises. In the plaint he first of all claimed a one-fourth share in his father's property, *i.e.*, his share under Hindu Law as one of the four sons of the deceased. Subsequently, however, he abandoned this position and claimed the share to which he would be entitled under Muhammadan Law, if not excluded by that law. The other sons and a daughter, Chatibai, were joined as parties and also claimed shares. The defendant, Sheikh Ghulam, denied plaintiff's right to inherit and denied also that his father had left the property specified, alleging that the greater part of it had been given to the defendant. The Subordinate Judge held that Hassomal was entitled to inherit and awarded him a 2/9th share in what he found to be the property left by Sheikh Ahmed, *viz.*, the property specified in the plaint minus the property acquired by Sheikh Ghulam in the partition of 1901. No order was made as to the claims of other sons and daughter as they had not paid Court-fees. Sheikh Ghulam appealed to the District Court, which held that the plaintiff Hassomal was not entitled to succeed to a share of the property of Sheikh Ahmed as one of his heirs. Hassomal now appeals from this decision.

The two main questions in this case are those dealt with in the lower Court's judgment. The first is whether the plaintiff is or is not excluded from inheritance under Muhammadan Law by virtue of his being a Hindu and therefore a *kafir*. On this point no evidence has been adduced, but the Sub-Judge held that, as Hinduism in Sind is purely monotheistic "with full regard for the sublime mission of every prophet whoever opened his sacred lips for the spiritual guidance of fallen humanity," the plaintiff was not beyond the pale of Islam for the purpose of succession. The learned Assistant Judge, after giving reasons for holding that Mr. Ameer Ali in the later edition of his Muhammadan Law does not give any support to this view, says: "But in any case, Hassomal describes himself in the plaint as a Hindu and, if he intended to claim the property as a Muhammadan, it was clearly incumbent on him to show that, notwithstanding his Hinduism, he belives in the cardinal principles of the Muhammadan faith. All we know about him is that he is a Hindu. There is no evidence whatever as to his religious beliefs. The presumption, therefore, is that he is a *kafir* and the appellant was not (as the learned Sub-Judge appears to think) under any obligation to put him in the witness-box or to produce any evidence on the point."

For appellant it is contended that this wrongly places the burden of proof on the plaintiff to show that he is not a *kafir*. Mr. Rupchand argues that, as the plaintiff is a son, he is, according to the first principles of Muhammadan Law, included as an heir and that the burden of proving he falls under the subsequent exception as to a *kafir* rests on the other side. But the Muhammadan Law cannot properly be dealt with in watertight com-

partments in this way. The fact that a *kafir* is excluded is as much an integral part of that law as the fact that a son is a sharer in the rules of inheritance. Though, therefore, plaintiff is *prima facie* entitled to a share *as a son*, yet the fact of his being a Hindu shifts the burden of proof on to him to show that he is not excluded as a *kafir*. For there can be no reasonable doubt that this term in its ordinary sense covers a follower of an antagonistic religion like Hinduism. To adopt the expression used in *Bhaiya Sher Bahadur* v. *Bhaiya Ganga Bakhsh Singh* (5), the popular idolatrous form of Hinduism is directly antagonistic to the cardinal principles upon which the religion of Islam is founded. If it be true, as suggested by the learned Sub-Judge, that the Hinduism of plaintiff and other persons in Sind is of a kind which differs from ordinary Hinduism and is not so antagonistic to Muhammadanism as to make him a *kafir*, then the burden of proving this clearly lies on him. I see, therefore, no reason to differ from the view taken by the lower Court on this point.

The second main question is, whether Act XXI of 1850 covers a case like the present where a convert and his son (a non-covert) claim a right of inheritance. On this point, I think, for the reasons given in the judgment of my learned brother, the ruling in *Bhagwant Singh* v. *Kallu* (1) should be followed. The words "in any way to impair or affect any right of inheritance" are so wide that they clearly admit of the construction thus put on them in that case and as pointed out in the judgment of Sir John Edge, they would be unnecessary if they were intended to be restricted to the protection of the right of inheritance of the persons renouncing their religion or being excluded from caste. No doubt the learned Assistant Judge is right in his view, that the terms of Act XXI of 1850 cannot possibly be construed so as to cover a right of inheritance claimed by the plaintiff *under Muhammadan Law*—that being a right which is not in any way *impaired* or *affected* by his father's conversion, but actually created by such conversion. But as the plaint actually claims a share according to Hindu Law and was never formally amended, the mere fact that plaintiff's Pleader in the lower Appellate Court abandoned that claim and admitted that his right under Hindu Law was entirely extinguished, should not debar him from obtaining the share under Hindu Law to which we hold he is entitled, at any rate to the extent of 2/9ths which he claims. Plaintiff is not bound by the erroneous admission on a point of law made by his Pleader in the Lower Court, cf. *Krishanji* v. *Rajmal* (6).

The lower Appellate Court's decree is, therefore, reversed and the case remanded to the lower Court for a finding on the second issue raised in that Court. Respondent No. 1 to bear appellant's and respondent No. 2's costs of this appeal. Other costs (including those of the lower Appellate Court) to be costs in the cause.

Decree reversed; *Case remanded.*

(5) 22 Ind. Cas. 293; 16 Bom. L. R. 306; 18 C. W. N. 401; 15 M. L. T. 169; (1914) M. W. N. 184; 12 A. L. J. 188; 26 M. L. J. 291; 19 C. L. J. 277; 36 A. 101; 1 C. L. J. 109; 17 C. C 68.

(6) 24 B. 360; 2 Bom. L. R. 467.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 234 OF 1912.

November 12, 1914.

Present:—Sir John Wallis, Offg. Chief Justice, and Mr. Justice Seshagiri Aiyar.

MANGALASAWMI THEVAR AND ANOTHER —DEFENDANTS—APPELLANTS

versus

Raja RAJESWARA DORAI, *alias* MUTHURAMALINGA SETHUPATHI AVERGAL, RAJAH OF RAMNAD—PLAINTIFF—RESPONDENT.

Landlord and tenant—Lease—Reversionary lease, whether can be granted—Trustee of devastanam *granting lease at low rental—Right of tenant—Improvement, right of tenant to claim compensation for.*

The grant of a reversionary lease is always objectionable and can be justified only in exceptional cases.

Where a trustee of a *devastanam*, just before his retirement from office, granted a lease for the long period of 40 years, at a time when nine years of the previous lease for the like period had still to run, at an advance of only Rs. 25 a year in spite of the fact that there had been materially a very great increase in the price of produce since the date when the previous lease was granted:

Held, that, having regard to the prevailing conditions, the lease must be deemed to have been granted at

an under-value and the tenant was not entitled to compensation for such improvements as he was bound to do under the terms of the previous lease.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Ramnad at Madura, in Original Suit No. 146 of 1910.

FACTS.—The former Rajah of Ramnad was also the Manager of Ramnad Devastanams. After divesting himself of the *semindari* and being about to do the same with respect to the Devastanams under his charge, he granted a lease of the suit properties which appertained to the Devastanams to the defendants for a term of forty years at a rent of Rs. 285 a year.

There was a prior lease of these properties in favour of these very defendants, nine years of which had still to run, at Rs. 260 at a year. The suit out of which the appeal arose was instituted by the present Rajah of Ramnad for a declaration that the new lease was invalid and for recovery of possession of the suit properties. The temporary Subordinate Judge of Ramnad held that there had been a materially great increase in the price of paddy since the grant of the prior lease and that having regard to present conditions, the lease must be considered to have been granted at an undervalue. He, therefore, decreed the plaintiff's suit. The defendants appealed.

Mr. *K. Bhashyam Iyengar* (with Mr. *A. Subbarama Iyer*), for the Appellants:—It was quite competent to the former Rajah to grant the lease. There was an increase of Rs. 25 in the rent reserved. At any rate the appellants are entitled to the value of improvements.

Messrs. *K. Srinivasa Iyengar* and *A. Krishnaswami Iyer*, for the Respondent:—A reversionary lease is always objectionable and can be justified only by exceptional circumstances. *Attorney-General* v. *Kerr* (1). No such circumstances exist in the present case. Between the dates of the old and the new lease there has been a material increase in the price of paddy. It is not shown that any difficulty is experienced in collecting rent. The appellants are not entitled to any relief even as regards improvements, as under the old lease they were bound to execute the same at their expense.

JUDGMENT.—The lease was granted by the plaintiff's father at a time when he was about to divest himself of the management of the Ramnad Devastanams, having already divested himself of the *semindari* itself some years before. It was granted for the long period of 40 years, at a time when nine years of the previous lease for the like period had still to run, at an advance of only Rs. 25 a year on a rental of Rs. 260, in spite of the fact that there had materially been a very great increase in the price of paddy since the date when the previous lease was granted. The grant of a reversionary lease is always objectionable and can only be justified in exceptional cases [*Attorney-General* v. *Kerr* (1)]. It is not shown that there had been any difficulty in collecting the rent before the new lease was granted. We also agree with the conclusion of the Subordinate Judge that having regard to present conditions, it must be considered to have been granted at an undervalue. The appellant is not entitled to compensation for improvements, as he was bound under the terms of the previous lease to effect the repairs for which he now claims compensation.

The appeal is dismissed with costs.

Appeal dismissed.

(1) 2 Beav. 420; 9 L. J. Ch, 190; 4 Jur. 406; 48 E. R. 1244; 50 R. R. 221.

BOMBAY HIGH COURT.

EXTRAORDINARY JURISDICTION APPLICATION No. 107 OF 1914.

August 21, 1914.

Present.—Mr. Justice Beaman and Mr. Justice Hayward.

SAKHARAM MANSARAM—PLAINTIFF—APPLICANT

versus

GOLABCHAND TARACHAND—DEFENDANT—RESPONDENT.

Negotiable Instruments Act (*XXVI of* 1881), *ss.* 9, 43, 118 (g)—*Endorsee from payee of* hundi—*Holder in due course*—*Presumption*—*Consideration, failure of.*

An endorsee from the payee of a *hundi* must be presumed until the contrary is proved to be a holder in due course within the meaning of section 9 by reason of section 118 (*g*) of the Negotiable Instrumens Act and is unaffected by the failure of the consideration as between the drawer and the payee.

Civil application under Extraordinary Jurisdiction, from the decision of the Judge of the Court of Small Causes at Poona, in Suit No. 4783 of 1912.

Mr. *J. Y. Abhyankar*, for the Applicant.

Mr. *J. B. Gharpure*, for Opponent No. 1.

Mr. *M. M. Kotashane*, for Opponent No. 2.

JUDGMENT.—The plaintiff sued as an endorsee of a *hundi* drawn by the 1st defendant in favour of one Magan. The 1st defendant pleaded that no consideration for the *hundi* had been received from Magan, and an issue was raised whether there had been consideration as between defendant No. 1 and Magan. The learned Judge of the Small Cause Court, Poona, did not decide whether there had been consideration as between the plaintiff and Magan, but dismissed the suit on the issue mentioned, holding that there had been no consideration as between the 1st defendant and Magan.

The plaintiff has now sought to have the decision set aside in extraordinary jurisdiction, on the ground that his suit as endorsee from Magan was not necessarily barred by the fact that there had been no consideration as between defendant No. 1, the drawer, and Magan, the payee. It appears to us that the plaintiff's position has been misapprehended and that his contention must be allowed. He must as endorsee be presumed, until the contrary is proved, to have been a holder in due course, that is to say, a holder for consideration from Magan within the meaning of section 9 by reason of section 118 (*g*) of the Negotiable Instruments Act. He would, therefore, (unless the contrary should be proved) be unaffected by the failure of consideration as between defendant No. 1, the drawer, and Magan, the payee, under the provisions of section 43 of the Negotiable Instruments Act, which provides that:—"A negotiable instrument made, drawn, accepted, indorsed, or transferred without consideration, or for a consideration which fails, creates no obligation of payment between the parties to the transaction. But if any such party has transferred the instrument with or without indorsement to a holder for consideration, such holder, and every subsequent holder deriving title from him, may recover the amount due on such instrument from the transferor for consideration or any prior party thereto." There is, therefore, this material issue remaining for decision, namely, whether the plaintiff was a holder in due course from Magan for consideration, that is to say, whether he had accepted the *hundi* from Magan for consideration. The decree of the learned Judge of the Small Cause Court, Poona, must, therefore, be set aside and the case remanded for a fresh decision in the light of the above remarks, after determining the issue:—

Whether the plaintiff was a holder in due course for consideration from Magan within the meaning of sections 9 and 43 of the Negotiable Instruments Act, having regard to the provisions of section 118 (*g*) of the Act?

Costs to abide the result.

Issue sent down

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL No. 31 OF 1914.

November 12, 1914.

Present:—Mr. Lindsay, A. J. C.

PIARE LAL—DECREE-HOLDER—APPELLANT

versus

MUHAMMAD MAHMUD AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Execution of decree, questions relating to—Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 58, sub-rule (3), applicability of—Decree, objection to attachment of, in execution.

The appellant obtained a decree against two persons *I H* and *A H* *I H* and *A H* along with two other persons held a decree against *M M* and *M Z*. The appellant applied for execution of his decree by attachment of the interest of *I H* and *A H* in the decree which they along with two other persons held against *M M* and *M Z*. This application was refused.

Held, that, *M M* and *M Z* being no parties to the appellant's decree, the questions arising between them and the appellant could not be taken as questions relating to the execution of the decree held by the appellant. The order refusing the application did not, therefore, fall under section 47, Civil Procedure Code, and was not appealable.

PIARE LAL v. MUHAMMAD MAHMUD.

Held, further, that the provisions of Order XXI, rule 53, sub-rule (3), refer to the stage at which execution of the attached decree is being sought and not to a case where the application for attachment of the decree has been disallowed.

Appeal against the order of the District Judge, Hardoi, dated 27th March 1914, dismissing an appeal from an order of the Munsif, Bilgram, dated 13th December 1913.

Babu *Rajeshwari Parshad*, for the Appellant.

JUDGMENT.—This is a second appeal in the execution department. The point raised is that the lower Appellate Court was wrong in holding that no appeal lay to it. The facts of the case are shortly as follows: One Piare Lal obtained a decree against two persons, named Ikbal Husain and Abdul Hak. It appears that Ikbal Husain and Abdul Hak along with two other persons held at this time a decree against two men named Mohammad Mahmud and Mohammad Zahir-ud-din. Piare Lal applied to the Court of execution of his decree against Ikbal Husain and Abdul Hak by attachment of their interest in the decree, which they along with the two other persons held against Mohammad Mahmud and Mohammad Zahir-ud-din. This application for attachment in execution of the decree against Ikbal Husain and Abdul Hak was refused by the Munsif on the 13th December 1913. An appeal was taken to the Court of the District Judge. In his opinion no appeal lay. It was sought to be argued before the Judge that the appeal lay, as being an appeal against an order passed in execution proceedings under section 47 of the Code of Civil Procedure. The learned Judge refused to allow this contention. He pointed out that the case was one falling under Order XXI, rule 58, and that under rule 63 the order of the first Court was final, subject to the result of any suit which might be brought by the party against whom the case was decided. It is again contended here that an appeal lay, because the order passed by the Munsif was under section 47, Civil Procedure Code. I am unable to accept this contention. It appears to me that the proceedings were execution proceedings relating to a decree obtained by Piare Lal against Ikbal Husain and Abdul Hak. Mohammad Mahmud and Mohammad Zahir-ud-din were not parties to that decree, so any question arising between these two last-named persons and Piare Lal could not be taken as a question relating to the execution of the decree which had been passed in Piare Lal's favour. It is pointed out that the objection raised by Mohammad Mahmud and Mohammad Zahir-ud-din was that inasmuch as the decree which Piare Lal sought to attach was a decree not only in favour of Ikbal Husain and Abdul Hak, but in favour of two other persons as well, the decree-holder here, Piare Lal could not be allowed to take out execution as against them. However, as I have already said the proceedings between these parties cannot, in my opinion, be treated as proceedings under section 47, because Mohammad Mahmud and Mohammad Zahir-ud-din were no parties to the decree execution of which was being sought. The learned Counsel for the appellant relies upon the provisions of Order XXI, rule 53, sub-rule (3). That sub-rule, however, does not appear to me to apply to this case. It provides that the holder of the decree sought to be executed by the attachment of another decree of the nature specified in sub-rule (1) shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute such attached decree in any manner lawful for the holder thereof. This sub-rule clearly indicates a different stage of proceedings, namely, the stage at which execution of the attached decree is being sought. That stage, however, has not been reached here, for the effect of the Munsif's order is to disallow the application by which Piare Lal sought to attach the decree which had been obtained against Mohammad Mahmud and Mohammad Zahir-ud-din. I think the decision of the Court below was perfectly right.

The appeal fails and is dismissed with costs.

Appeal dismissed.

CHANDRABATI v. BABU RAM.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 58 OF 1913.

July 8, 1914.

Present:—Mr. Justice D. Chatterjee and Mr. Justice Walmsley.

Musammat CHANDRABATI—DECREE-HOLDER—APPELLANT

versus

BABU RAM AND ANOTHER—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), s. 602—Mortgage created by security bond—Transfer of Property Act (IV of 1882), s. 67—Execution—Decree for costs—Application against surety—Sale on claim arising under mortgage—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 4—Personal liability of surety.

Where an application for execution of a decree for costs obtained in the Privy Council against a surety and the properties which he had charged as security under section 602 of the Civil Procedure Code of 1882, was resisted on the ground that the security could not be realised without a suit under section 67 of the Transfer of Property Act:

Held, (1) that the claim of the decree-holder was based entirely on the security bond which created a mortgage in her favour and the claim against the surety was thus a claim arising under the mortgage, within the meaning of Order XXXIV, rule 14, of the Civil Procedure Code, 1908, and the properties could not be sold without a suit under section 67 of the Transfer of Property Act, 1882;

(2) but that the security bond also created a personal liability, and the decree-holder could realise the amount of costs covered by the security bond from the person and other properties of the surety under section 145, Civil Procedure Code, 1908.

Appeal against the order of the District Judge of Bhagalpur, dated the 15th of November 1912.

Babu *Kulwant Sahay*, for the Appellant.

Babu *Jogesh Chandra Ray* and Moulvi *Khurshed Hussain*, for the Respondents.

JUDGMENT.—The appellant obtained a decree for costs in Privy Council and she applied for the execution of the said decree against the surety and the properties he had charged as security, given under section 602 of the old Civil Procedure Code. It was objected that she could not realise the security without a suit under section 67 of the Transfer of Property Act. In support of this contention of the respondent reliance was placed on the judgment of this Court in *Tokhan Singh* v. *Girwar Singh* (1). The Court below gave effect to this contention, and hence this appeal.

(1) 32 C. 494; 9 C. W. N. 372; 1 C. L. J. 118.

It is urged that *Tokhan Singh's* case (1) was decided under section 99 of the Transfer of Property Act, which is no longer law, and Order XXXIV, rule 14, of the present Civil Porcedure Code, Act V of 1908 which stands in its place, is not applicable to the present case. Section 99 of the Transfer of the Property Act provided that where a mortgagee, in execution of a decree for the satisfaction of any claim whether arising under the mortgage or not, attaches the mortgaged property, he shall not be entitled to bring such property to sale otherwise than by instituting a suit under section 67, etc. Order XXXIV, rule 14, is "where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale, etc."

The main alteration seems to be the deletion of the words *or not*, and the prohibition now applies only to cases of decrees for payment of money in satisfaction of a claim arising under the mortgage. The question, therefore, is whether the decree of the appellant is one within the meaning of this rule. The decree is not against the surety. The claim against him is based entirely on the security bond which creates the mortgage. The claim against the surety is a claim arising under the mortgage, and if the decree obtained by the appellant can be treated as a decree for the payment of money in satisfaction of such a claim, the rule does apply, and the mortgaged property cannot be sold except under a decree under section 67 of the Transfer of Property Act. If it is not such a decree, still the mortgaged property cannot be sold as such without a decree in a suit under section 67 of the Transfer of Property Act. So far as this point is concerned, the reason seems to be that the equity of redemption may have been dealt with in the meantime, and it would lead to multiplicity of suits and other loss to the mortgagor to sell the property subject to unascertained claims.

It is contended, however, that the appellant can realise the personal security under section 145 of the Civil Procedure Code. The question would depend upon

the construction of the security bond. The bond is in accordance with the rules of the Court and is set out at page 10 of the paper-book. It sets out that the surety is bound in the sum of Rs. 4,000 to the appellant and to the Registrar of the Court to be paid to them, etc. It then goes on to say that the said surety shall pay the costs up to Rs. 4,000, and, on such payment, the bond will become void, and, in default, the mortgaged properties will be sold. We think that this does create a personal liability, and, if the appellant gives up his rights as mortgagee and does not seek to sell the mortgaged properties as such, he can realise the amount of costs up to Rs. 4,000 from the person and other properties of the surety. The application made by the appellant was for recovery of the costs from the person and property of the surety, and so far she was within her rights. She, however, wanted to sell the mortgaged properties and described them as such, and did not expressly indicate her election to abandon her rights as a mortgagee under the security bond. In this view of the case, we think that the order of the lower Court was so far wrong as it did not allow her to proceed as upon a personal bond. The application, however, was misleading, and we allow the appeal with the qualification stated above, but without costs in either Court. The application for execution will proceed subject to the amendment suggested.

Appeal allowed.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION APPLICATION No. 53 OF 1911.

July 3, 1914.

Present:—Mr. Fawcett, J. C., and Mr. Boyd, A. J. C.

Seth RUPCHAND—DEFENDANT—APPLICANT

versus

MINHOMAL HARDASMAL AND ANOTHER—PLAINTIFFS—OPPONENTS.

Provincial Small Cause Courts Act (IX of 1887), s. 25, scope of—Findings of fact—Interference in revision—Civil Procedure Code (Act V of 1908), s. 115.

The powers conferred by section 25 of Act IX of 1887 are wider than those conferred by section 115 of the Civil Procedure Code.

Where a Small Cause Court decree is based on a finding which is clearly opposed to the evidence, resulting in grave injustice to the defendant, the High Court is not merely justified in exercising, but acts reasonably in the exercise of, its revisional jurisdiction.

Application against the decree of the Sub-Judge, First Class, Sukkur.

Mr. *Rupchand Bilaram*, for the Applicant.

Mr. *Isardas Oodharam*, for Opponent No. 1 (*c*).

JUDGMENT.—This is an application for revision, under section 25 of the Provincial Small Cause Courts Act, of a decree for Rs. 219 odd passed against the applicant by the Small Cause Court, Sukkur. The suit was brought against him for recovery of money due in respect of certain tins of butter supplied to the defendant-applicant at Quetta, namely, on the 8th November 1907, 4th December 1907, 5th December 1907 and 2nd June 1909. The defendant alleged that there had been a partnership between him and the plaintiff regarding the sale of butter, in respect of which he had brought a suit for accounts in 1909 at Quetta, and that in that suit the plaintiff had already been allowed a set-off of Rs. 62-2-0 for butter supplied by the plaintiff and that no more was due to him on that account. He pleaded that the claim was *res judicata* by reason of this suit of 1909. The Judge of the Small Cause Court on this contention raised the issue: "Did plaintiff claim value of butter in respect of Suit No 24 of 1909 of Quetta Court as defendant and did he get Rs. 62-2-0 as set-off?" On this issue he has decided in the negative, and he has accordingly held that it is unnecessary to decide whether the plaintiff's suit is barred as *res judicata*. The applicant contends *inter alia* that this decision is erroneous and entirely against the documentary evidence on record.

The learned Judge has recorded no reasons for his decision, nor was he bound to do so under Order XX, rule 4, Civil Procedure Code. The grounds for his decision are not, therefore, before us. But it is clear from the record that the only basis on which this decision can be founded is that he believed the statement of the plaintiff that the butter, in respect of which plaintiff obtained this set-off of Rs. 62-2-0, was different from the butter supplied in November and December 1907, in respect of which he brought this present suit. In his deposition the plaintiff

says that the butter, in respect of which he obtained this set-off, was sent on three occasions under three separate orders from the defendant and that, though written orders were sent, those have been lost by him. He can show no entry in any book about them and his statement, that the butter now in suit was different from the butter on account of which he obtained this set-off, is entirely uncorroborated, though he says that some of it (namely that in respect of which he claims the sum of Rs. 65-2-0) was given to the defendant in the presence of three other persons. On the other hand, it is clearly shown by the judgment in the Queta suit that this set-off of Rs. 62-2-0 was in respect of butter supplied to the defendant in *November and December* 1907; and, as the plaintiff admits that this was supplied on three occasions, there is a strong presumption that it was identical with the butter in suit, which is alleged in the plaint to have been supplied on three separate occasions in those two months. It is also noticeable that the value claimed for this butter by the defendant in the Quetta suit namely, Rs. 87-10-0, corresponds very closely with value claimed for the butter in this suit, namely, Rs. 83-10-0. There was dispute in the Quetta suit as to whether this butter was supplied on the partnership account or on a separate account. But, although the Judge appears to have left this point undecided, it is clear from a comparison of paragraph 7 of plaintiff's written statement in that suit, the Commissioners' report therein and the judgment, that this set-off of Rs. 62-2-0 was in respect of butter, the price of which the plaintiff stated then to be Rs. 87-10-0 but in respect of which he was only allowed the amount of Rs. 62-2-0 shown in the plaintiff's accounts. In these circumstances it is, I think, clear that the burden lies strongly on the plaintiff to show that the butter of November and December 1907 included in the present suit was different from the butter of the same months in respect of which he was allowed a set-off. This burden he has clearly not discharged. In his evidence he admits that he has made a mistake regarding the date on which the 4th item of butter was supplied, and that it was really in June 1903 instead of June 1909, as stated in the plaint. Again he contradicts himself as to where the butter for which he claims Rs. 65-2 in the Quetta suit was supplied: first of all he says that it was sent to defendant at Quetta from Sukkur, while afterwards he says that it was given to Rupchand at Sukkur in the presence of three other persons. Again, though he says that the butter of November and December of 1907 in suit was sent to the defendant on orders sent direct by defendant to plaintiff at Sukkur, yet the written order of 8th November 1907 by the defendant to Jiatmal, which was produced by plaintiff himself, is addressed to plaintiff's son, Jiatmal, as Manager of the Edward Dairy at Quetta, and Jiatmal says he can offer no explanation on this point. Finally, the plaintiff has given no explanation as to why the 4th item, in respect of which he claims Rs. 110-4, was not referred to in his written statement in Quetta suit, though the amount had (according to the plaintiff's evidence in Court) been then due for nearly one year. This omission to do so might, according to the ruling in *Nawbut Pattak* v. *Mohesh Narayun Lal* (1), be held to debar the present claim in respect of this item, but without going so far as this, it is clear that this omission to mention it, when he was dealing with the question of what was due to him by the defendant, raises a strong presumption against its being really due. In any case, it is impossible to hold that the plaintiff is a trustworthy witness in respect of his claim, and I am strongly of opinion that his uncorroborated word is absolutely insufficient to discharge all the inferences to the contrary arising from the documentary evidence, so as to justify any Court in holding it proved that the butter of November and December 1907 sued for was in fact different from the butter of the same months, in respect of which plaintiff was given the set-off of Rs. 62-2. It is also, in my opinion, clearly unjustifiable to credit the testimony of the plaintiff and his witnesses as to the delivery to the defendant of the 4th item of butter, in view of plaintiff's uncertainty as to the time when it was supplied, his omission to mention it in his written statement in the former suit and his non-production of any documentary evidence regarding it, although he and his witnesses Pamandas and Nurmahomed say that a receipt for this butter was actually passed by Rupchand. It is, to say the least, very strange and suspicious

(1) 32 C. 654; 1 C. L. J. 361.

that plaintiff should have lost all the documents regarding this item and the alleged three different items for which he got a set-off, though he has kept the documents Exhibits 79 and 81, in respect of the first three items in his plaint. Those documents clearly support defendant's contention that the butter was really obtained from Jiatmal and, as I have already pointed out, the presumption is that this was the same butter in respect of which plaintiff got his set-off in the Quetta suit.

It is no doubt open to question whether a Revisional Court can under section 25 of the Provincial Small Cause Courts Act interfere, merely because it disagrees with a finding of fact by the lower Court. Under that section this Court has power to interfere, if it is not satisfied that the decree was "according to law." In the case of *Bai Jasoda* v. *Bamansha* (2) this point was touched on, but left undecided, although (as admitted at page 340 of the report of that case) the real ground for interference was that a finding of fact by the Small Cause Court Judge was held to be entirely unjustified and capricious. In that case the Judge had omitted to give the points for determination and his decision thereon in his judgment, and it was held that this error of law of itself gave the High Court jurisdiction to interfere. In this case there is no such omission, so this technical ground for interference is absent. But it would be absurd to say that in *Bai Jasoda's* case (2), the Court would not have had good ground for interference, even though the Judge had framed an issue, "Are the *khatas* in suits proved?" and found this in the negative, instead of merely saying "claim not proved." It would be a *reductio ad absurdum* to hold the contrary; and I think, having regard to the wide discretionary power vested in a High Court under section 25, it cannot have been the intention of the Legislature that its powers to interfere should be limited entirely to cases where there has been some error of *law* (strictly so called) of the kind which is required to justify interference in revision under the Civil Procedure Code. It has been held in *Poona City Municipality* v. *Ramji* (3), *Bai Jasoda* v. *Bamansha* (2), *McCarron* v. *Welti* (4) and *Turner* v. *Jagmohan Singh* (5), that the powers conferred by section 25 of Act IX of 1887 are wider than those conferred by section 622 of the old Code of the Civil Procedure (corresponding to section 115 of the present Code); and as said in the case of *Poona City Municipality* v. *Ramji* (3): "It is undesirable and would be improper for us to attempt, when a power is discretionary, to define the limits within which such power should be exercised. That must depend upon the facts of each individual case." The cardinal principle adopted is that a High Court should only interfere to remedy injustice. No doubt as an ordinary rule, a finding of fact by a Small Cause Court Judge should not be interfered with; but there is, in my opinion, no justification for saying that it should *never* be interfered with. In my opinion the present decree cannot be said to be one "according to law," if it is based on a finding which is clearly opposed to the evidence, at any rate in a case like this where the appreciation of evidence depends, not on a mere conflict of testimony between certain witnesses, whose demeanour the Judge had an opportunity of observing and whose evidence he is, therefore, in a better position to appreciate than a Revisional Court, but almost entirely on the proper inferences to be drawn from a proved or admitted state of facts. The inferences from the documentary evidence in this case are so dead against the statement of the plaintiff and his evidence was otherwise so unsatisfactory, that the Judge was not legally justified in relying on his uncorroborated assertions regarding the first three items of the butter in suit not being the same as that for which the set-off of Rs. 62-2-0 was allowed in the Quetta suit, or the oral testimony of himself and his witnesses as to the 4th item of butter. It is to my mind a case where the finding clearly results in injustice to the defendant, and in which there are substantial grounds for the interference of the Court with the finding. As a somewhat similar case, I may refer to *Turner* v. *Jagmohan Singh* (5),

(2) 23 B. 334.
(3) 21 B. 250.
(4) 27 A. 192; A. W. N. (1904) 227; 1 A. L. J. 697.
(5) 27 A. 531 at p. 537; 2 A. L. J. 297; A. W. N. (1905) 77.

where it is remarked: "The learned Advocate for the respondent in the course of his argument submitted that we should not in revision lightly disturb a finding of fact of the lower Court. We are at one with him in this. But the evidence given for the defence in this case is not controverted, and, if accepted, as it has been by the Court below, furnished a complete answer to the suit. The power of interfering in revision conferred by the Small Cause Courts Act is wide—wider than the power conferred by section 622 of the Civil Procedure Code, and if substantial grounds are shown for the interference of the Court, the Court is not merely justified in exercising, but acts reasonably in the exercise of, its revisional powers. In the present case we are of opinion that a grave injustice would be done if the decree of the Court below were allowed to stand."

For the above reasons, I would reverse the decree of the lower Court and dismiss the plaintiff's suit with costs. Opponent No. 1 must also bear applicant's costs.

Decree reversed.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL MISCELLANEOUS APPEAL No. 5 OF 1914.

July 28, 1914.

Present:—Mr. Fawcett, J. C., and Mr. Crouch, A. J. C.

Agha GHULAM DASTAGIR KHAN—PLAINTIFF—APPELLANT

versus

Agha GHULAM HUSSEIN KHAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 3—Partition suit—Agreement appointing trustees to hold plaintiff's share, whether reference to arbitration and adjustment of suit.

An agreement appointing trustees to represent the plaintiff in taking an account from, and effecting partition with, defendant and, thereafter, to hold plaintiff's share in trust for him, does not give the trustees the powers of arbitrator in the matter, and even if it did, it would be a mere agreement to refer to arbitration a matter pending before a Court and would not amount to an adjustment of the dispute within the meaning of Order XXIII, rule 3, Civil Procedure Code.

Mr. *Wadhumal Oodharam*, for the Appellant.

Mr. *Lalchand Hassomal*, for the Respondent.

JUDGMENT.—This is an appeal from an order of the first Class Sub-Judge, Sukkur, (Chandiram Kotumal) refusing to record an alleged compromise of a suit under Order XXIII, rule 3, Civil Procedure Code. Plaintiff sued for partition, and among other issues the following were raised:—

4. Has defendant No. 2 any interest in the property of the suit? If so, how much and in what property?

5. What property and how much (property) was left by Khan Bahadur Kadirdad Khan?

6. Has defendant No. 1 incurred any expenses? If so, to what extent, and what effect have those expenses on this suit?

7. Who is liable for costs of the suit?

8. What decree should be passed?

On the 3rd June 1914, the plaintiff and defendant No. 1 signed a document of which the following is a translation:—

The parties beg to state that in the above suit they have effected the following compromise and the Court may be pleased to pass a decree accordingly:

1. On behalf of the plaintiff, Mr. Mahomed Ibrahim Khan, Vazir, Khairpur State, Sind, and Hon'ble Mr. Gulam Mahomed Khan Burgri, Barrister, are appointed trustees. Both these trustees will take account from the defendant re the property in suit and will deposit the amount received towards the share of the plaintiff in Bombay Bank through themselves.

2. The plaintiff will go to England before October 1914. Expenses, etc., thereof will be paid to the plaintiff by the above trustees. When the plaintiff returns from England after passing, examination he will take his moveable and immoveable property and the amount of his share from the trustees and keep the same into his possession.

3. Defendant No. 1 also agrees to and accepts the above arrangements.

4. Each party may bear its own costs of the suit.

5. Defendant No. 2 is given up in this suit.

(*Sd.*) Agha Ghulam Dastagir Khan.

(*Sd.*) Ghulam Hussein Kadirdad Khan.

The suit was fixed for hearing on the 4th June, and on that date this document was

put in by defendant No. 1's Pleader as a compromise of the suit, which should be acted on by the Court under Order XXIII, rule 3, Civil Procedure Code. The plaintiff, however, objected to it and asked that the case should go on in Court.

In his examination regarding the agreement, which he admits signing, he says that he understood that the proposed trustees, Mr. Mahomed Ibrahim and Mr. Burgri, as well as the defendent No. 1 would be under Court's control in giving an account, and that, had he known they would not be so, he would not have signed the document. The learned Sub-Judge has held that the document in question is not an adjustment of the case under Order XXIII, rule 3, Civil Procedure Code, by means of a lawful compromise, and has refused to enforce it and pass a decree in accordance with its terms.

The main question which arises is, whether the suit has been adjusted wholly or in part by this agreement, so as to come within the meaning of Order XXIII, rule 3. It is quite clear that so far as regards the main issues in the suit, Nos. 5 and 6, and as to the determination of the property which should be awarded to the plaintiff as his share, the agreement in itself makes no actual settlement, but merely appoints two gentlemen as trustees to represent the plaintiff in taking an account from, and effecting partition with, defendant and thereafter to hold plaintiff's share in trust for him until his return from England. It does not give the trustees the powers of arbitrators in the matter and, even if it did, it would be a mere agreement to refer to arbitration a matter pending before a Court, which cannot be treated as an adjustment of the dispute under Order XXIII, rule 3, though an award, or at any rate the acceptance of an award consequent on the arbitration, may be so treated. On this point, we agree with the view taken by Maclean, C.J., in *Tincowry Dey* v. *Fakirchand Dey* (1), which has been followed by the Madras High Court in *Venkatachellam Reddi* v. *Rungiah Reddi* (2) and by Beaman, J., in *Rukhanbai* v. *Adamji Shaik Rajbhai* (3). The same view has also been adopted by Pratt, Judicial Commissioner, in the case of *Seumal* v. *Pursomal* (4). As pointed out by the Sub-Judge in his order appealed against, a decree based on such a compromise could not state what relief plaintiff got in respect of his admitted right to a share and would be mere waste paper in regard to the main question at issue. The only matters in dispute which the agreement really settles are issues 4 and 7, which are covered by paragraphs 4 and 5 of the agreement: but these provisions are clearly conditional on the arrangement stated in paragraphs 2 and 3 being accepted and acted on and must fall with that arrangement.

Accordingly the agreement cannot be accepted as adjusting the suit even "in part," *viz.*, in regard to issues 4 and 7.

It is contended by Mr. Wadhumal that the agreement was one by plaintiff to withdraw the suit, which can be inforced under Order XXIII, rule 3, even though he subsequently changed his mind. But the agreement itself says nothing about the suit being withdrawn, and on the contrary asks the Court to pass a decree according to the so-called 'compromise.' And, even supposing there was an agreement to withdraw the suit, this would be a matter falling under Order XXIII, rule 1, and not Order XXIII, rule 3, unless there was some definite compromise which could be embodied in the Court's decree. In this case, as already shown, there is no such compromise.

Accordingly we see no reason to interfere with the lower Court's order and dismiss the appeal with costs.

Appeal dismissed.

(1) 30 C. 218, 7 C. W. N. 180.
(2) 12 Ind. Cas 372; 26 M. 353; 10 M. L. T. 248; 21 M. L. J. 990; (1911) 2 M. W. N. 249.
(3) 1 Ind. Cas. 622; 33 B. 69; 10 Bom. L. R. 366.
(4) 19 Ind. Cas. 450; 6 S. L. R. 166.

KALIANBARTHI *v.* ROCHANBAI.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION APPLICATION No. 59 OF 1912.

August 3, 1914.

Present:—Mr. Crouch, A. J. C., and Mr. Boyd, A. J. C.

KALIANBARTHI—APPLICANT

versus

ROCHANBAI, *wife of* ISARBARTHI—OPPONENT.

Limitation Act (IX of 1908), Sch I, Art. 158—Application to set aside award—Commencement of period of limitation—Material irregularity—Erroneous decision on point of law.

The period of limitation prescribed by Article 158, Schedule I, of the Limitation Act, 1908, for an application to set aside an award commences to run from the date of submission of the award to the Court, and not from the date of service of the notice.

To give an erroneous decision on a point of law is not necessarily to act illegally or with material irregularity.

Mr. *Isardas Oodharam*, for the Applicant.

Mr. *Eupchand Bilaram*, for the Opponent.

JUDGMENT.—This application purports to be one to revise an order passed by Fawcett, Additional Judicial Commissioner, ordering an award to be filed. As a matter of fact, no such order was passed by the learned Judge, the procedure laid down by clause 16 of the second Schedule, Civil Procedure Code, having been strictly followed. Judgment was given in terms of the award and a decree followed thereon. Mr. Isardas who has appeared for applicant has argued the case as if it were one to revise an order refusing to set aside an award, and we will deal with it as such. Admittedly no appeal lies against such an order, but it is conceivable that there might be a case in which the High Court would be justified in interfering by way of revision and even setting aside the decree. We must, however, be convinced that the lower Court has acted in the exercise of its jurisdiction illegally, or with material irregularity. *Prima facie* there seems no case whatever for interference; the error, if there be any, was merely an erroneous decision on a point of law, but Judges have jurisdiction to decide wrongly as well as to decide rightly, and to do so is not necessarily to act illegally or with material irregularity; but we have been asked to give a decision on the point of law involved, as being one that frequently arises and on which this Court on its appellate side has not yet given a decision.

The order of reference was passed on the 16th March 1912 and the award was due on the 18th May. On the 15th May, the arbitrators applied for an extension, and the time for filing the award was extended to the 30th June. No notice was given of this extension to the other side; it is not the practice to give such notice. The award was filed in Court on the 30th June during vacation. Notice was ordered to be served on the parties and notice was served on applicant's Pleader on the 13th July. An application for a copy of the award was immediately put in and the copy was delivered on the 15th. The vacation ended on the 15th. On the 18th July, applicant filed what was in clear terms an application to set aside the award on the ground of the arbitrator's misconduct. As it was filed after the period of ten days limited by Article 158 of the Schedule to the Limitation Act, it was *prima facie* the duty of the Court to refuse it; the Court did so, holding it to be time-barred.

Mr. Isardas contends that Article 158, literally construed and strictly applied, operates so harshly and so unjustly that a more generous construction must be sought as the correct one. He points out that the Court is bound to give notice of the filing; such notice must be for the purpose of giving the parties opportunity to file objections; that if the 10 days expire before the notice is actually served, the very object of the notice is defeated; that if we read Article 158 of the Limitation Act with the provisions of clause 10 of the second Schedule, Civil Procedure Code, and construe them together as meaning that the period of 10 days is to run from the date of the notice being served, we get a reasonable and fair rule of law. This last contention receives support from a ruling by the Sind Sadar Court in 1897 [*Buli widow of Hasari* v. *Gianchand* (1)] and thus demands serious attention.

Under the provisions of the second Schedule, Civil Procedure Code, clauses 12-15, the Court has power:—

(1) (1897) Varialsing's Sind Sadar Court Reports 1.

(i) To modify or correct an award.
(ii) To pass orders as to costs.
(iii) To remit the award.
(iv) To set aside an award.

Now an award can be set aside only on the ground either of the corruption or misconduct of the arbitrator, as defined in clause 15 (1) (*a*) and (*c*), or that one of the parties has been guilty of specified acts of fraud. And it is clear from the terms of clause 16 that an award cannot be set aside unless an application be made that such be done; for, if the Court sees no cause to remit the award for re-consideration, and no application has been made to set it aside, or the Court has refused such application, then the Court shall, after the time for making such application has expired, proceed to pronounce judgment according to the award.

While thus the Court has power to modify or correct an award without any restriction as to time, it has no power to set aside an award unless a specific application has been put in within ten days of submitting the award. The words of Article 158 are clear and unmistakable. Even if we were to adopt Mr. Isardas' suggestion to its extreme and were to read the whole of clauses 10 and 16 of the second Schedule, Civil Procedure Code, with Article 158, even then it would, in my opinion, be equally clear that no application to set aside an award could be admitted after the expiration of ten days from the filing of the award.

If we trace back the history of the provisions, we find that there is no reason whatever to suppose that the Legislature has been guilty of saying something that it did not mean. The Indian rules as to arbitration have been copied closely from those obtaining in England; and under the English procedure a notice of motion to set aside an award must be given before the last day of the sittings next after the award has been made; whereas no time is prescribed within which an application to remit an award must be made.

The earliest provisions as to arbitration in India were contained in the Code of Civil Procedure Act VIII of 1859 and in sections 322, 323, 324, a distinction was drawn between modifying, correcting and remitting an award on the one hand, and setting it aside on the other. The second sentence of section 324 provides that "any application to set aside an award shall be made within ten days after the same has been submitted to the Court." Section 320 runs thus:—

"When an award in a suit shall be made either by the arbitrator or arbitrators, or by the umpire, it shall be submitted to the Court under the signature of the person or persons by whom it may be made, together with all proceedings, depositions and exhibits in the case."

By the Limitation Act IX of 1871, the second sentence in section 324 of Act VIII of 1859 was repealed and for it was substituted Article 155:

155. Under the Code of Civil Procedure to set aside an award.	Ten days.	When the award is submitted to the Court, and notice of the submission has been given to the persons and in manner prescribed by the High Court.

The last 19 words of the third column present some difficulty. It is evident that they referred to a special rule of one or more of the High Courts In a note to Article 158 in Starling's Limitation Act, 1877, there is a reference to an old rule, No. 155 of the Bombay High Court, whereunder either party might, on notice to the other, *submit* the award to a Judge in Chambers. Considerable difficulty arose in the application of this rule in view of Article 155 for "submitted to the Court" meant "handed in to the Registrar," while "notice of submission" had reference to a later proceeding before a Judge in Chambers. As the last 19 words of Article 155 were not repeated in Article 158 of the Limitation Act of 1877 and never had any application to Sind, it is unnecessary for us to attempt to discover what they meant.

Sections 516 and 522 of the Civil Procedure Code (Act X of 1877), which came into force on the 1st October 1877, run thus:—

"516. When an award in a suit has been made, the persons who made it shall sign it and cause it to be filed in Court, together with any depositions and documents which have been taken and proved before them; and notice of the filing shall be given to the parties."

"522. If the Court sees no cause to remit the award or any of the matters referred to arbitration for re-consideration in manner aforesaid, and if no application has been made to set aside the award, or if the Court has refused such application, the Court shall, after the time for making such application has expired, proceed to give judgment according to the award, etc., etc."

On the same date, the 1st October 1877, the Limitation Act XV of 1877 came into force and Article 158 was as follows:—

158. Under the Code of Civil Procedure to set aside an award (Civil Procedure Code, section 522.)	Ten days.	When the award is submitted to the Court.

Now to file a paper on the part of a party is to place it in the official custody of the Clerk of the Court. To file on the part of the clerk is to duly place among the records of the Court with all proper endorsements, entries in registers, etc. To "file an award" "to cause an award to be filed," "to submit an award to the Court" and "to present an award to the Court" are all synonymous terms. In the Indian Arbitration Act, the word "file" is used indifferently to mean either the act of the arbitrator or party or the act of the Court staff.

It would be difficult to devise expressions which would declare more clearly the intention of the Legislature that the period of limitation was to run from the date of submission of the award to the Court, and not from the date of service of the notice. The suggestion that the last 19 words of the old Article 155 were transferred to section 516, Civil Procedure Code, has no foundation. "Notice of the filing" in section 516 was quite different thing from "notice of the submission" in Article 155.

Nor has any case of "hardship" been made out. If parties choose to withdraw a suit from the Court and submit it to a private tribunal, they must be presumed to have satisfied themselves that the arbitrators selected are thoroughly trustworthy and that the other side can be relied on to conduct their case honourably and with reasonable expedition, though free from the discipline of the Court. The cases in which misconduct on the part of the arbitrator or of one of the parties such as to invalidate the award actually occurs, are in practice rare and it may be fairly assumed that when such misconduct occurs, the aggrieved party is stimulated to a high degree of watchfulness and no award can be filed without his being immediately aware of it. Where no such attitude of watchfulness is maintained, it may fairly be inferred that the grievance is merely technical. Section 18 of the Limitation Act adequately protects an aggrieved party from the fraudulent concealment of any misconduct entitling him to relief. But where there is no fraudulent concealment, *vigilantibus non dormientibus jura subveniunt.*

If we look at the matter from the point of view of the arbitrator, the limitation imposed appears wholly reasonable. It would be most unfair to the arbitrator, and most inexpedient in the interests of arbitration, to expose an arbitrator to the risk of being called on to answer to a charge of misconduct, which may seriously affect his reputation as a competent and honourable man of business, weeks or perhaps months after he had destroyed his notes and dismissed the matter from his memory, by leaving the period of limitation extensible indefinitely by the slackness of one party or the deliberate evasion of service by the other. If a charge is to be brought at all, it must be brought with the utmost promptness: the period of limitation of the arbitrator's liability must be absolutely definite and brief.

As no case has been made out for our interference by way of revision, we dismiss the application with costs.

Application dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1640 OF 1911.

April 29, 1914.

Present:—Mr. Justice Holmwood and Mr. Justice Chapman.

ARABAR RAHAMAN—DEFENDANT—APPELLANT

versus

ISMAIL EBRAHIM AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872), s 107—Contract to par

ARABAR RAHAMAN v. ISMAIL IBRAHIM.

chase goods—Failure to take delivery—Breach of contract—Re-sale—Ascertainment of goods—Damages, principle of assessing—Pleadings in mofussil—Practice.

The High Court sitting in second appeal and dealing with pleadings in the *mofussil* will not be so strict as it would be in cases from the original side of the High Court

Angullia v. *Sassoon & Co*, 13 Ind. Cas. 705; 39 C. 568; 16 C. W. N. 593, referred to.

The defendant at Chittagong agreed by a written contract to purchase from the plaintiffs a certain quantity of Cocoanada chillies Ex. *S.S. Lawada* at a specified rate. The contract, after reciting the terms for payment of price, provided that on failure to fulfil the above terms, the difference of market-value would be recoverable by the sellers on a week's notice. There was a note also to the effect that re-sale was to be at the option of the sellers. The chillies arrived at Chittagong on the steamer *Kotaria*, having been transhipped at Calcutta from the steamer *Lawada*. The defendant was given notice to take delivery, which he failed to do. The plaintiffs sued for damages for breach of contract:

Held (1) that section 107 of the Contract Act applied;

(2) that the plaintiffs acquired their right of re-sale by the contract itself and, therefore, had no need to invoke section 107;

(3) that the principle of assessing damages laid down by section 107 and by the Allahabad High Court in *Prag Narain* v. *Mul Chand*, 19 A. 535 at p. 541, must be kept in view in this case;

(4) that the fact that the quantity of chillies brought to Chittagong formed part of a large consignment of chillies Ex. *S.S. Lawada*, did not affect the quantity which reached Chittagong, Ex. *S.S. Lawada* on another steamer and which, the notices said, was set apart and appropriated to the defendant's use

Appeal against the decree of the District Judge, Chittagong, dated 22nd March 1911, affirming that of the Sub-Judge, second Court, Chittagong, dated 31st August 1910.

FACTS.—The material facts of the case were these: The defendant in suit by a written contract, dated 14th July 1909, bought 302 maunds of Cocoanada chillies at Rs. 17-4 per maund from the plaintiffs. The contract was in this form:—

AGREEMENT.

Dated Chittagong, 14th July 1909.

Sellers.—Ebrahim Soleman Salehji and Company.

Buyers.—Kaji Arabar Rahaman and Company of Feni.

Goods.—Cocoanada chillies Ex. *S.S.* Lawada, voyage 160.

Quantity.—(302) three hundred and two maunds.

Rate.—Rs. 17-4. Rupees seventeen, annas four only per maund.

Earnest money—(if any)—Rs. 302, three hundred and two only.

TERMS.

1. Goods deliverable Ex—godown within 2 days from steamer's arrival at Chittagong.

2. Price to be paid before delivery in all cases in cash. In special cases of credit, the price to bear interest at...per month.

3. On failure to fulfil the above terms, difference of market value to be recoverable by the sellers on a week's notice.

N. B.—Re-sale to be at the option of the sellers.

On 19th July chillies arrived at Chittagong on the steamer Katoria having been transhipped at Calcutta from the steamer Lawada. On 21st July the plaintiffs sent a letter to the defendant stating "that chillies you purchased from us arrived here per *S.S.* Katoria, voyage 284," and asking him to take delivery.

The defendant did not take delivery and the plaintiffs instituted this suit to recover damages for breach of contract.

Both the Courts below decreed the plaintiffs' suit in a modified form and the defendant appealed to the High Court. On the hearing of this appeal, it was pressed on the Court that the plaintiffs should have been held bound to their allegations made in the plaint and not allowed a decree on their right of re-sale as contained in the contract above set forth. This point was not taken in any of the grounds of appeal on behalf of the defendant-appellant and was the occasion for the first observation made by the Court in the course of their judgment.

Babu *Ramdayal De*, for the Appellant.

Babu *Probodh Kumar Das*, for the Respondent.

JUDGMENT.—This is an appeal from the judgment and decree of the learned District Judge of Chittagong who, agreeing with the Court of first instance, has held that the defendant is liable to pay to the plaintiffs Rs. 450 as damages for breach of contract. He also dismissed the plaintiffs' cross-appeal in respect of the set-off of Rs. 302 but about this there is no further appeal here.

The contract on which the suit is based appears at page 14 of the paper-book, and

the questions which arise upon that contract are, *firstly*, whether upon the plaint the plaintiffs are entitled to ask for any relief except that by re-sale. Many other questions have been raised by the learned Vakil who has appeared for the appellant, some of which do not appear in his grounds of appeal.

It is sufficient for us to say, in the first place, that we cannot be so strict sitting here in second appeal and dealing with pleadings in the *moffusil* as the learned Judges in the case cited in *Angulia* v. *Sassoon & Co.* (1) held it their duty to be in a case from the original side of this Court. But the plaint was apparently based on the right of re-sale and the plaintiffs are entitled to compensation on the same principles as it was given in the case of *Prag Narain* v. *Mul Chand* (2).

With reference to the other contentions we will briefly give our opinion. We find that section 107 applies to this case. We think that the plaintiffs did not rescind the contract by the notices, Exhibit 4 and Exhibit 26. No doubt, as was held by the Full Bench in the case of *Moll Schutte & Co.* v. *Luchmi Chand* (3), the plaintiffs acquired their right of re-sale by the contract itself and, therefore, had no need to invoke section 107. But the principle of assessing damage laid down by that section and by the Allahabad Court in the case we have above referred to must be kept in view in this case, as the lower Courts have not imposed the full penalty prescribed by the contract, but going on the principles of equity have fixed as the reasonable date a date earlier than that on which the plaintiffs actually re-sold the goods.

It is sought to bring this case within the rule in *Angulia* v. *Sassoon & Co.* (1). But apart from what we have alreadyheld as to pleadings in the *moffussil*, we are unable to hold on the materials before us that the goods were not ascertained or set apart for the defendant's use. The fact that 302 maunds of chillies originally formed part of a larger consignment of chillies Ex. steamship Lawada does not affect the 302 maunds which reached Chittagong Ex. steamship Lawada on another steamer and which the notices say were set apart and appropriated to the defendant's use. The learned Judge in the lower Appellate Court found this on the facts of the case. He says: "Exhibit 3" (which is not before us), "clearly specified that the chillies purchased by the defendant had arrived, and I think that this was a sufficient notice to the defendant of their arrival," and we may add of their being at his disposal. The grounds of appeal do not in any way raise this question of ascertained goods, and as it is a question which depends largely on facts and was dealt with as we have seen in the lower Appellate Court, we cannot take it any further than we have indicated.

The difference in the identity of the steamer, on which such stress is laid in the written statement and in the grounds of appeal is wholly irrelevant, and we are glad to find that during the very prolonged course of argument this point has not been pressed upon us. The chillies were those shipped in the Lawada, and the particular parcel was transhipped to the steamship Katoria for conveyance to the plaintiffs in Chittagong. We think that the case has been dealt with according to law in the lower Court and a just and proper decision has been arrived at.

Damages have been fixed on the ascertained fall of price as shown by the notice of the 19th August. This is a concession to the defendant against which no cross-objection has been taken.

As regards the order to set-off one decree against the other, we can find no authority that this cannot be done. It is perhaps irregular and should have been left to subsequent execution. But this is a matter of form and not a matter of substance. The appellant can gain no possible advantage, as under Order XXI, rule 18, he is precluded from executing his smaller decree in face of the plaintiff's larger decree and he can only set it off. Then the executing Courts are admittedly the same and the decreeing Courts are only technically different by reason of section 33 of the Small Cause Courts Act, and there is indication in several Bombay rulings that the Small Cause Court would have had jurisdiction to deal with a claim of set-off beyond its own pecuniary jurisdiction.

(1) 13 Ind. Cas. 705; 39 C. 568; 16 C. W. N. 593.
(2) 19 A. 535 at p. 541; A. W. N. (1897) 150.
(3) 25 C. 505, 2 C. W. N. 283.

As regards the alleged error in the decree for costs, the facts are not clearly stated either in the printed book or by the learned Vakil who argued this appeal. We leave it to the lower Court to look into the matter and settle it.

The appeal is dismissed with costs. We assess the hearing fee at two gold *mohurs*.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 7 OF 1914.

October 26, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

THE CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA, THROUGH ITS AGENT, T. A. R. C. T. ARUNACHALAM CHETTY—COUNTER-PETITIONER—DECREE-HOLDER—APPELLANT

versus

K. P. VELLAIAPPA CHETTY AND OTHERS—PETITIONERS—RESPONDENTS.

Hindu Law—Nattukkottai Chetties—Family property and trade assets, whether distinct.

In the case of Nattukkottai Chetties, their family property should be treated as trade assets, and no distinction should be made between the family property and the trade assets.

Appeal from an order of the Court of the Subordinate Judge of Ramnad, at Madura, dated the 8th December 1913, in Execution Application No. 892 of 1913, in Execution Petition No. 95 of 1913 (in Civil Suit No. 154 of 1911 on the file of the Chief Court of Lower Burma).

Messrs. *K. Srinivasa Aiyangar* and *A. Krishnaswami Aiyar*, for the Appellant.

Mr. *N. Ramachandra Aiyar*, for the Respondent.

JUDGMENT.—The Subordinate Judge's order cannot be supported. Rule 50 of the Order XXI of the Code of Civil Procedure relied on by the Subordinate Judge has no application, as no property of the minor defendants not involved in the family trade was sought to be attached or sold.

As regards the contention (accepted by the learned Subordinate Judge) that the family property in Pallateen must be proved to be the assets of the Rangoon Firm (which is not different from the family Firm known as K. P. Firm, it being only a branch of the K. P. Firm), we follow the rulings in *Chidambaram Chetty* v. *Ramasami Chettiar* (1) and Appeal Suit No. 169 of 1913 that "in the case of Nathukottai Chetties, their family property should be treated as trade assets" and that no distinction should be made between the family property and the trade assets.

The Subordinate Judge's order is set aside and the Petition No. 892 of 1913 in Execution Application No. 95 of 1913 will stand dismissed with costs in this and in the lower Court, the attachment order being revived.

The execution proceedings are transferred to the file of the temporary Subordinate Judge of Sivaganga.

Order set aside.

(1) 26 Ind. Cas. 911; 27 M. L. J. 631.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 245 OF 1913.

July 3, 1914.

Present:—Mr. Kanhaiya Lal, A. J. C.

Musammat VISHUNATH KUAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

Thakur GAURI SHANKAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Occupancy right, relinquishment of, by ex-proprietor—Agreement, voluntary, validity of—Ex-proprietary tenancy converted by ex-proprietor into rent-free holding for life—Ejectment—Trespasser—Jurisdiction of Civil Court—Oudh Rent Act (XXII of 1886), s. 7 A, cl. (4).

A voluntary agreement entered into by an ex-proprietor before the enactment of section 7A of the Oudh Rent Act, to relinquish his occupancy rights arising in respect of his *sir* land in consideration of his holding that land rent-free for his life-time, cannot be regarded as invalid or forbidden by law. The successors-in-interest of the ex-proprietor taking possession of the land after his death are liable to ejectment as trespassers through the Civil Court.

Gaya Singh v. *Udit Singh*, 13 A. 396; A. W. N. (1891) 140; *Binda Prasad* v. *Rajendra Prasad*, 10 O. C. 235, *Mithan Kunwar* v. *Musammat Bahsa*, 11 O. C. 345; *Hirday Behari* v. *Prag Tiwari*, 11 Ind. Cas. 527; 14 O. C. 144; *Bhikham* v. *Ghasi Ram*, 10 O. C. 248; and *Raghubans Sahai* v. *Brijnandan Lal*, 1 Ind. Cas. 731; 6 A. L. J. 477, referred to.

Appeal from the decree of the District Judge, Hardoi, dated 25th March 1913, modifying the order of the Subordinate Judge, Unao, dated 27th June 1912.

VISHUNATH KUAR v. GAURI SHANKAR.

Babu *Puttoo Lal*, for the Appellants.
Mirza *Sami Ullah Beg*, for the Respondents.

JUDGMENT.—Gaya Bakhsh was the owner of a 6-*biswas* share in several villages. His shares in villages Parsanda and Mahauna were sold by auction in execution of a decree and were purchased by Raghubar Sahai and Dwarka Prasad respectively. At the time of the auction-sale he was holding some *sir* land in the said villages, in regard to which he entered into an agreement with the auction-purchasers on the 16th Janurry 1899, whereby he limited his possession and enjoyment of the said land to his life-time and agreed that it would revert after his death to the auction-purchasers in consideration of the purchasers allowing him to hold the same rent-free for his life. His shares in the other villages were sold by him to Sheodat Singh on the 13th January 1897. In regard to the *sir* plots standing in those villages, a similar agreement was executed on the 16th January 1897 whereby Gaya Bakhsh was allowed to hold the same free of rent for his life. Gaya Bakhsh died in March 1910 leaving a nephew Brij Bhukhan Ram. The present suit was filed by the plaintiffs, who are the successors-in-interest of Raghubar Sahai, Dwarka Prasad and Sheodat Singh, for possession of the land granted rent-free to Gaya Bakhsh for his lifetime and for damages, on the allegation that Brij Bhukhan had no right to retain possession of the same. The validity of the above agreements forms one of the important questions at issue in this case.

The sale took place when section 25 of the Oudh Laws Act was in force, by which a right of occupancy was granted to an ex-proprietor in respect of so much of the land in his cultivating occupancy at the time of the sale as the Deputy Commissioner might determine, subject to the payment of rent for land so determined at the rate fixed by the Deputy Commissioner under the provisions of the Oudh Rent Act. The section did not contain any prohibition against alienation, transfer, or relinquishment of the right of occupancy. But by section 5 of the Oudh Rent Act it was provided that tenants who had lost all proprietary right, whether superior or subordinate, in the lands which they held or cultivated within 30 years next before the thirteenth day of February 1856, would be deemed to possess a heritable, but not a transferable, right of occupancy in the land so held or cultivated on the 24th day of August 1886. Nothing contained in that section, however, affected the terms of an agreement in writing entered into between the landlord and the tenant after the date on which the first Oudh Rent Act (XIX of 1868) came into force. There was no provision at that time in the Oudh Rent Act that a tenant with a right of occupancy of the kind created by section 25 of the Oudh Laws Act was subject to the same disability as that imposed on certain classes of tenants having a right of occupancy under section 5 of the Oudh Rent Act. Section 7A of the Act was added by section 2 of Act IV of 1901 to make it clear that a tenant with a right of occupancy of the kind referred to in section 25 of the Oudh Laws Act was subject to the same disability as tenants having rights of occupancy under section 5 of the Oudh Rent Act. An agreement entered into between Gaya Bakhsh and the predecessors-in-interest of the plaintiffs prior to the enactment of section 7A, clause (4), of the Oudh Rent Act cannot, therefore, be regarded as invalid or forbidden by law. A voluntary relinquishment by an ex-proprietary tenant of his right of occupancy in favour of the landlord or the sale of an occupancy tenure by a tenant in favour of his landlord has been held to be vaild and not forbidden by law—*Gaya Singh* v. *Udit Singh* (1), *Binda Prasad* v. *Rajendra Prasad* (2), *Mithan Kunwar* v. *Musammat Behsa* (3), and *Hirday Behari* v. *Prag Tiwari* (4)—though a suit to enforce such an agreement to relinquish or sell may not be maintainable.—*Bhikham* v. *Ghasi Ram* (5), and *Raghubans Sahai* v. *Brijnandan Lal* (6).

In this case Gaya Bakhsh voluntarily relinquished his ex-proprietary rights on the date of the agreement and converted himself into a rent-free grantee, holding for his life under the terms of the agreement. The defendant-appellant, *Musammat* Vishunath Kuar, and her son, Brij Bhukhan, who died during the pendency of the suit, had no right to take possession of the land after the death

(1) 13 A. 396, A. W. N. (1891) 140.
(2) 10 O. C. 235.
(3) 11 O. C. 345.
(4) 11 Ind. Cas. 527; 14 O. C. 144.
(5) 10 O. C. 243.
(6) 1 Ind. Cas. 731; 6 A. L. J. 477.

of Gaya Bakhsh Singh and must, therefore, be treated as trespassers liable to ejectment through the Civil Court. The other defendants denied that they were in possession of the property in dispute and also opposed the plaintiffs' claim on the grounds urged by Brij Bhukhan. It is admitted that the names of the other defendants are not entered in the revenue papers in respect of the land in suit and it is not shown that they are colluding with Brij Bhukhan and are in possession of the land on his behalf. They cannot, therefore, be made liable for damages or costs.

The appeal of appellants Nos. 2, 3 and 4 is allowed in so far that they will be exempted from the decree. The appeal of appellant No. 1 is dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

PRIVY COUNCIL APPLICATION No. 28 OF 1913.

December 5, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

MOHAMAD WALI KHAN—PLAINTIFF—APPLICANT

versus

MOHAMAD MOHIUDDIN KHAN—AND OTHERS—DEFENDANTS—RESPONDENTS.

Appeal to Privy Council—Connected appeals—One appeal allowed, another dismissed—Leave to appeal granted in appeal which was allowed—Other appeal, whether fit case for leave to appeal to be granted.

Two connected first appeals arising out of the same suit were disposed of by the High Court. In one of the appeals the High Court confirmed the decision of the lower Court and in the other reversed it. The same question was involved in both the appeals. Leave for appeal to the Privy Council was given in the one in which the High Court had reversed the judgment of the Court below.

Held, that under the circumstances the other case also was a fit one for appeal to His Majesty in Council.

Application for leave to appeal to His Majesty in Council.

FACTS of the case appear fully from the judgment.

Mr. *Abdur Raoof*, for the Applicant:—The connected Appeal No. 29 of 1913 raises the same grounds as this appeal. We are entitled to get a certificate in it as it satisfies the requirements of section 110, Civil Procedure Code. In this appeal, although this Court upheld the decree of the lower Court, a questions of law is involved. This Court in effect decided that we are estopped from raising certain question on account of an award as regards other properties, and I submit that we are thus entitled to appeal.

[RICHARDS, C. J.—It is not enough that the question should be one of law, it is necessary that it must be a substantial question of law.]

Moreover, as we are entitled to appeal in the connected appeal, which is based on the same grounds and in which the same questions will have to be decided, we should be allowed to appeal in this matter also.

Order XLV, rule 4, Civil Procedure Code, indicates the general policy of the law. There two suits are allowed to be consolidated for the purposes of appeal if the decision in the two suits is based on the same grounds and raises practically the same questions. Our case is stronger. The appeals in this Court arose out of the same suit and our appeals to the Privy Council raise substantially the same questions in both. The result of not allowing us to appeal in one case will be that on practically the same matters there may be two conflicting decisions one of the Privy Council and one of this Hon'ble Court.

Dr. *Sunder Lal* (with him Dr. *Tej Bahadur Sapru*), for the Respondents:—In order to entitle the appellant to appeal to the Privy Council, the requirements of section 110, Civil Procedure Code, must be fulfilled. There must be some substantial question of law involved in this appeal, as this Court affirmed the lower Court's decree. The Privy Council may give special leave to appeal, as it is not bound by any such rules, but the powers of this Court as regards certifying are limited to the powers conferred by section 110, Civil Procedure Code.

[RICHARDS, C. J.—Are we not empowered under Order XLV, rule 8, taken together with section 109, clause (c), to certify in cases like the present?]

The scope under which leave to appeal can be granted was indicated by the Privy Council in *Motichand* v. *Ganga Pershad Singh* (1). They held that there must be some question of public importance or substantial question

(1) 24 A. 174; 4 Bom. L. R. 159; 6 C. W. N. 362; 29, I. A. 40 (P. C.).

of law involved. I submit that the same test should be applied here.

JUDGMENT.—The value of the subject-matter of the suit out of which this appeal arises and of the proposed appeal to His Majesty in Council exceeds Rs. 10,000, but this Court affirmed the decree of the Court of first instance. We have, therefore, to see whether the case fulfills the requirements of section 110 of the Code of Civil Procedure, or is otherwise a fit one for appeal to His Majesty in Council.

The question which is involved in appeal No. 29 is involved in the proposed appeal. Both appeals arise out of the same suit. To a large extent at least the decree of this Court will be wrong in the event of their Lordships of the Privy Council differing from the view taken by this Court in Appeal No. 29. We think, therefore, under the special circumstances of this case that we are justified in certifying that the case is "otherwise a fit one for appeal to His Majesty in Council," and we so certify.

Leave granted.

MADRAS HIGH COURT.

APPEALS NOS. 216 AND 217 OF 1911.

October 6, 1911.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Spencer.

IN No. 216 OF 1911

M. R. RY. UMADE RAJAH RAJE DAMARA KUMARA CHINNA VENKATAPPA NAYANIM BAHADUR VARU—PLAINTIFF—APPELLANT

versus

M. R. RY. UMADE RAJAH RAJE DAMARA KUMARA THIMMA NAYANIM BAHADUR VARU AND OTHERS—DEFENDANTS—RESPONDENTS

AND

IN No. 217 OF 1911

M. R. RY. UMADE RAJAH RAJE DAMARA KUMARA SESHACHALAPATHI NAYANIM BAHADUR VARU, DIED, AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

M. R. RY. UMADE RAJAH RAJE DAMARA KUMARA THIMMA NAYANIM BAHADUR VARU AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Maintenance, agreement embodied in decree or order, effect of—Compromise affecting immoveable property neither registered nor incorporated in decree, value of—Agreement creating future interest in favour of unborn persons, whether valid

A compromise affecting immoveable property cannot be given effect to, if it is neither registered nor incorporated in a decree or order of a Court.

An amount provided as maintenance for a member of a family does not lose its character of being increased or decreased under a change of circumstances as a maintenance allowance by being embodied in an instrument or a decree.

Ravula Parti Cholamanna v. *Ravula Parti Rama Row*, 12 Ind. Cas 317; 10 M. L. T. 232, 21 M. L. J. 870, (1911) 2 M. W. N. 265, 36 M. 46; *Gopikabai* v. *Dattatraya*, 24 B. 386, 2 Bom. L. R. 191, *Subramaniam Pattar* v. *Vembammal*, 14 M. L. J. 339; *Maharajah Gness Chand Roy* v. *Sambhoo Chand Roy*, 5 W. R. 98 (P. C.), referred to.

An agreement which creates a future interest in immoveable property in favour of persons unborn, imposes a restraint upon alienation contrary to the principles of Hindu Law and is, therefore, invalid

Chandi Churn Barua v. *Sidheswari Debi*, 16 C. 71; 15 I. A. 149, followed.

Appeals against the decrees of the Court of the Temporary Subordinate Judge of North Arcot, in Original Suits Nos. 17 and 9 of 1910, respectively.

Mr. *S. Srinivasa Aiyangar*, for the Appellants.

Messrs. *L. A. Govindaraghava Aiyar*, *T. Narasimha Iyengar*, *T. V. Muthukrishna Aiyar*, *K. Bashyam Aiyangar*, *G. Venkataramayya*, *Venkata Subha Rao*, *Radhakrishna Iyer*, *P. Venkatrama Rao*, *S. Varadachariar*, for the Respondents.

JUDGMENT.

SPENCER, J.—The first defendant in these suits is the present *zemindar* of Kalahasti, an impartible estate. The 1st plaintiff in Original Suit No. 9 of 1910 and the sole plaintiff in Original Suit No. 17 of 1910 are brothers of the 1st defendant. The 2nd plaintiff in Original Suit No. 9 of 1910 is the minor adopted son of the 1st plaintiff. They brought these suits for a declaration of their rights to maintenance at the rate of Rs. 650 per mensem and for recovery of the same with arrears and interest as a charge upon the estate. They also claimed priority over the mortgage rights of certain mortgagees, who where made parties to the suit, and thus raised questions which need not now be considered as they are not pressed in these appeals. The 1st defendant acknowledged that the plaintiffs were entitled to be maintained out of the estate; but pleaded that the financial condition of the estate was such that he could not afford to give his brothers more than Rs. 400 per mensem, which was in

fact the amount that they were receiving during the period when the estate was under the management of the Court of Wards. The lower Court gave the plaintiffs a decree for Rs. 400 per mensem during their joint and several lives for the maintenance of their branches of the family and directed that the sums due on account of past and future maintenance at this rate should be recoverable as a charge upon the estate. From this the plaintiffs appeal on the ground that the amount awarded should not have been less than Rs. 650.

The position taken for the appellants is this. The present 1st defendant brought a suit, Original Suit No. 12 of 1890, for partition against the then *zemindar* Muthu Venkatappa, to which all the brothers were made parties. It ended in a compromise in which the estate was declared to be impartible and the succession to it was declared to be governed by rules of primogeniture. Simultaneously it was agreed that the *zemindar's* brothers, including the present plaintiffs and the 1st defendant, and their male descendants should be entitled to a maintenance allowance from the income of the estate of Rs. 600 per mensem for the first ten years and of Rs. 700 per mensem thereafter. The District Court passed a decree in terms of the compromise, but on appeal the High Court held in *Venkatappa Nayanim* v. *Thimma Nayanim*(1) that the stipulations which were outside the scope of the suit should not have been embodied in the decree, and these included the stipulations as to allowances, so they were excluded.

After the death of Muthu Venkatappa, Akkappa succeeded to the *zemindari* and during his time two of the brothers of Muthu Venkatappa *viz.*, the present 4th defendant and the father of the 6th defendant, brought suits against Akkappa in respect of their maintenance allowances and obtained consent decrees for Rs. 650 per mensem. The other brothers, *viz.*, the 1st plaintiff in Original Suit No. 9 of 1910 and the plaintiff in Original Suit No. 17 of 1910 and the present *zemindar*, got registered agreements executed (Exhibits A, C and I) with Akkappa in similar terms of Rs. 650 per mensem. On the death of Akkappa the 1st defendant became *zemindar*.

(1) 18 M. 410.

Now it is urged that the appellants have by virtue of Exhibits A and C, become creditors of the estate and not mere maintenance holders, that the agreements are binding on all the successors of the *zemindar* who executed them and that, therefore, no less sum than what was agreed upon therein can now be given as maintenance. Further it is argued that the compromise, having been entered into as a settlement of certain claims to portions of the estate, is binding on all who took part in it and their representatives, and creates vested rights in favour of those whose rights are declared in it.

Lastly, it is contended on the evidence that the amount claimed was not excessive and that the estate could well afford it.

On the last point I agree with the Subordinate Judge's opinion that nothing more than Rs. 400 is proper and reasonable for the reasons given in paragraph 10 of his judgment.

As for the other points now taken in the appeals, it is noticeable that Exhibit A, though purporting to have been executed in pursuance of the *rasinamah* in Original Suit No. 12 of 1890, contains terms very different from the compromise petition (Exhibit D). Not only is the amount of maintenance different in the two documents, as I have already stated, but the periodical instalments in which payments are to be made are different, and Exhibit D states the source to be the income of the *zemindari* whereas Exhibits A and C provide for recovery of the allowance from the estate as well as its incomes. Exhibits A and C are three years later than Exhibit D.

It is thus impossible to treat Exhibits A and C as having the same force and binding character as a decree in a suit terminating litigation and compromising a *bona fide* claim to property. Nor can the appellants rely on those terms of the compromise (Exhibit D) which have not passed into a decree or order of Court so far as they affect the immoveable property comprised in the document, as the agreement of compromise was not registered (Vide *Ravula Parti Chelamanna* v. *Ravula Parti Rama Row*(2). Exhibits A and C are registeredand purport to be

(2) 12 Ind. Cas. 317; 36 M. 46; 10 M. L. T. 232; 21 M. L. J. 870; (1911) 2 M. W. N. 265.

agreements relating to the payment of maintenance allowances, as is distinctly stated in the first clause of the documents.

An amount provided as maintenance for a member of a family does not lose its character as a maintenance allowance by being embodied in an instrument or decree, the character, I mean, of being liable to be increased or decreased under a change of circumstances [Vide *Gopikabai* v. *Dattatraya* (3), *Subramaniam Pattar* v. *Vembammal* (4), and *Maharajah Grees Chund Roy* v. *Sambhoo-Chand Roy*(5)]. For these reasons alone I consider that the Subordinate Judge had power to direct the 1st defendant to pay maintenance at a lower rate than Rs. 650. But as reliance is placed on the binding character of the registered documents under which it is claimed that plaintiffs and their male heirs have acquired a right to an hereditary annuity for all time, I may observe that in so far as Exhibits A and C provide that Seshachalapati and Venkatappa and their male descendants have a vested right to recover the fixed allowances through the present *zemindar* and after him through the rightful owners of the *zemindari* or their heirs, assignees, executors, administrators, trustees, etc., from the estate and its incomes by declaring a recurring charge on the Kalahasti estate, these documents create a future interest in immoveable property in favour of persons unborn, and thus impose a restraint upon alienation which is contrary to the principles of Hindu Law. In excluding females and collaterals they provide for a line of succession not according to law, and they are, therefore, invalid. [*vide* Mukhopadhyay's Law of Perpetuities in British India, pp. 123 to 128 and the Privy Council decision in *Chandi Churn Barua* v. *Sidheswari Debi* (6)].

I would, therefore, dismiss these appeals with costs.

The 3rd respondent in Appeal No. 216, who got a consent decree in Original Suit No. 33 of 1895 (Exhibit E) on 22nd April 1896 for maintenance allowance of Rs. 650 per mensem, has filed a memorandum of objections claiming priority over the appellant's right, on the ground of his decree being prior in point of time to Exhibit C which is dated 17th November 1896.

In these suits it is unnecessary to determine questions of priority between the various maintenance holders *inter se*, seeing that their right to receive maintenance rests in the first instance not on their decrees or agreements but on their relationship to the owner of the *zemindari*.

The objection memorandum in Appeal No. 216 of 1911 is for this reason dismissed with costs. That in Appeal No. 217 is out of time and is also dismissed with costs.

SANKARAN NAIR, J.—I agree. I think that considering the income of the *zemindari*, Rs. 400 is a fair rate of maintenance.

The terms of the compromise in Original Suit No. 12 of 1890 relating to maintenance were not embodied in the decree. It is not those terms that are now sought to be enforced. The subsequent registered agreement of 1896 is so, far as the rate is concerned, only binding on the *zemindar* who executed it. It is not shown that it was executed under the circumstances which would make it binding on the succeeding *zemindars* who take the property in their own right.

It was not contended, nor could it be successfully contended, that the maintenance formed such a charge on the *zemindari* as would preclude the *zemindar* for the time being from alienating portions of it for necessary purposes. It would be unreasonable to hold in the circumstances that the maintenance is a fixed unvarying amount.

Appeals dismissed.

(3) 24 B. 386, 2 Bom. L. R. 191.
(4) 14 M. L. J. 339.
(5) 5 W. R. 98 (P. C.).
(6) 16 C. 71; 15 I. A. 149.

PUNJAB CHIEF COURT.

FIRST CIVIL MISCELLANEOUS APPEAL No. 775 OF 1913.

June 18, 1914.

Present:—Sir Alfred Kensington, KT., Chief Judge.

LAL SINGH AND ANOTHER—OBJECTORS—APPELLANTS

versus

SHAM LAL AND ANOTHER—RESPONDENTS.

—Guardians and Wards Act (VIII of 1890), s. 24—Marriage of minors—Court's duty.

TULSHA DEI v. MAHABIR.

It is no part of a Court's duty under the Guardians and Wards Act to assume direct responsibility for the marriage of a minor of whose person a guardian has been appointed. It would be better if the Court simply declines to either sanction or prohibit the marriage of the minor to a particular person and leaves the parties concerned to settle their disputes among themselves.

Miscellaneous first appeal from the decree of the District Judge, Gurgaon, dated the 18th of March 1913.

Lala *Duni Chand*, for the Respondents.

JUDGMENT.—The facts of this curious dispute are as follow. Rattan Lal Bania died in 1911, leaving a daughter named Chambeli, aged about 16. Sham Lal, brother-in-law of Rattan Lal, applied to be made guardian of her person and was so appointed on 10th October 1912, this Court declining to interfere on 3rd December 1912.

In the meanwhile one Lal Singh, now appellant, came on the scene, alleging that Rattan Lal had betrothed Chambeli to his son some three years before, while Sham Lal wished her to marry a man named Ghisa, who appears to be aged 23 (not 36 as stated in the present appeal). The Court did not go into the question of the previous betrothal, but after getting Ghisa medically examined had up all the parties, Chambeli included, on the 18th March 1913 and allowed her to make her choice. She selected Ghisa, and the Court thereon sanctioned marriage to him, while to satisfy Lal Singh Rs. 125 was deposited in Court by Sham Lal, as being the sum which Lal Singh said he had expended on betrothal ceremonies. The order as to this sum was that Lal Singh could draw it for himself at any time up to a year.

Lal Singh, not unnaturally, appealed against this very summary order of 18th March 1913, and on the 15th May this Court prohibited marriage to Ghisa till further orders. It now transpires that Chambeli had been in fact married to Ghisa on 27th April 1913. She has been since living with Ghisa and, it is said, with the usual result, though this cannot be verified.

The District Judge evidently acted in good faith for what he considered to be the best interests of the girl, but it is no part of a Court's duty under the Guardians and Wards Act to assume direct responsibility of the kind, and it would have been better if the District Judge had simply declined to either sanction or prohibit the marriage to Ghisa, leaving the parties concerned to settle their dispute among themselves. Reference may be made to section 24 of the Act and to the ruling in *Bai Diwali* v. *Moti Karson* (1).

However now that the marriage has taken place I decline to still further complicate matters by interference, and the appeal is accordingly rejected. If the sum of Rs. 125 is still in deposit in Court, I think that the District Judge should make it over to Lal Singh, notwithstanding the fact that the prescribed limit of a year has been exceeded. Lal Singh obviously could not prejudice his claim in appeal by applying for the money till that appeal was decided.

With that explanation I leave the lower Court to dispose of the Rs. 125 at its discretion. The appeal is dismissed. No order as to costs.

Appeal dismissed.

(1) 22 B. 509.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 18 OF 1913-14 OF BARA BANKI DISTRICT.

April 16, 1914.

Present:—Sir Duncan Colvin Baillie, S. M.

Rani TULSHA DEI—DEFENDANT—APPELLANT

versus

MAHABIR—PLAINTIFF—RESPONDENT.

Estoppel—Holdings, separate, treated as one—Landlord, action of—Ejectment, notice of, cannot be for part of holding.

Where a landlord has once treated the separate holdings of a tenant as one, by including all of them in one and the same suit for arrears of rent, he is estopped from subsequently issuing a notice of ejectment in respect of some only of those holdings.

In Oudh a notice of ejectment cannot be for a part of a holding.

Karamat Ali v *Bihari Lal*, 1 Select Decision 1887, distinguished from.

Appeal from the decree of the Officiating Commissioner, Fyzabad, dated 14th October 1913, reversing the order of the Assistant Collector, Bara Banki, dated 29th April 1913.

FACTS.—The plaintiff tenant had been holding plot No. 570 since 1305 *Fasli* at a certain specified amount of rent, and in 1311

Fasli he took from the defendant landlord another plot, No. 623, under a separate agreement. Subsequently the landlord treated the two plots as one holding by instituting a single suit for arrears of rent due in respect of both the plots and by filing a single application under section 61 of the Oudh Rent Act for ejectment of the tenant from both the plots. The tenant, however, satisfied the decree passed against him for arrear of rent and continued to occupy the two plots. The landlord then issued against the tenant a notice of ejectment for 1321 *Fasli* in respect of plot No. 570 only. The tenant contested the notice, on the ground that it was invalid inasmuch as it was only for a part of his holding. The Court of first instance upheld the notice, while the Commissioner on appeal cancelled it, on the ground that the landlord was by his own action estopped from pleading that the two plots constituted two separate holdings. The matter came up for decision in appeal before the Board of Revenue.

Mr. *A. P. Sen*, for the Appellant.

Babu *Hem Chandra Sen*, for the Respondent.

JUDGMENT.—I see no reason to disagree with the Commissioner. The appellant clearly treated the two fields as one holding when he sued for the rent of both in a lump sum setting off collections against the total demand. It is accepted law in Oudh that the notice cannot be for a part of a holding. Selected Decision, File No. 1552 of 1886 [*Karamat Ali* v. *Bihari Lal* (1)], does not apply to Oudh law under which the addition of a field to a holding gives a new period.

The appeal is dismissed with costs on appellant.

Appeal dismissed.

(1) 1 Select Decision 1887.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1693 OF 1913.

November 16, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Hannay.

SIVAPADA MUDALI AND OTHERS—DEFENDANTS NOS. 1, 4 AND 5—APPELLANTS

versus

PITTY THAYAGARAJA CHETTIAR AND ANOTHER—PLAINTIFF AND DEFENDANT NO. 3—RESPONDENTS.

Madras Estates Land Act (I of 1908), ss. 6 (1), 8—Holding sold in rent auction—Ryot in possession on date Act came into force, whether still ryot—Kudivaram interest, right to, whether affected by s. 6—Landlord purchasing Kudivaram interest, right of.

A person in possession of *ryoti* land professing to hold it as a *ryot* on the date of the passing of the Madras Estates Land Act, gets a permanent right of occupancy.

Therefore, a *ryot* whose holding was sold away in a rent auction before the Madras Estates Land Act came into force but who continued in possession of such land at the commencement of the Act, obtained a permanent right of occupancy in the holding under section 6, clause (1), of the Act.

The rights to the *kudivaram* interest as between the rival claimants thereto (other than the landlord who is debarred by section 8 from claiming such interest) are not affected by section 6, clause (1).

Second appeal from the decree of the District Court of Chingleput, in Appeal Suit No. 71 of 1912, preferred against that of the Court of the District Munsif, Tiruvellore, in Original Suit No. 649 of 1906.

Mr. *K. N. Aiya*, for the Appellants.

Messrs. *K. Srinivasa Aiyangar* and *G. S. Ramachandra Aiyar*, for the Respondents.

JUDGMENT.—The defendants are the appellants. They were the tenants of the plaintiff, who is the *zemindar* of the Egathoor *zemin*. The plaintiff purchased not only the *zemindari* from the former *zemindar*, but he also purchased the *kudivaram* right in the plaint *ryoti* lands which the former *zemindar* had purchased in rent auction-sale of 1900. The plaintiff brought the suit out of which this second appeal has arisen as the purchaser of the *kudivaram* right from the rent auction purchaser for ejecting the defendants.

This suit was brought in the District Munsif's Court of Tiruvellore about the end of 1906 before the Estates Land Act came into force. The suit was first dismissed by the District Munsif and by the District Judge on appeal. The High Court, on second appeal, held that the decision of the lower Courts

against the plaintiff on the fifth issue was wrong and set aside the decree of the lower Courts and remanded the suit for disposal on its merits. The judgment of the High Court is dated 22nd August 1911 after the Estates Land Act came into force. When the case went back to the District Munsif, the defendants raised a fresh contention, namely, that the Madras Act I of 1908 has conferred on them occupancy rights in the land and that the suit ought to be dismissed on that ground. Thereupon two new issues were raised by the District Munsif and they are as follows:

6th issue:—"Whether the defendants are entitled to occupancy rights under Madras Act I of 1908."

7th issue:—"Whether this plea can be raised now."

The learned District Munsif decided the issues in the defendants' favour and dismissed the plaintiff's suit without costs. On appeal, the learned District Judge held on the 6th issue that section 6 of the Estates Land Act protects only those *ryots* who were in possession on the date of the passing of the Act by reason of their holding over (after the expiry of the period of lease, having never had occupancy right before), that a *ryot* whose holding had been sold away in rent auction before the Act came into force but who continued in possession is not "a *ryot* in possession" within the meaning of section 6, clause 1, but is only a trespasser in occupation of *ryoti* land, and that the word "possession" means "lawful possession" and not merely holding over whilst proceedings for ejectment are in progress. Upon this view, the learned District Judge decreed the plaintiff's suit with costs.

In *Gorakala Kanakaiya* v. *Janardha Padhai* (1), the Full Bench decided that even after a decree in ejectment had been passed against the *ryot* in favour of the landlord, if the decree had not become final owing to an appeal having been preferred against it and if the said appeal is pending on the date when the Madras Estates Land Act came into force, the *ryot* is entitled to rely on section 6 and the suit must be decided in his favour against the landlord. In the order of reference to the Full Bench in that case the learned Judges of the Division Bench made the following remarks:—

"The contention that the possession of the defendant ceases in law by a decree for possession against him is a confounding of possession with title and is not worthy of serious notice."

The explanation to section 6 added by section 3 of Act IV of 1909 is as follows:—"For the purpose of this sub-section, the expression 'every *ryot* now in possession' shall include every person who, having held land as a *ryot*, continues in possession of such land at the commencement of this Act." It seems to me that the defendants in this case were *ryots* in possession of *ryoti* land not being old waste, and continued in possession of such land at the commencement of the Act and that, therefore, according to the plain wording of section 6, clause 1, they obtained a permanent right of occupancy in the holding of which they so continued in possession. Under section 8, clause 1, the landholder who has purchased the *kudivaram* right in a rent-auction sale has no right to hold it as a *royt*. Even if he had taken possession as soon as he had purchased it in 1902, the land could not cease to be *ryoti* land: section 8, clause 3, clearly says that the purchase of the occupancy right by the landholder shall not have the effect of converting *ryoti* land into private land (see also section 185 of the Act which has, among other provisions, placed stringent restrictions on the conversion of *ryoti* land into private land). The land being thus *ryoti* land and the defendants holding the land for the purpose of agriculture (without repudiating their liability to pay rent for the benefit of such occupation, though they may not have had title to occupy it till the passing of the Estates Land Act as against the landholder owing to their *kudivaram* right having been sold away), the defendants do come under the definition of "*ryot*" in section 3, clause 15, and can, therefore, claim the benefit of section 6, clause (1). In the case of *Markapuli Reddiar* v. *Thandava Kone* (2) Ayling and Seshagiri Aiyar, JJ., held that, "where the landlord bought the tenants' interest at a rent sale held in 1878, the land continued to be *ryoti* land under section 8 of the Estates Land Act and a person in possession at the time the new Act was passed, acquired

(1) 8 Ind. Cas. 736; 36 M. 439; 21 M. L. J. 31 (F.B.); (1910) M. W. N. 841; 9 M. L. T. 64.

(2) 25 Ind. Cas. 916; (1914) M. W. N. 798.

occupancy rights under section 6 of the Act." It is contended by Mr. K. Srinivasa Aiyangar that that case might have been decided on the ground that the defendant therein had been recognised as tenant by the landholder after the landholder purchased the holding in rent auction (though the defendant was let in only as a Pannai tenant), and hence the defendant in that case was entitled to the benefit of section 6.

But the learned Judges do not base their decision on that narrow ground, but on the broader ground that a person in possession of *ryoti* land professing to hold it as a *ryot* on the date of the passing of the Act gets a permanent right of occupancy. Next it is contended that if section 6 be so literally interpreted, it will give the permanent occupancy right to a person in possession, not only against the landlord but also against persons entitled to claim the *kudivaram* right as against the persons in possession; for instance, a trespasser who had dispossessed the *ryot* lawfully in possession, say a week before the passing of the Madras Estates Land Act, would acquire a right of occupancy in the land as against the true owner of *kudivaram* right. I think, however, that though the words "as against the landlord" do not appear in section 6, clause 1, the use of the words "permanent right of occupancy" and the references to the claims of a landlord in several places in that long section clearly indicate that the rights to the *kudivaram* interest as between rival claimants thereto (other than the landlord who is debarred by section 8 from claiming such interest) were not intended to be affected by section 6, clause 1. It is then said that the landholder in this case sues in ejectment not as landholder, but as purchaser of the *kudivaram* interest. But if section 8, clause 1, prevents the landholder from setting up a right to hold the land, which he has purchased in rent auction, *as a ryot*, that is, if it prevents him from getting rid of his status as landholder in respect of the land whose *kudivaram* right he has purchased in rent auction, his said purchase cannot avail him against the *ryot* in possession just as it would avail in favour of a third person. I think that this is the principle of the decision in *Markappali Reddiar* v. *Thandava Kone* (2) and I am prepared to follow it.

In the result the lower Appellate Court's decree will be reversed and the District Munsif's decree will be restored. There will be no order as to costs under the circumstances of this case.

HANNAY, J.—I agree.

Decree reversed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 17 OF 1913-14, OF BARA BANKI DISTRICT.

April 16, 1914.

Present:—Sir Duncan Colvin Baillie, S. M.

MATA PRASAD AND ANOTHER—DEFENDANTS —APPELLANTS

versus

SPECIAL MANAGER, COURT OF WARDS, UMRAEGAON ESTATE, BARA BANKI DISTRICT—

PLAINTIFF—RESPONDENT.

Oudh Rent Act (XXII of 1886), s. 33—Enhancement of rent, claim for—Construction of document—"Ziada sitani," meaning of—Landlord and tenant, agreement between, interpretation of—Occupancy tenant liable to all incidences attaching to him as such.

Where a landlord enters into an agreement with a tenant binding himself not to commit *"ziada sitani,"* it simply means that there will be no unreasonable enhancement of rent, and not that no enhancement at all shall be made, and thus does not bar an enhancement warranted by the express provisions of the law.

A person declared to be an occupancy tenant must accept the incidences attaching to that tenure.

Appeal from the decree of the Commissioner, Fyzabad, dated 13th November 1913, reversing that of the Assistant Collector, Bara Banki, dated 29th May 1913.

FACTS.—At the time of the First Regular Settlement there was a litigation between one Sital Singh, the predecessor-in-interest of the plaintiff, and one Durga Brahmin, the former *zemindar* and the predecessor-in-interest of the defendants, in which a compromise was ultimately arrived at between the parties, the material portion of which being translated runs as follows:—"I, Sital Singh, agree to give the land entered above at a rent of Rs. 175 per annum to the plaintiff, Durga Brahmin, for ever on condition of payment of rent. I will neither commit extortion (*ziada sitani*), nor will eject him." On the 21st of May 1870 a decree was, therefore, passed according to the terms given in the compromise. Subsequent to the passing of

this decree, the successors-in-interest of Sital Singh attempted on several occasions to eject by notice the successors-in-interest of Durga Brahmin, but on each occasion the notices were cancelled on the ground that the latter were not ordinary tenants but were holding under the compromise above referred to, under the terms of which they could not be ejected. Another notice was issued but cancelled, and the relevant portion of the judgment passed in that case on the 8th of July 1885 by the Extra Assistant Commissioner was as follows:—"As the fields in question are covered by the *sulahnama* of 21st May 1870, under which the plaintiff has a right of occupancy in them, I cancel the notice of ejectment." The last case of the series was decided by the Commissioner on the 20th of July 1910, in which he cancelled the notice of ejectment on the ground that the present defendants held as occupancy tenants. Nevertheless, the defendants and their predecessors were recorded as ordinary tenants in the *khasras* of the Recent Regular Settlement of 1301 *Fasli* and of the First Regular Settlement.

The plaintiff, contenting himself with the result of the long course of the litigation above referred to, treated the defendants as occupancy tenants and brought the present suit under section 33 of the Oudh Rent Act for enhancement of rent, on the ground that the rate of rent paid by them was below that paid by ordinary tenants after allowing the deduction of 12½ per cent. The defence was that section 33 of the Oudh Rent Act was not applicable to the case, inasmuch as the defendants were not occupancy tenants but were holding under a compromise and a decree of the Court dated the 21st of May 1870, as their ancestor had accepted the compromise in consideration of his giving up his proprietary right in land, as they were liable neither to ejectment nor to enhancemet of to rent and as the subsequent decisions of 1885 and 1910 did not create any new right and interfere with those created by the *sulahnama*.

The Court of first instance found that the defendants were tenants under a special agreement, that both the conditions contained in the *sulahnama* must hold good, that the Extra Assistant Commissioner's decision of 1885 could not be interpreted as one declaring occupancy rights under section 5 of the Oudh Rent Act, and relying upon the decision in the case of *Bindal Singh* v. *Musammat Ilahi Khanam* (1) dismissed the plaintiff's claim. The Commissioner, on appeal, held that the decision of 1885 operated as *res judicata* in the present case, that although it was not clear by that decision as to whether the defendants could be said to be holding as tenants under a special agreement or as occupancy tenants under section 5 of the Oudh Rent Act, still the compromise could not be interpreted as one entitling Durga's heirs to hold land for ever at a rent of Rs. 175 per annum, and that, therefore, section 33 of the Oudh Rent Act did apply to the case and the plaintiff was entitled to the relief he claimed. The matter went up further in appeal for decision by the Board of Revenue.

Mr. *Fakhar-ud-din Hasan*, for the Appellants.

Pandit *Kanhaiya Lal*, for the Respondent.

JUDGMENT.—I must agree with the Commissioner that the words '*mula sitani*' do not necessarily imply that there should be no enhancement whatsoever of the appellant's rent. To my mind it means that there should be no unreasonable enhancement, that the *zemindar* should make no unfair demand. I do not think that this agreement bars enhancement under the law. Appellant has been found to be an occupancy tenant and must, as the Commissoner says, accept the incidences attaching to that tenure.

The appeal is dismissed with costs on appellant.

Appeal dismissed.

(1) 23 Select Decision 1892.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 77 OF 1914.

November 6, 1914.

Present:—Sir John Edward Power Wallis, KT., Offg. Chief Justice, and Mr. Justice Seshagiri Aiyar.

PERURI VISVANATHA REDDI—DEFENDANT—APPELLANT

versus

D. T. KEYMER—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 13—Foreign judgment, when suit on, competent in British Courts—

PEBURI VISVANATHA *v.* KRYMER.

—*Decision on merits, when not—Competent jurisdiction, Court of.*

A case in which the written statement of the defendant is struck out for his failure to answer interrogatories and he is not permitted to go into the merits at the trial, cannot be said to have been decided on the merits.

Therefore, a plaintiff is not entitled to sue in the Courts in India on a foreign judgment thus obtained.

Quære:—Whether a judgment passed in the exercise of jurisdiction conferred on the High Court in England pursuant to an Act of the Imperial Parliament is the judgment of a Court of competent jurisdiction for the purpose of section 13 of the Civil Procedure Code, 1908?

Appeal from the judgment and decree of the Hon'ble Mr. Justice Bakewell, dated the 8th September 1914, in the Ordinary Original Civil Jurisdiction of the High Court and made in Civil Suit No. 291 of 1913.

Mr. *V. V. Srinivasa Aiyangar* (with him Mr. *V. Manilamani Pillai*), for the Appellant.

Mr. *D. Chamier*, instructed by Messrs. *King* and *Partridge*, for the Respondent.

JUDGMENT.—This is an appeal from the decision of Bakewell, J., on the original side giving judgment for the plaintiff in a suit on a foreign judgment obtained by the plaintiff against the defendant in the High Court in England. The defendant pleaded among other things that the English Court had no jurisdiction, and that the case was not decided by the English Court on the merits. Bakewell, J., overruled both the defences and gave the plaintiff a decree on the judgment sued on.

It appears from the certified copy of the English judgment filed by the plaintiff that the defendant was ordered to answer interrogatories and failed to do so, and that, therefore, it was ordered that his defence should be struck out and that he should be placed in the same position as if he had not defended, and that the plaintiff should be at liberty to sign judgment against him for £425-17*s*.-2*d*. the amount claimed and costs and that judgment was signed accordingly.

Now in this state of things the first question that arises is whether a judgment obtained in this manner was a judgment not given on the merits of the case, within the meaning of section 13 (*b*) of the Code of Civil Procedure, in which case it is not to be conclusive upon the parties in a subsequent suit. Bakewell, J., has held that it must, in the circumstances, be taken to have been given on the merits, but with great respect we are unable to agree with him. We cannot see how a case, in which the defence or, to use our phraseology, the written statement of the defendant was struck out and he was not permitted to go into the merits at the trial can be said to have been decided on the merits. In *The Delta* (1) Sir Robert Phillimore overruled a plea of *res judicata* by reason of a foreign judgment on two grounds, one, that the foreign judgment had not been pronounced when the English suit was instituted and that it was, therefore, merely a case of *lis alibi pendens* and the second, that the foreign judgment "not having been given on the merits of the case but on matter of form only" could not be set up as a bar to a decision on the merits. A foreign judgment passed in default of appearance was there treated as not being a decree on the merits, as also by Gorell Barnes, J., in *Challenge and the Duc d'Aumale* (2). It does not seem to us to make any difference whether the default was to enter appearance or to answer interrogatories, when the result of not answering them was to put the defendant in the same position as if he had never entered appearance. There is, however, even more direct authority. In *Haigh* v. *Haigh* (3), in refusing to set aside a judgment signed, as the judgment sued on was, after the defence had been struck out for failure to answer interrogatories, Parson, J., said that he had the strongest disinclination that any case should be decided otherwise than upon its merits, but that in the circumstances he could not set aside the judgment. And in *Farden* v. *Richter* (4), the Master and the Judge at Chambers set aside a judgment obtained in this way on the default of the defendant to answer interrogatories, and the Court of Appeal restored the judgment on the ground that the affidavit of the defendant in support of the motion to set aside the judgment did not show that he had a defence on the merits. These cases, which

(1) (1876) 1 P. D. 393; 45 L. J. P. 111; 35 L. T. 376; 26 W. R. 46.

(2) (1904) P. 41; 73 L. J. P. 8; 89 L. T. 481; 9 Asp. M. C. 497.

(3) 31 Ch. D. 478; 55 L. J. Ch. 190; 53 L. 868; 34 W. R. 120

(4) 23 Q. B. D. 124; 58 L. J. Q. B. 244; 60 L. T. 304; 37 W. R. 767.

apparently were not cited before the learned Judge, appear to us to show that a judgment obtained in such circumstances as the present judgment cannot be considered to have been decided upon the merits.

It has next to be considered how this finding affects the present case. This is a suit on the foreign judgment and not on the original cause of action as appears both from the plaint and the issues; and it is now well settled that in such a suit the cause of action is the legal obligation to satisfy a foreign judgment which complies with the requisite conditions. This was so ruled by Phear and Bayley, JJ., in *Heeramonee Dossee* v. *Promothonath Ghose* (5), citing the judgment of Parke, B., in *Williams* v. *Jones* (6), and is in accordance with all the later authorities in England. Such a foreign judgment under the terms of our law is not conclusive unless the case be decided on the merits, and a judgment that is not conclusive for this reason cannot of itself constitute a cause of action. Even before the introduction of the statutory provision in the Code of 1877 that foreign judgments not given on the merits should be no bar to a fresh suit here, it had been ruled in *Sreehuree Bukshee* v. *Gopal Chunder Samunt* (7), citing Story's Conflict of Laws, that foreign judgments must, in order to be received, finally determine the points in dispute and must be adjudications on the merits. Whether or not this latter statement be in accordance with principle or with recent decisions in England, it has been accepted by the Legislature and embodied in the Code and we are bound to give effect to it. The provisions of the Code of 1877 expressly dealt only with foreign judgments as a bar to a suit, and not as constituting a fresh cause of action. It would, however, be anamolous that different rules as to the recognition of foreign judgment should apply according as it is set up as a bar to a fresh suit or as a fresh cause of action; and the provision, which was added to section 14 by Act VII of 1888, giving the Courts power to inquire into the merits of the case in suits brought on foreign judgments of certain specified Courts is a clear indication that the general provisions of section 14 were considered applicable to suits on foreign judgments as well as to foreign judgments set up in bar to a fresh suit. This question is very fully discussed in Mr. Hukim Chand's 'Res judicata,' where the same conclusion is come to. We must, therefore, hold that the plaintiff is not entitled to sue on the foreign judgment in this Court as it was not a decision on the merits.

In this view of the case, it is unnecessary to consider whether the judgment sued on was the judgment of a Court of competent jurisdiction for the purposes of section 13 of the Code by reason of its having been passed in the exercise of jurisdiction conferred on the High Court in England pursuant to an Act of the Imperial Parliament, *Moazzim Hossein Khan* v. *Raphael Robinson* (8). The utility of such a suit is no doubt much impaired by the decision we have come to, but this is not perhaps to be regretted, as but for the fact that the authority conferring jurisdiction on the High Court in England is the Imperial Parliament to which we are subject, no such suit would lie here for the reasons given by their Lordships of the Judicial Committee in *Gurdyal Singh* v. *Rajah of Faridkot* (9). The precise point decided in *Moazzim Hossein Khan* v. *Raphael Robinson* (8) might come before the Courts in England if a defendant resident in England were sued there upon a judgment obtained in one of our High Courts under clause 12 of the Letters Patent, which are issued under an Imperial Statute, but no such case has yet arisen. In the result the appeal will be allowed and the suit dismissed with costs throughout.

Appeal allowed.

(5) 8 W. R. 32; 2 Ind. Jur. (N. S.) 233.
(6) (1845) 13 M. & W. 628; 14 L. J. Ex. 145; 2 D. & L. 680; 67 R. R. 767.
(7) 15 W. R. 500.
(8) 28 C. 641; 5 C. W. N. 741.
(9) 22 C. 222 (P. C.); 21 I. A. 171; 4 M. L. J. 267; (1894) A. C. 670

MUHAMMAD NASIM *v.* MUHAMMAD AHMAD.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 41 OF 1914.

September 4, 1914.

Present:—Mr. Stuart, J. C., and Mr. Kanhaiya Lal, A. J. C.

MUHAMMAD NASIM—DEFENDANT—APPELLANT

versus

MUHAMMAD AHMAD AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s 92—Maintainability of suit—Trustee de facto or de son tort subject to same liabilities as trustee de jure—Minor, position of, as trustee.

A suit under section 92, Civil Procedure Code, is maintainable as against a *de facto* trustee or a trustee *de son tort*, for he is subject to the same liabilities, while he is so acting, as a trustee *de jure*.

Budree Das Mukim v *Choom Lal Johurry*, 33 C. 789; 10 C. W. N. 581, *Jugalkishore* v. *Lakshmandas Raghunath Das*, 23 B 659, *Bishen Chand Basawat* v. *Syed Nadir Hossein*, 15 L A 1 at p 10; 15 C. 320; 12 Ind. Jur. 170; 5 Sar P C. J. 113 and *Neti Rama Jogiah* v. *Venkatacharlu*, 26 M. 450, referred to.

A person who is not *sui juris* and requires a guardian to look after his property, cannot be entrusted with the management of a trust.

Appeal from the decree of the Officiating District Judge, Fyzabad, dated 7th December 1912.

Babu *Basudev Lal*, for the Appellant.

Mirza *Sami Ullah Beg*, Munshi *Nawab Ali* and Chaudhri *Neamat Ullah*, for the Respondents.

JUDGMENT.—This was a suit under section 92 of the Code of Civil Procedure for the removal of the defendant from the trusteeship of certain endowed property, for the appointment of new trustees and for an order directing the defendant to file accounts of the trust-property for the years 1904 to 1911 during which he had been in possession.

The property in question was endowed by Muhammad Ali, the father of the plaintiffs and grandfather of the defendant, by a Will executed by him on the 10th October 1897 for certain religious and charitable purposes. The Will appointed Muhammad Ibrahim, the eldest son of the testator, *mutawalli* or manager of the trust on a salary of Rs. 100 per mensem, and directed that the *mutawalli* shall keep an account of the income and the expenditure of the entire profits arising out of the dedicated property, get the same checked and signed occasionally by reliable Muhammadans of the neighbourhood and carry on the purposes of the trust in accordance with the provisions of the Will. It further stated that if Muhammad Ibrahim failed to carry out the purposes of the trust or acted dishonestly in the discharge of his duties, he should be removed and any of the other sons of the testator by his second wife should be appointed in his place, if found suitable, or else some other reliable person of his other heirs or members of his brotherhood should be selected for the purposes.

Muhammad Ali died on the 18th October 1897 about a week after the execution of the Will. Muhammad Ibrahim took charge of the endowed property and acted as a *mutawalli* till his death in 1904. He left a son, Muhammad Nasim, then an infant, and a widow, *Musammat* Kaniz Sughra, who took charge of the property and administered it as a guardian of the minor till her death. *Musammat* Zaib-un-nisa, the maternal grandmother of the minor, thereafter stepped into the guardianship, but took no proper steps to carry out the purposes of the trust. The major portion of the income of the *waqf* property was to be devoted to the maintenance of an Arabic School, but it has been found that the school has a nominal existence and that the salaries of the staff are seldom paid. In fact, the *waqf* was repudiated in this case on behalf of the defendant. The learned District Judge found that a *waqf* was lawfully created. He further found that the defendant was a minor, about eight or nine years old, that no accounts of receipts and disbursements were filed by his guardian and that the defendant was disqualified by reason of his minority to act as a *mutawalli* of the trust. He, therefore, directed the removal of the defendant from the *de facto* trusteeship, which had been assumed on his behalf by his guardian on the death of Muhammad Ibrahim, the previous *mutawalli*, and appointed Abdul Karim, another son of Muhammad Ali, as a *mutawalli* in his place, with an advisory committee of two persons comprising Haji Qurban Ahmad, a Vakil of Bara Banki, and Rahat Husain, a maternal uncle of the minor defendant, to advise the *mutawalli* and supervise the administration of the trust-property, with power to report to the Court if any case of mismanagement was discovered. He further directed that on the defendant attaining majority he shall

take the place of Rahat Husain on the said committee.

The only ground urged on behalf of the defendant in this appeal is that the suit for the removal of a person who is not a *mutawalli* of the trust-property, is not maintainable under section 92 of the Code of Civil Procedure. The defendant had, by his assumption of the management of the trust-property through his guardian, become a *de facto* trustee of the endowed property. On 10th October 1911 his guardian, *Musammat* Zaib-un-nisa, filed an account in the Court of the District Judge, Fyzabad, in which Rs. 658 were shown as having been spent for charitable purposes appertaining to the trust. A *de facto* trustee or a trustee *de son tort* is subject to the same liabilities, while he is so acting, as a trustee nominated by the author of the trust or appointed in accordance with his directions, and, as held in *Budree Das Mukin* v. *Ohooni Lal Johurry* (1), a suit under section 92 of the Code of Civil Procedure lies against a trustee of an express or constructive trust, whether such trustee be *de jure* or *de son tort*. Section 92 of the Code deals with cases where there has been an alleged breach of an express or constructive trust created for public purposes of a charitable or religious nature or where the direction of a Court is deemed necessary for the administration of such a trust. Where no trustee has been lawfully appointed and the administration of the trust requires that a scheme should be settled and trustees appointed for the administration of the trust, a suit will lie under this section against a person alleged to be in the position of a trustee *de son tort*. In *Jugalkishore* v. *Lakshmandas Raghunath Das* (2), where a certain person assumed the management of a temple to which certain property was attached on the death of a trustee, without having been appointed in the manner directed by the author of the trust, and some of the worshippers of the temple filed a suit with the sanction of the Advocate-General for his removal from the management of the temple on the ground of his misconduct and mismanagement of the trust-property, it was held that by taking charge of the endowment and purporting to manage it as temple property, he had made himself a constructive trustee or a trustee *de son tort*, liable to the beneficiaries in an action under section 539 of the old Code of Civil Procedure for any of the reliefs therein referred to. As observed by Candy and Fulton, JJ., in that case, "the public may tolerate for a time irregularities in the management of the endowment in which they are interested, but they do not thereby lose their rights, for the law expressly provides that whenever the direction of the Court is deemed necessary they may with proper sanction institute a suit."

In *Bishen Chand Basarat* v. *Syed Nadir Hossein* (3), Sir Barnes Peacock in delivering the judgment of the Judicial Committee said:—"If there had been any objection that he (that is, the plaintiff) was illegally substituted as trustee, an application might have been made by any person interested in the performance of the trusts to have him removed, and a new trustee appointed by the Court under the Code of 1877." The Code of 1877 corresponded in this matter with the provisions contained in section 539 of the last Code of Civil Procedure and section 92 of the present Code. A suit for the appointment of a new trustee to a temple on the ground that the defendant was not a lawful trustee and that the trusteeship was, therefore, vacant was similarly held by Benson and Ayyangar, JJ., in *Neti Rama Jogiah* v. *Venkatacharlu* (4), to be a suit under section 539 of the old Code, being comprised in the words "whenever the direction of the Court is deemed necessary for the administration of such trust." The defendant is obviously unfitted by reason of his minority to be allowed to act as a trustee. According to the Fatawa-i-Alamgiri, it is a condition to the validity of the appointment of a *mutawalli* that he should be adult and possessed of a capacity to administer the trust, and even when the office of a *mutawalli* devolves upon a minor by virtue of a provision in the deed of trust, for example, if the *waqfnama* provides that the *tawliat* should be confined to the male descendants of the *waqf*

(1) 32 C. 780; 10 C. W. N. 581.
(2) 23 B. 650.
(3) 15 I. A. 1 at p. 10; 15 C. 629; 12 Ind. Jur. 170; 5 Sar. P. C. J. 113.
(4) 26 M. 450.

or the members of a particular family, and it happens that at some time the person on whom the office devolves by virtue of this provision is a minor, the Muhammadan Law requires the *Qazi* to appoint some person to do the work until the minor attains majority (Ameer Ali's Muhammadan Law, 4th Edition, Volume I, pages 445 and 446). A person who is not *sui juris* and requires a guardian to look after his property cannot be entrusted with the management of a trust. The learned District Judge, therefore, rightly removed the defendant and entrusted the management to Abdul Karim, one of the surviving sons af Muhammad Ali. The committee appointed to advise him in the management comprises an independent legal practitioner of Bara Banki and a maternal uncle of the minor, who will look after the interests of the beneficiaries. The interests of the defendant in the administration of the trust are in no way endangered and the right given to him to step into the committee on attaining majority in the place of his uncle, Rahat Hussain, secures him an opportunity to supervise the administration of the trust when he is of a fit age to do so. The other pleas have not been pressed.

In regard to the cross-objections filed by the plaintiffs-respondents, we see no reason to remove the name of Rahat Husain from the advisory committee. The costs of the plaintiffs ought, however, to have been allowed to them.

The appeal is, therefore, dismissed with costs. The cross-objections are allowed in so far that the plaintiffs-respondents will be entitled to recover their costs here and below from the defendant-appellant, who will bear his own costs throughout.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1643 OF 1911.

May 21, 1914.

Present:—Mr. Justice Fletcher and Mr. Justice Richardson.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—PLAINTIFF—APPELLANT

versus

LALIT MOHAN BOSE AND OTHERS—DEFENDANTS—RESPONDENTS.

Land Improvement Loans Act (XIX of 1883), ss 7, 12—Certificate—Suit for balance of loan—Charge on land for improvement of which advance made—Charge, enforceability of—Sale, validity of—Estoppel.

Section 7 of the Land Improvement Loans Act (XIX of 1883) gives various means by which the Collector may, on behalf of the Government, recover the moneys that have been advanced. According to it the land for which the advance is made is a security to the Government for the purpose of securing the re-payment of the improvement charge.

Where the certificate executed by the Collector at the time of the granting of the loan, and registered under section 12 of Act XIX of 1883, stated that for the re-payment of the loan with interest, the immoveable property specified in the margin in addition to the land on which the improvement was to be made, was hypothecated to the Government, the Government obtained under the terms of the Statute read along with the certificate, a perfectly good charge on the land that was hypothecated by the certificate and was entitled to enforce that charge by sale in the ordinary manner.

It would be wrong to say that because the word mortgage was put in the plaint, the rights of the Government are gone.

Appeal against the decision of the Additional Sub-Judge, Burdwan, dated 25th April 1911, affirming that of the Munsif at Burdwan, dated 18th December 1909.

Babu *Ram Charan Mitter*, for the Appellant.

Babu *Gour Chander Pal*, for the Respondents.

JUDGMENT.

FLETCHER, J.—This is an appeal from a judgment of the learned Additional Subordinate Judge of Burdwan, dated the 25th April 1911. The suit was brought by the plaintiff, the Secretary of State for India in Council, to recover out of certain lands the balance of certain improvement charges and interest remaining due to the plaintiff under the provisions of the Land Improvement Loans Act XIX of 1883. It is quite true that the person who drew up the plaint in this case on behalf of the plaintiff has used the word 'mortgage' in it and that seems to be the ground on which the

learned Judge of the lower Appellate Court thought that the plaintiff could not recover the money by the sale of the property, and that has been the point urged in the appeal before us. Such a view, I think, would, under money proceedings in this country, be absolutely abortive. The cause of action is to recover money out of the land, whether it is a mortgage or a charge or anything else. The question turns solely upon a construction of Act XIX of 1883. The advance made in this case was made on the 12th May 1896 to one Benode Behari Bose, and the amount advanced was Rs. 500 which was re-payable in instalments. Benode Behary subsequently mortgaged the property to the defendants Nos. 3 and 4. They obtained a decree on their mortgage and brought the property to sale in execution and themselves purchased it. They are now the owners of the land, subject to the certificate. The seventh section of the Act (XIX of 1883) gives various means by which the Collector may on behalf of the Government recover the moneys that have been advanced. But I understand that, in a case in this Court on an Act in identically the same terms, namely, the case of *Luchmi Narain Singh* v. *Nand Kishore Lal Das* (1), the learned Judges suggested that provisions of this nature can only be enforced where the land is an estate or a tenure. I should certainly like to consider more carefully the provisions of the Act and the case we have been referred to, before I assented to that proposition. These provisions were put in deliberately to entitle the Government to recover the re-payment of the money paid and any view to the contrary would render these provisions in many cases unworkable. But section 7 is important to show that the land is a security to the Government for the purpose of securing the re-payment of the improvement charge. Take for instance, section 7, clause (*d*): the money may be recovered out of the property comprised in the collateral security. Collateral security suggests that there is another security and that is the principal security. Then, take section 7, clause (2), which deals with the case in which a surety is joined to guarantee the payment. If the surety is called upon by the Government to pay, the surety is entitled to get his money out of the land for the benefit of which the loan had been granted. The document in this case is what is called a certificate and that certificate was executed by the Collector at the time of the granting of the loan. According to the endorsement of the Collector, a copy of the certificate was duly forwarded to the Sub-Registrar for registration under the provisions of the Indian Registration Act, that is, in accordance with section 12 of Act XIX of 1883. It seems, therefore, that the certificate has, in fact, been duly registered. This is a form approved of apparently by the Government. It is headed 'the Boards Miscellaneous Form No. 307,*' and under the provisions of sec-

(1) 29 C. 537, 6 C. W. N. 484.

*Certificate granted under the Land Improvement Loans Act, 1883, and the rules made thereunder.

To

son of , of

On production of this certificate the aforesaid is entitled to receive from Government in the district of the following sums, on the dates noted against each, as a loan to be expended on (here describe clearly the nature of the improvement) the land specified in the margin.

Date

" Amount

"

2. The conditions relating to the making and re-payment of this loan are as follows:—

(*a*) That it, with the interest thereon, shall be payable on the dates and by the amount specified below.—

Date

" Amount (Principal and interest)

"

(*b*) That, in the case of a loan granted by instalments, if the applicant, after taking one or more instalments, fails to take any other instalment within six weeks from the date on which he is entitled to it, the Collector may declare the loan closed. The total of the instalments taken by the applicant shall then constitute the loan, which shall be treated as having been fully paid on the date on which the last instalment was actually taken; and a fresh arrangement for re-payment shall be made by the Collector, consistent with rules 17 and 18, in modification of this certificate.

(*c*) That interest shall be levied for the period intervening between the date of the completion of the loan (in cases in which loans are granted in one payment), or between the dates of the payment of the instalments (in cases in which the loans are granted in instalments), and the date from which the first instalment of interest, consolidated with the first instalment of the principal, becomes payable. The interest leviable in such cases shall

tion 10 of the Act, the local Government has power with the previous sanction of the Governor-General in Council to provide as to the nature of the security to be taken for the due application and repayment of the money. We must assume that this document coming from the custody of the Government is a document framed in accordance with section 10 of the Act, and clause 2 (*d*) of the certificate states that for the re-payment of the loans with interest, the immoveable property specified in the margin in addition to the land on which the improvement is to be made is hypothecated to the Government. There cannot be the slightest doubt that under the terms of the Statute read along with the certificate, the Government obtained a perfectly good charge on the land that was hypothecated by the certificate. It would be altogether wrong for us to say that because the word 'mortgage' is put in the plaint, the rights of the Government are gone. There cannot be a shadow of doubt as to those rights being enforcible. In my opinion, the judgment of the lower Appellate Court ought to be set aside and in lieu thereof, we should make a declaration that the plaintiff is, under and by virtue of Act XIX of 1883 and the certificate, Exhibit I, in the case, entitled to a charge on the land mentioned in the margin of the certificate and on the land on which the improvement has been made, and we should direct that that charge be enforced by sale in the ordinary manner. The respondents in this appeal must pay the costs of this appeal and the costs of the two lower Courts to the appellant.

RICHARDSON, J.—I agree.

Appeal allowed.

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be demanded in a lump sum on the date on which the first consolidated instalment of principal and interest is made payable.

(*d*) That the loan shall be applied solely to the purpose specified above; and that, if at any time it is proved to the satisfaction of the Collector that any part of the loan has been misapplied, he may proceed to recover the whole amount of the loan with such interest as may have become due thereon.

These clauses to be used only when needed.

(*e*) That, unless (here enter any conditions as to the period or periods appointed for completing the work) the work has been completed by (date), or any extension of the said date granted by the Collector, the loan shall be held to have been misapplied.

(*f*) That, for the re-payment of the loan with any interest due on the same, the immoveable property specified in the margin is hypothecated to Government.

(*g*) That, if any instalment is not paid on the due date, the whole amount of the loan shall be deemed to have become due.

(*h*) That, if it be proved to the satisfaction of the Collector that the statements made by the aforesaid in his application for this loan, as to the nature and extent of encumbrances, are in any particular untrue, the Collector may so declare in writing, and thereupon the whole of such loan, with such interest as may become due thereon, shall forthwith become due and payable.

(*i*) (Where a loan and a free grant are made under rule 27). That, if the work be not carried out to the satisfaction of the Collector, the amount given as a free grant shall be re-paid, and shall be recoverable under the provisions of the Public Demands Recovery Act, 1895.

Signature of the Collector, Sub-Divisional Officer, or Deputy Collector.

I understand and agree to the aforesaid terms and conditions.

Signature of Certificate-holder.

Received contents.

Signature of the payee (the payee should affix a one-anna stamp if the loan exceeds Rs. 20).

N. B (1) Both the land to be improved and all the immoveable property hypothecated as collateral security, whether by the borrower himself or by a surety or sureties, should be described in the marginal specification as nearly as possible in the manner prescribed in section 21 of the Indian Registration Act, 1877.

(2 In the description of the immoveable property to be given in the margin of clause (*f*), paragraph 2 above, it shall be stated if the property is free from encumbrances, and if not, what are the nature and extent of the encumbrances.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 263 OF 1912.

July 11, 1914.

Present:—Mr. Justice Chevis and Mr. Justice Shadi Lal.

MEHRA—PLAINTIFF—APPELLANT

versus

MANGAL SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Adoption—Appointment of heir—Alienation by appointee—Appointee's son whether competent to contest—Hindu Law—Ancestral property—Property ancestral qua grandson if it descends to son.

The son of an appointee, whether born before or after the appointment of his father, is incompetent

to contest an alienation by his father of the property received from the appointer

Property, whether ancestral or self-acquired of the appointer, received by the appointed heir, cannot be regarded as ancestral *qua* the latter's sons. But if it once descends to, or comes into the hands of the appointee's son, then it would be ancestral *qua* the grandson

The ceremonial adoption of Hindu Law and the customary appointment of heir distinguished from each other; and ancestral property defined and explained.

Second appeal from the decree of the Divisional Judge of Sialkot, dated 7th August 1911.

Pandit *Rambhaj Datta*, for the Appellant.

Mr. *Nanak Chand*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by Mehra, who is appellant in this Court, for possession of a plot of land sold by his father, Jawala, to the defendants in 1898. Jawala had been appointed an heir by one Amir and obtained the land in dispute in his capacity as the latter's heir.

It is admitted that the plaintiff was born subsequent to the appointment of Jawala as heir of Amir. On these facts, the Courts below have held that the land in the hands of Jawala was not ancestral *qua* the plaintiff, and that the latter has no *locus standi* to impeach the alienation. The plaintiff, having been non-suited in the lower Courts, has preferred a further appeal to this Court and the sole question for our determination is whether the above finding as to the nature of the property is or is not correct.

The point is, so far as we are aware, a novel one and not covered by any direct authority of this Court. The only two judgments of this Court which have been referred to by the lower Court are *Fatteh Singh* v. *Nihal Singh* (1) and *Tulsi* v. *Ram Rakha* (2), and both of them are inapplicable to the present case.

In the first case, an alienation was effected by an appointed heir and the person contesting it was an agnate of the appointer. As the property had descended from the common ancestor of the appointer and of the plaintiff in that case, the latter was rightly found entitled to attack the alienation which injured his reversionary rights. That case is clearly no authority for the proposition that a son of the appointed heir is similarly entitled to contest an alienation by his father.

The law is clear that in the event of the appointed heir dying childless and leaving no widow, the estate which he inherited from the appointer passes to the male collaterals of the appointer's family if it consists of property over which the appointer had only a restricted power. The judgment in *Tulsi* v. *Ram Rakha* (2) lays down the rule that the son of the appointed heir born prior to the appointment has no right to contest an alienation by his father of property received from the appointer.

In the case before us, the plaintiff was, as mentioned above, born after the appointment and the ruling has, therefore, no direct application. But for the reasons set out below we are of opinion that that fact should not make any difference and that the son of an appointee, whether born before or after the appointment of his father, is incompetent to contest an alienation by the latter of the property received from the appointer.

The point being *res integra*, we have to decide it in accordance with the general principles of customary law. It must be remembered that we are not here dealing with a ceremonial adoption of Hindu Law, in which the adopted son is completely transferred from his natural family and becomes a part and parcel of the adoptive family in the same way as if he were a natural born son. But in the case of the customary appointment of heir, it has been repeatedly held that it does not involve the transplanting of a person from one family to another. The tie of kinship with the natural family is not dissolved and the fiction of blood relationship with the members of the new family has no application to the appointed heir. The relationship established between the appointer and the appointee is a purely personal one and does not extend beyond the contracting parties on either side [vide, *inter alia*, *Vasira* v. *Kahna* (3)].

It follows that the appointer or his male lineal ascendant cannot be called an ancestor of the appointee's son.

As regards the appointee's right to property, it is clear that he does not ordinarily

(1) 25 P. R. 1901; 28 P. L. R. 1901.
(2) 66 P. R. 1906; 110 P. W. R. 1908.
(3) 111 P. R. 1893

lose his right of succession in his natural family and any property which he inherits from his natural father or any other male lineal ascendant would, undoubtedly, be ancestral *qua* his sons, and the latter are entitled to set aside an improper alienation of that property made by their father. But the same thing cannot be predicated with respect to the estate which the appointed heir receives from the appointer. If the estate consists of the self-acquired property of the latter, then the appointee becomes an absolute owner of it and has plenary power of disposal over it. If, on the other hand, the estate consists of property over which the appointer had only a restricted power, then the appointed heir takes it subject to the residuary interest which resides in the appointer's reversioners. The property having descended from a common ancestor of the appointer and his reversioners, the latter have the same right of objecting to an alienation made by the appointee as they possessed with respect to an alienation by the appointer. As regards them the property continues to be ancestral and they can protect their reversionary rights by vetoing an improper alienation: vide, *Sita Ram* v. *Raja Ram* (4).

But we do not think that property, whether ancestral or self-acquired, of the appointer, received by the appointed heir, can be regarded as ancestral *qua* the latter's sons. As regards sons, ancestral property has been defined to mean property inherited from a direct male ancestor, and the point which we have to decide is whether the property in question fulfils the requirements of this definition.

It has already been pointed out that the appointer or his ascendant, who originally held the land, is not an ancestor of the appointee's son and it, therefore, follows that the property originally held by the former cannot be called ancestral property of the latter. If it once descends to, or comes into the hands of the appointee's son, then it would be ancestral *qua* the grandson, for the very simple reason that it would be inherited from the appointee who is the common ancestor of the son and the grandson. The same remark does not apply to the property in the hands of the appointee.

(4) 12 P. R. 1892 (F. B.).

The conclusion at which we have arrived can be supported on another ground. The definition of ancestral property already given involves the idea of inheritance, and inheritance there means succession *ab intestato* and does not obviously include testamentary succession. Now it has been held in many cases that the appointment of an heir is tantamount to a gift which comes into operation on the death of the appointer and that the property received by the appointee should be regarded in the nature of a bequest.

As remarked by Sir Meredyth Plowden (at page 231) in *Ralla* v. *Budha* (5): "The power of adoption, when validly exercised, has precisely the same effect as regards the *warisan ekjaddi* or presumptive heirs, as a valid transfer of the adoptor's land by gift to the adopted son would have: it operates in fact as a transfer of his land, but a transfer taking effect after the death of the donor instead of in his life-time." If this is the correct description of the mode in which the appointed heir gets the property, then it is clear that he does not inherit it within the meaning of the above definition of ancestral property. The appointee is a legatee of the property and the son of a legatee has absolutely no right to control an alienation by the father of the property bequeathed to the latter.

We would now refer to two judgments which, it is contended by the learned Pleader for the appellant, have adopted a different view.

The first case upon which reliance has been placed is that reported as *Thamman Singh* v. *Jit Singh* (6). It arose out of a suit brought by an adopted son to contest an alienation by his adoptive father, and the sole point which was decided was whether the adoptive father had a right to repudiate an adoption once validly made. Having decided it in the negative, the learned Judges remanded the case to the Divisional Judge for disposal, with the remark that the adoption under the deed was valid and that the plaintiff's *locus standi* was established. The further question that, even if the adoption or appointment was valid, the appointed heir was not entitled to impeach

(5) 50 P. R. 1893 (F. B.).
(6) 9 P. R. 1893.

the alienation by his adoptive father because the property was not ancestral as regards him, was not raised by the parties and no opinion was, therefore, expressed on it.

The other case which requires notice is *Chajju* v. *Dalipa* (7), the *placitum* of which is to the effect that "by custom among Mahtons of Nawashahr Tahsil, in the Jullundur District, the sons of an appointed heir who predeceased his adoptive father are entitled to succeed on the latter's death to his estate." With respect to this case, we would make two observations. In the first place, we find that the appointee was a nephew of the appointer and the former's sons were, therefore, agnates of the latter. In the second place the learned Judges regarded the appointment of heir in the same light as a gift and remarked that "there can be no question that a gift, if valid, would benefit the donee's sons, whether the donee himself predeceased the donor or not." Looking at the case in the light of the above observations and having regard to its special facts, we do not think it militates against the view taken by us about the nature of the property in the hands of an appointed heir.

It is, however, significant that in the case of *kritrima* adoptions which, as has been pointed out in several judgments of this Court resemble the customary appointment of an heir in the Punjab, the Calcutta High Court has held that the sons of a person adopted in the *kritrima* form are not entitled to inherit the property of the adoptive father [vide, *inter alia*, *Juswant Singh* v. *Doolee Chand* (8)]. At page 258 of the report the learned Judges make the following observations:—

"Under the Hindu Law, as laid down in Macnaghten, Volume I, page 76, and also in a decision of this Court in Volume VIII of the Weekly Reporter, the relation of the *kritrima* son extends to the contracting parties only, and the son so adopted will not be considered the grandson of the adopting father's father, nor will the son of the adopted be considered the grandson of his adopting father." These observations are, in our opinion, equally applicable to the person appointed an heir under the Customary Law.

From the general principles of the Customary Law relating to the nature of the ancestral land and from the incidents of the customary appointment of heir, the result which we deduce is that the property in the hands of Jawala was not ancestral *qua* the plaintiff.

We accordingly hold that the plaintiff's suit has been rightly dismissed by the Courts below and that this appeal must fail. The appellant must pay the costs of the respondent in this Court.

Appeal dismissed.

(7) 51 P. R. 1906; 124 P. L. R. 1906; 78 P. W. R. 1906.

(8) 25 W. R. 255 at p. 258.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 434 OF 1913.

September 10, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Tyabji.

NARAYANA REDDI—PLAINTIFF No. 2—APPELLANT

versus

KAMAKSHI AMMAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Suit, abatement of—Minor suing to recover certain property as his by survivorship despite a Will of his father—Death of minor—Legal representative, right of, to continue suit.

A minor sued through his guardian for possession of certain property as his by survivorship and also challenged the validity of his father's Will, which vested the property in the defendant in trust for the minor in case he should attain majority and in trust for a temple in case of his failure to do so. The minor died and his legal representative was placed on the record as plaintiff:

Held, (1) that as the minor had sued for possession of the suit property despite the Will, his legal representative was entitled to prosecute the suit;

(2) that the cause of action was not personal to the minor on the ground that it would be open to him to repudiate his guardian's action on attaining majority and that, therefore, the suit did not abate.

Second appeal from the decree of the Court of the Subordinate Judge of Trichinopoly, in Appeal Suit No. 334 of 1911, preferred against that of the Court of the District Munsif of Karur, in Original Suit No. 294 of 1910.

Mr. *S. T. Srinivasagopalachariar*, for the Appellant.

Mr. *T. Rangachariar* (with him Messrs. *N. Rajagopalachariar* and *K. Parthasarathi*), for the Respondents.

JUDGMENT.—The 1st plaintiff, a minor, sued the 1st defendant by his guardian for

possession of the suit property as his by survivorship, and for a declaration that the Will purporting to have been made by his deceased father, on which the 1st defendant relied, was null and void. This Will vested the property in the 1st defendant in trust for the 1st plaintiff in case he should attain majority and in trust for a temple in case of his failure to do so. First plaintiff died a minor. Second plaintiff, the present appellant, was placed on the record as his legal representative, subject to objection to be disposed of in the final judgment. The 2nd plaintiff then had the other defendants impleaded, as representing the temple and as having taken possession of the property on its behalf in accordance with the Will on the 1st plaintiff's decease.

The lower Appellate Court held, and these defendants have argued here, that the 2nd plaintiff's cause of action is not identical with the 1st plaintiff's and that the former, therefore, cannot carry on the latter's suit. We cannot follow the learned Subordinate Judge in his argument based on the alleged division of the Will into two portions, one of which it was, he held, unnecessary for the 1st plaintiff to have declared inoperative. It is in fact doubtful whether the 1st plaintiff was under any obligation to ask for relief in respect of the Will at all, since it was the foundation, not of his claim, but of the 1st defendant's defence, and it was for the 1st defendant to propound it and establish its validity. But in any case, the 1st plaintiff sued, alleging that the property had vested in him and that he was entitled to possession of it notwithstanding the Will, and the 2nd plaintiff was entitled, as his heir, to prosecute that suit. The facts that the 2nd plaintiff impleaded fresh defendants, to whom the property had been transferred, and that he alleged the transfer to them as consequent on the 1st plaintiff's death, are immaterial, when the former alleged that both the 1st defendant and the other defendants took the property under colour of the same title, that based on the Will. We observe further that, not only was this the allegation in the plaint and the foundation on which the 1st plaintiff and after him the 2nd plaintiff were bound to base their claim, but it was not denied by the defendants subsequently impleaded, who set up no separate title or trespass on their part.

Here the lower Appellate Court's decision is supported further on the ground that the cause of action of a minor, such as the 1st plaintiff's is personal to him, since it would be open to him to reprobate his guardian's action on attaining majority and, therefore, does not survive to his heir. We have been shown no authority for this contention and it does not commend itself on its merits.

The second appeal must, therefore, be allowed. The lower Appellate Court's decision is set aside and it is directed to restore the appeal to its file and dispose of it according to law. The costs in this Court will be costs in the cause.

Appeal allowed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 328 OF 1912.

June 9, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT. and Mr. Justice Beachcroft.

AKSHOY KUMAR CHATTERJEE—PLAINTIFF—APPELLANT

versus

AKMAN MOLLA AND OTHERS—DEFENDANTS RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 178 (1) (d), 194—Privity of contract, whether exists between lessor and under-lessee—Covenant by tenure-holder not to excavate tank—Breach of covenant by raiyat—Tenure-holder, liability of—No actual damages suffered—Infringement of right—Nominal damages.

Section 178 (1) (d) of the Bengal Tenancy Act is controlled by section 194.

There is neither privity of contract nor privity of estate between the head lessor and the under-lessee and hence the under-lessee is not personally liable for the rent reserved by, nor on the covenants contained in, the head lease.

Wherever any act injures another's right and would be evidence in future in favour of the wrong-doer, an action may be maintained for an invasion of the right, without proof of any specific damage.

Where a tenure-holder, who had expressly undertaken not to excavate any tank on the property, granted to a *raiyat* a lease of some land within the tenure and the *raiyat* being unaware of the restrictive covenant in the lease of the tenure-holder excavated a tank:

Held, (1) that the tenure-holder, and not the *raiyat*, was liable in damages to his lessor for excavation of the tank by the *raiyat*;

(2) that there had been a breach of covenant not to excavate any tank, that is, an infringement of the legal right of the plaintiff, who was consequently entitled

to nominal damages, even though he may not have suffered actual damage.

Nominal damages does not necessarily mean small damages.

Appeal against the decree of the Subordinate Judge of Khulna, dated the 13th November 1911, affirming that of the Munsif of Khulna, dated the 22nd February 1911.

Babu *Surendra Chunder Sen*, for the Appellant.

Babu *Brojo Lal Chuckerbutty*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff in a suit for declaration that the defendants have no right to excavate a tank on the disputed holding. The plaintiff also asks for a mandatory injunction on the defendant to compel him to fill up the tank, or in the alternative for a decree for compensation to the extent of Rs. 400. The Courts below have dismissed the suit against all the four defendants. The first defendant is a *raiyat* in occupation of the land, while the other three are tenure-holders and intermediate between the plaintiff and the *raiyat*. The title of the tenure-holders was created on the 28th May 1854 by a lease under which they undertook not to cut down fruit-bearing trees and to excavate tanks on the property. The first defendant executed a *kabuliat* in favour of the tenure-holders on the 6th May 1883, but he was in occupation of a portion of the land from before that date. The Subordinate Judge has held that this *kabuliat* was the inception of the present tenancy, because at that time the tenant obtained a lease of additional lands of which he had not previously been in occupation. The case for the plaintiff is that the defendants have committed a breach of the covenant not to excavate a tank on the property comprised in the tenure and that they are consequently liable to indemnify him. The prayer for a mandatory injunction has not been seriously pressed; in fact the alternative claim shows that the plaintiff would be amply satisfied with a decree for compensation and does not intend that the tank should be filled up.

The first question for consideration is, whether there has been a breach of covenant; and if so, by whom? There is no room for controversy that there was an express undertaking by the tenure-holders not to excavate any tank on the property. That covenant has been broken. No doubt it has not been broken by the excavation of a tank by the tenure-holders themselves, but, *prima facie*, they must be held responsible for the act of their under-tenant. In the first place, in the lease which was granted to the *raiyat* on the 6th May 1883, they did not take the precaution to insert a covenant that the *raiyat* would not excavate any tank on the holding. Indeed there is nothing to show that the *raiyat* was ever apprised of this restrictive covenant in the lease of the tenure-holders. In the second place, it is plain that they have placed the *raiyat* in a position to excavate the tank. Our attention, however, has been drawn to section 194 of the Bengal Tenancy Act which is in these terms: "Where a proprietor or permanent tenure-holder holds his estate or tenure subject to the observance of any specified rule or condition, nothing in this Act shall entitle any person occupying land within the estate or tenure to do any act which involves a violation of that rule or condition." It has been argued for the appellant that this is a saving clause for conditions binding on landlords and that consequently the first defendant was not entitled to excavate a tank in violation of a condition to that effect in the lease of the tenure-holders. On behalf of the respondents it has been argued that the tenure-holders should not be held responsible, because if they had inserted a restrictive covenant in the lease granted to the *raiyat*, it would have been unenforceable under section 178, sub-section (1), clause (*d*), which provides that nothing in any contract between a landlord and a tenant made before or after the passing of the Act shall take away or limit the right of a tenant, as provided by the Act, to make improvements and claim compensations for them. Stress has also been laid on the fact that the Courts below have concurrently found that the excavation of this tank was an improvement of the holding, that the tank covers only a small portion of the land comprised in the holding and that water is needed for the use of men and cattle and will be beneficial for the purposes of cultivation. Under these circumstances, the tenure-holders-respondents contend that they should not be held responsible, as they could not have in any event restrained the first defendant from improving his holding by the excavation of the tank. This contention is clearly unsound, for, in our opinion, section 178, sub-section (1), clause (*d*), is controlled by section 194, which would have been super-

fluous if the object of the Legislature had been merely to lay down that the grantee is in no better position than the grantor. The Legislature obviously contemplated cases of the character now before us, where it might be argued with plausibility that the grantee was entitled, by virtue of the provisions of the Bengal Tenancy Act, to do what could not be done by his grantor. To avoid the conflict which may in this way arise, the Legislature has expressly provided that persons occupying land within a tenure cannot do such acts as involve a violation of the conditions under which the tenure is held. It is thus plain that the tenure-holders might have effectively inserted a restrictive covenant against excavation of tanks in the sub-lease granted by them to the first defendant. The tenure-holders are consequently liable for breach of covenant, even if it be assumed that they have no remdy against their sub-lessee: *Penley* v. *Watts* (1), *Smith* v. *Howell* (2), *Walker* v. *Hatton* (3). This does not, however, show that the plaintiff is entitled to ask for damages as against the first defendant. It is well settled that there is neither privity of contract nor privity of estate between the head lessor and the under-lessee, and hence the under-lessee is not personally liable for the rent reserved by, nor on the covenants contained in, the head lease: *Berney* v. *Moore* (4), *Holford* v. *Hatch* (5), Laws of England by Halsbury, Volume 18, Article 865. Consequently the plaintiff has no cause of action against the first defendant.

The second question for consideration is the measure of damages for the breach of the covenant. It has been argued on behalf of the tenure-holders that no decree for damages should be made, because the plaintiff has suffered no appreciable damage. It has not been shown that the value of the land as security for the rent has diminished; nor has it been proved that if the land reverts to the plaintiff upon surrender, abandonment or sale of the tenure in execution of a decree for arrears of rent, the plaintiff will not be able to make a re-settlement on the same rent as at present. On the other hand, the excavation of the tank has been a real improvement of the holding. On these facts, we have been pressed to hold that the plaintiff is not entitled to a decree for damages. We are of opinion that this contention is not well founded. There has been a breach of the covenant not to excavate any tank, that is, an infringement of the legal right of the plaintiff, who is consequently entitled to nominal damages, even though he may not have suffered actual damages: *Williams* v. *Williams* (6), *Wigsell* v. *Corporation of the School for the Indigent and Blind* (7). As Serjeant Williams says, wherever any act injures another's right and would be evidence in future in favour of the wrong-doer, an action may be maintained for an invasion of the right, without proof of any specific damage, *Millor* v. *Spateman* (8); *Patrick* v. *Greenaway* (9). In this way, not only is the principle that wherever there is a wrong there should be a remedy, enforced, but the award of nominal damages for the infliction of a legal wrong may settle the question of title or determine rights of the greatest importance to the plaintiff. From this point of view, it has sometimes been said that even though the result of a trespass may benefit the plaintiff and not damnify him, he is entitled to nominal damages. Hence, if a breach of covenant is deliberate, the Court may award vindictive damages, as Bowen, L. J., put it in *Whitham* v. *Kershaw* (10). Here, however, there is no reason to apprehend that the tenure-holders have wilfully committed the breach of covenant. The plaintiff is consequently entitled to nominal damages, which is not necessarily small damages. As Halsbury, L.C., said in *Medana* v. *Comet* (11): "Nominal damages is a technical phrase which means that you have negatived anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been

(1) (1841) 7 M. & W. 601; 10 L. J. Ex. 229; 56 R. R. 810.
(2) (1851) 6 Ex. 780, 20 L. J. Ex. 377; 86 R. R. 452.
(3) (1842) 10 M. & W. 249; 2 D. (N. S.) 263; 11 L. J. Ex. 361, 62 R. R. 600.
(4) 1791) 2 Ridgeway Parl. Rep. 323 at p. 331.
(5) (1779) 1 Doug. 183; 99 E. R. 119.
(6) (1874) L. R. 9 C. P. 659; 43 L. J. C. P. 382, 30 L. T. 688; 22 W. R. 706.
(7) (1882) 8 Q. B. D 357; 51 L. J. Q. B. 330; 46 L. T. 422; 30 W. R. 474.
(8) (1651) 1 Saunders 346 *b*.
(9) (1796) 1 Saunders 346 *b*. *note*.
(10) (1885) 16 Q. B. D. 613 at p. 618; 54 L. T. 124; 34 W. R. 340.
(11) (1900) A. C. 113 at p. 116; 69 L. J. Q. B. 35; 48 W. R. 398; 82 L. T. 95; 16 T. L. R. 104, 9 Asp. M. C. 41.

infringed: but the term nominal damages does not mean small damages." We assess the damages at Rs. 100, which according to the plaintiff is the sum required to fill up the tank.

The result is that this appeal is allowed and the decree of the District Judge set aside. The suit will stand dismissed with costs in all the Courts as against the first defendant but it will stand decreed for Rs. 100 as against the other defendants. The appellant is entitled to his costs in this Court on the amount decreed, but as between him and the defendants other than the first defendant the costs in both the Courts below must be borne by themselves.

Appeal allowed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1185 OF 1911.

July 6, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

MAHAMAYA DEBI—PLAINTIFF—APPELLANT

versus

HARIDAS HALDAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Custom—Kalighat palas, whether transferable in limited market—Heritable and partible and devisable—Alienation of a religious office, when permissible—Essentials of a valid custom—Immemorial existence of custom—Presumption—Reasonableness of custom—Inconsistency with general law—Mortgagor setting up title of third person—Estoppel—Trustee mortgagor—No estoppel where mortgage void as contrary to Statute—Mortgage of intangible property—Foreclosure.

According to custom the *palas* or turns of worship of the Kalighat shrine are transferable in the limited market of hereditary *shebaits* by blood or marriage.

The custom is a valid one.

A *pala* of the Kalighat temple is heritable, and it is immaterial whether the heir is a male or a female. It is also partible and devisable

Though probably religious offices were originally indivisible, they are now deemed partible.

In the absence of a custom or usage to the contrary or any term to that effect in the deed of endowment, a religious trust, or the right of management of a religious or charitable endowment or a religious office attached to a temple or any other endowment cannot be alienated by the holder.

But an alienation of a religious office may be made in favour of a person standing in the line of succession and not disqualified by personal unfitness.

A custom to be valid, (1) must be immemorial, (2) must be reasonable, (3) must have continued without interruption since its immemorial origin and (4) must be certain in respect of its nature generally as well as in respect of the locality where it is alleged to obtain and the persons whom it is alleged to affect.

Evidence showing exercise of a right in accordance with an alleged custom as far back as testimony can go, raises the presumption, though only a rebuttable presumption, as to the immemorial existence of the custom.

The period of ascertaining whether a particular custom is reasonable or not, is the time of its possible inception It is sufficient if no good legal reason can be assigned against it

Since customs in general involve some inconsistency with the general common law of the realm or are contrary to a particular maxim, the fact of this inconsistency is not of itself a ground for holding the custom unreasonable and bad.

Per *Mookerjee, J.*—A mortgagor cannot set up against his mortgagee the title of a third person, especially in view of his express declaration in the mortgage deed that no objection on his part or on behalf of his heirs or representatives shall be maintainable. Even a trustee cannot set up as a defence for himself against the mortgagee that the property mortgaged is trust property which he had no right to mortgage. The principle, however, is inapplicable when the mortgage is void as contrary to Statute.

A mortgagee of *palas* is a mortgagee of intangible property, and is entitled to foreclose the mortgage quite as much as a mortgagee of chattels, or a mortgagee of land.

Appeal against the decree of the District Judge of 24-Parganas, dated the 3rd February 1911, modifying that of the Subordinate Judge of 24-Parganas, dated the 16th August 1910.

Dr. *Rash Behary Ghose*, Babus *Mahendra Nath Roy*, *Braj Mohan Majumdar*, *Haribhusan Mukerji*, *Mohini Mohan Chatterjee* and *Sarat Chunder Mukerjee*, for the Appellant.

Babu *Atul Krishna Roy*, for the Respondents.

JUDGMENT.

MOOKERJEE, J.—This is an appeal by the plaintiff in a suit for foreclosure of a mortgage by way of conditional sale, executed in her favour by the defendants on the 16th August 1905, in renewal of two previous conditional mortgages, dated the 8th October 1900 and 9th December 1901. The earlier mortgages had been granted to secure loans of Rs. 1,400 and Rs. 800 respectively. The mortgage now in suit was given to secure the sum of Rs. 2,200, which was to carry interest at the moderate rate of 6 per cent. per annum and was made re-payable on the 16th August 1908. The subject-matter of the security consisted of 3 *palas* or turns of worship held by the

mortgagors in the temple of the goddess Kali at Kalighat. The mortgage-money was not repaid on the due date, and the plaintiff commenced this action on the 13th September 1909 to recover the sum with interest and costs. The plaintiff alleged in the plaint that the *palas* were transferable according to immemorial custom. The first defendant, who alone contested the claim, set up in his written statement the case that the *palas* were not transfereable by custom, and that even if the alleged custom was proved, no Court should recognise and enforce it, as it was unreasonable and opposed to public policy. The Subordinate Judge held that the *palas* were transferable by custom in a limited market, that the custom was neither unreasonable nor opposed to public policy and that the plaintiff was accordingly entitled to a foreclosure decree. On appeal, the District Judge has reversed the decision and has given the plaintiff only a personal decree against the defendants, as in his opinion the custom of transferability of *palas* was opposed to public policy and unenforceable in a Court of Justice. On the present appeal by the plaintiff, three substantial grounds emerge for consideration: namely, *first*, are the mortgagors estopped to deny the validity of the mortgage on the ground that the property given by way of security was inalienable; *secondly*, is the custom of transferability of *palas* reasonable, so that it may be recognised and enforced by a Court of Justice; and, *thirdly*, is the plaintiff entitled to a foreclosure decree, in view of the nature of the property given by way of security? Before I deal with these questions, it is necessary to define the custom which, the Courts below have concurrently found, does exist in respect of this particular religious foundation.

The Courts below have found that *palas* are ordinarily transferred by sale, mortgage, lease and gift, and that they are also the subject of partition and of testamentary devise. This is proved, not merely by oral evidence, but also by evidence of concrete instances in which such transactions have come before Courts and have been upheld as legal. One of the earliest transactions of which we find mention is a mortgage by way of conditional sale of a *pala*, which was executed on the 4th October 1819 and was foreclosed in due course. We have other instances of conditional mortgages, dated 11th April 1831 and 29th June 1831, which were both foreclosed in 1837. We have further a conditional mortgage of the 18th February 1835, which was foreclosed on the 8th August 1840 after contest in a suit in which the mortgagor unsuccessfully pleaded that the *pala* was non-transferable. A more modern instance is a conditional sale of 1864 which was foreclosed on the 16th December 1867. Instances of sales of *palas*, specially in recent years, are quite numerous, and it is not disputed that two of the *palas* in suit were acquired by the father of the first defendant, mortgagor, by purchase. Instances have also been adduced in which *palas* have been sold in execution of decrees, have been leased out for longer or shorter periods, have been bequeathed like other property and have in fact formed the subject of transfer in some form or other. One of the most recent instances on the record is a decree of this Court, dated 30th August 1900, which directed possession to be delivered of a *pala* which had been mortgaged by way of conditional sale, followed by a decree for foreclosure. It has been conclusively proved that 83 *palas* out of 360 have changed hands permanently. These facts amply justify the concurrent finding of the Courts below that the custom of transfer of *palas* of the Kalighat shrine has been established beyond the shadow of a doubt; the existence of the custom has been traced back almost to the time of the first establishment of British Courts in this country, and even as early as 1840 the Court found that the custom of transfer was fully established. The evidence, at the same time, established that these transfers have not been unrestricted; but have been confined to co-*shebaits* or to the members of families on whom a *shebait* can bestow his daughters in marriage; in other words, there is undisputed and overwhelming evidence, oral and documentary, that in practice *palas* have been transferred during at least 90 years, though in a limited market which those alone can enter who are qualified to become *shebait* by birth or marriage. Only one instance has been traced in which a transfer in favour of an absolute stranger, not connected with the hereditary *shebaits* by blood or marriage, has been recognised; but the transferee in that case was the hereditary *pujari* or priest whose function, it must be observed, is entirely distinct from that of a *shebait*,

The plaintiff is the widow of one Jnanendra Nath Mookherjee, who was the son of the daughter's son of a member of the senior branch of the family of Haldars, who are the hereditary *shebaits* of the goddess *Kali*. The husband of the plaintiff was also the son of a daughter of a Haldar, in other words, the husband of the plaintiff was descended from the Haldars on the paternal as also on the maternal side. The plaintiff is, consequently, a possible *shebait*; in other words, the contingency might have happened which would have entitled the plaintiff to take one or more *palas* by inheritance. The plaintiff is plainly entitled to the benefit of the custom, and this conclusion does not in any way contravene the well-established rule that a custom cannot be enlarged by parity of reasoning: *Arthur* v. *Bakenham* (1), *Prodyote Kumar Tagore* v. *Rakhal Chandra Sarkar* (2). The plaintiff is conclusively proved to belong to a class of persons to whom *palas* have hitherto transferred and the transfers have been been recognised as valid. Consequently, if the validity of the custom is established, there is no conceivable reason why the plaintiff should not by foreclosure become entitled to the three *palas* in dispute.

As regards the *first* question, it has been argued on behalf of the mortgagee that as no man is allowed to dispute a title which he himself has granted, the mortgagor cannot set up against his mortgagee the title of a third person; this cannot be disputed: *Doe d. Bristow* v. *Pegge* (3), *Goodtitle d. Edwards* v. *Bailey* (4), *Doe d. Ogle* v. *Vickers* (5), *Doe d. Hurst* v. *Clifton* (6), *King* v. *Smith* (7), *Debendra Nath* v. *Mirza Abdul Samed* (8). The rule has been held applicable where the mortgagor is a trustee, acting in a public capacity, and not for his own benefit [*Doe d. Levy* v. *Horne* (9), notwithstanding the contrary dictum in *Fairtitle d. Mytton* v. *Gilbert* (10), *Doe d. Baggaley* v. *Hares* (11)], and the principle has been repeatedly approved and applied in the Courts of the United States that a mortgagor is estopped to deny his title, and cannot set up as a defence for himself against the mortgagee that the property so mortgaged is trust property which he had no right to mortgage: *Bush* v. *Marshall* (12), *Strong* v. *Waddell* (13), *Jones* v. *Reese* (14), *Farris* v. *Horston* (15), *Boisclair* v. *Jones* (16); *Usina* v. *Wilder* (17); *McLeon* v. *Smith* (18). The reason for the rule is concisely put by Collier, C. J., in *Stewart* v. *Anderson* (19): "by the mortgage, the mortgagor professes to convey, and thus declares that he has an interest co-extensive with what he undertakes to transfer; and he will not be heard to say, in contradiction of his own deed or in opposition to a claim founded thereon, that he was guilty of a falsehood and had no estate or interest therein." This principle has been held inapplicable where the mortgage is void as contrary to Statute [*Brewster* v. *Madden* (20)], on the ground that "it is not competent to parties to a contract to estop themselves or anybody else in the face of an Act of Parliament:" *Barrow's case* (21). Hence it has been ruled that a corporation is not estopped from pleading that a mortgage made by it is *ultra vires*: *Ex parte Watson* (22). See also *Fairtitle d. Mytton* v. *Gilbert* (10), *Blackburn District Benefit Building Society* v. *Cunliffe Brooks & Co.* (23), *British Mutual Banking Co.* v. *Charnwood Forest Railway Company* (24). But the view has been steadily maintained that trustees for a public purpose are not, by the nature of their office, protected from the operation of estoppel as against the assignees of the original parties to the deed in question:

(1) (1708) 11 Modern 148 at p. 161; 88 E. R. 957.
(2) 5 Ind. Cas. 243; 37 C.322 at p. 326; 11 C. L. J. 209; 14 C. W. N. 487.
(3) (1785) 1 T. R. 758n, 99 E. R. 1362.
(4) (1777) 2 Cowper 597 at p 601; 98 E. R. 1260.
(5) (1836) 4 A & E. 782, 6 N. & M. 437; 6 L. J. K. B. 206; 111 E. R. 977.
(6) (1836) 4 A & E 809 at p. 813, 6 L. J. K. B. 274; 111 E. R. 988.
(7) (1900) 2 Ch. 425; 69 L. J. Ch. 598; 83 L. T. 815; 16 T. L. R. 410
(8) 1 Ind. Cas. 264; 10 C. L. J. 150 at p. 168.
(9) (1842) 3 Q. B. 760, 12 L. J. Q. B. 72, 3 G. & D. 339; 7 Jur. 38; 61 E. R. 897.
(10) (1787) 2 T. R 161 at p. 171; 1 R. R. 455; 100 E. R. 91.
(11) (1833) 4 B. & Ad. 435 at p. 440; 1 N. & M. 237; 2 L. J. K. B. 88; 110 E R. 519.
(12) (1848) 6 Howard 284; 12 Law. Ed. 490.
(13) (1876) 56 Ala. 471.
(14) (1880) 65 Ala. 134.
(15) (1883) 74 Ala. 162.
(16) (1867) 36 Ga. 499.
(17) (1877) 58 Ga. 178.
(18) (1880) 49 Wis. 200.
(19) (1846) 10 Ala. 504 at p. 508.
(20) (1875) 15 Kans. 249.
(21) (1880) 14 Ch.D. 432 at p. 441; 49 L. J. Ch. 498; 41 L. T. 755; 28 W. R. 270.
(22) (1888) 21 Q B.D. 301 at p. 302; 57 L.J.Q B. 609.
(23) (1885) 29 Ch. D. 902; 54 L. J. Ch. 1091; 53 L. T. 741.
(24) (1887) 18 Q. B. D. 714 at p. 719; 56 L. J. Q. B. 449; 57 L. T. 883; 35 W. R. 590; 52 J. P. 150.

Doe d. Levy v. *Horne* (9), *Webb* v. *Herne Bay Commissioners* (25), *Higgs* v. *Northern Assam Tea Co.* (26). I am not prepared to accept the view indicated by Banerjee, J., in *Mallika* v. *Ratan Mani* (27), which receives no support from the decision of the Judicial Committee in *Juggut Mohini Dossee* v. *Sokheemoney Dossee* (28), cited in support of this position; but there are cases where trustees have been allowed to impeach their own grants [*Ramonee Debia* v. *Baluck Doss* (29)], and conflicting *dicta* are to be found in *Gulam Nabi* v *Nagammal* (30) and *Gulzar Ali* v. *Fida Ali* (31), [see *Sidhu Sahu* v. *Gopi Charan Das* (32), where the earlier cases are discussed]. I am of opinion that in the case before us, the Court should not depart from the ordinary rule that the mortgagor cannot dispute the title of the mortgagee, specially in view of the express declaration of the mortgagors in the fourth paragraph of the mortgage-deed that "no objection on their part or on behalf of their heirs or representatives shall be maintainable." But I do not desire to rest the decision solely on the ground of estoppel, for, as will presently be seen, there is no substance in the objection raised by the mortgagors.

As regards the *second* question, it has not been disputed on behalf of the mortgagee that in the absence of a custom or usage to the contrary or any term to that effect in the deed of endowment, a religious trust or the right of management of a religious or charitable endowment or a religious office attached to a temple or any other endowment cannot be alienated by the holder: *Raja Vurmah Valia* v. *Ravi Vurmah Kunhi* (33), *Rama Varma* v. *Raman Nayar* (34), *Kannan* v. *Nilakandan* (35), *Lakshmanaswami Naidu* v. *Rangamma* (36), *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (37), *Sarkum* v. *Rahman Bakhsh* (38); *Narayana* v. *Ranga* (39), *Subbarayudu* v. *Kotayya* (40), *Alagappa* v. *Sivaramasundara* (41), *Rajeshwar* v. *Gopeshwar* (42), *Durga Bibi* v. *Chanchal Rani* (43), *Rup Narain Singh* v. *Junko Bye* (44), *Mallika* v. *Ratan Mani* (27), *Rangasami* v. *Ranga* (45), *Rajaram* v. *Ganesh* (46), *Ukoor Dass* v. *Chunder Sekhur Dass* (47), *Juggur Nath* v. *Kishen Pershad* (48), *Kali Charan* v. *Bangshi Mohan Das* (49), *Dube* v. *Srinivas* (50), *Ramanadhan* v. *Murugappa* (51), *Trimbak* v. *Lakshman* (52) and *Kuppa* v. *Dorasami* (53). There is also authority for the proposition that an alienation of a religious office may be validly made in favour of a person standing in the line of succession and not disqualified by personal unfitness: *Sitarambhai* v. *Sitaram Ganesh* (54), *Mancharam* v. *Pranshankar* (55), *Annasami* v. *Ramakrishna* (56) and *Nirodbarani Dassi* v. *Shiba Dass* (57). But the appellant does not invite us to go even as far as this proposition. She asks us to assume that a *pala* or turn of worship is not alienable except by custom, and contends that the custom which has been proved in this case should be recognised by the Court: *Raja Vurmah Valia* v. *Ravi Vurmah Kunhi* (33), *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (37). This raises the question, whether the custom possesses the characteristics deemed essential for the validity of a custom. These essential attributes were specified by Tindal, C. J., in *Tyson* v. *Smith* (58) in these terms: "A custom to be valid must have four essential attributes—*first*, it must be immemorial;

(25) (1870) 5 Q. B. 642; 39 L. J. Q. B 221; 23 L. T. 745; 19 W. R. 241.
(26) (1869) 4 Ex. 387; 38 L J. Ex. 233; 21 L. T. 336, 17 W. R. 1125.
(27) 1 C. W. N. 493.
(28) 14 M. I A. 289; 10 B. L. R. 19; 17 W. R. 41; 2 Suth P. C. J. 512; 3 Sar. P. C. J. 23; 20 Eng.Rep. 795.
(29) 14 W. R. 101; 11 B. L. R. 336n.
(30) 6 M. L J. 270.
(31) 6 A. 24; A. W. N. (1883) 182.
(32) 18 Ind. Cas. 969; 17 C. L. J. 233 at p. 237.
(33) 4 L. A. 76, 1 M. 235; 1 Ind. Jur. 134; 3 Sar. P. C. J. 687, 3 Suth. P. C. J. 382.
(34) 5 M. 89.
(35) 7 M. 337.
(36) 26 M. 31.
(37) 27 L A. 69; 23 M. 271; 4 C. W. N. 329; 2 Bom. L. R. 597; 10 M. L. J. 29.
(38) 24 C. 83
(39) 15 M. 183; 2 M. L. J. 19.
(40) 15 M. 389. (41) 19 M. 211.
(42) 34 C. 828; 11 C.W.N. 782.
(43) 4 A. 81; A. W. N. (1881) 124.
(44) 3 C. L. R. 112.
(45) 16 M. 146. (46) 23 B. 131.
(47) 3 W. R. 152.
(48) 7 W. R. 266.
(49) 15 W. R. 339; 6 B. L. R. 727.
(50) 5 B. L. R. 617; 14 W. R. 409.
(51) 13 M. L. J. 341; 27 M. 192.
(52) 20 B. 495.
(53) 6 M. 76; 7 Ind. Jur. 75.
(54) 6 B. H. C. R. 250.
(55) 6 B. 298.
(56) 24 M. 219; 11 M. L. J. 1.
(57) 3 Ind. Cas. 76; 36 C. 975; 13 C. W. N. 1084.
(58) (1838) 9 Ad. & El. 406; 1 P. & D. 307; 1 W. W. & H. 749; 48 R. R. 589; 112 E. R. 1265.

secondly, it must be reasonable; *thirdly*, it must have continued without interruption since its immemorial origin; and, *fourthly*, it must be certain in respect of its nature generally, as well as in respect of the locality where it is alleged to obtain and the persons whom it is alleged to affect." See also *Hurpershad* v. *Sheo Dyal* (59), *Raja Vurmah Valia* v. *Ravi Vurmah* (33), *Lutchmeeput Singh* v. *Sadaullah Nushyo* (60) and *Ghasiti* v. *Umrao Jan* (61). In the case before us, the custom obviously satisfies the first, third and fourth requirements. The time when the custom originated is unknown; all that has been ascertained is that as far as the evidence can be carried back, it has been in existence. This takes the case out of the rule formulated by Willes, J., in *London Corporation* v. *Cox* (62), that "a custom originating within time of memory, even though existing in fact, is void at law." There is no force in the contention that the proof of the existence of the custom should have been carried back by direct evidence to 1793, when the first Regulations were passed by the Indian Legislature, if not to the year 1773 when the Supreme Court was established. It is well settled that evidence showing exercise of a right in accordance with an alleged custom as far back as testimony can go, raises the presumption, though only a rebuttable presumption, as to the immemorial existence of the custom. As Tindal, C. J., said in *Bastard* v. *Smith* (63), "You cannot reasonably expect to have it proved that the custom did in fact exist before time of legal memory; but you are to require proof, as far back as living memory goes, of a continuous, peaceable and uninterrupted user of the custom." To the same effect is the observation of Farwell, J., in *Mercer* v. *Denne* (64): "not only ought the Court to be slow to draw an inference of fact which would defeat a right that has been exercised during so long a period as the present, unless such inference is irresistible, but it ought to presume everything possible to presume in favour of such a right." It is interesting to note that Vijnaneswara in his Mitakshara enunciated a similar rule (Yajnavalkya, Book II, 27). On the authority of a text of Katyayana, he holds that "time within the memory of man extends as far as a hundred years," as a man has, according to Sruti, a hundred years' duration of life (Mitakshara, trans. Gharpure, page 50). Apararka, in his commentary on the same text of Yajnavalkya, treats a period beyond three generations (that is, one hundred and five years) as time immemorial, and refers to an earlier text to show that a period beyond sixty years might be treated as time beyond human memory. In any event, it is well-settled that if the existence of the custom has been proved for a long period, the onus lies on the person seeking to disprove the custom to demonstrate its impossibility; in this case, the mortgagors have entirely failed to meet the evidence of the custom adduced by the plaintiff. There is also no room for serious controversy as regards the certainty and continuity of the custom. The only question, consequently, for consideration is whether it is reasonable, as the appellant contends, or unreasonable and opposed to public policy, as the respondent asserts. It is indisputable that if a custom be against reason, it has no force in law; but as explained in Co. Litt. 62*a*, the reason here referred to is not to be understood as meaning every unlearned man's reason, but artificial and legal reason warranted by authority of law; or as Blackstone puts it (Commentaries, Vol. I, page 77) it is sufficient if no good legal reason can be assigned against it. When, however, it is said that a custom is void because it is unreasonable, nothing more is meant than that the unreasonable character of the alleged custom conclusively proves that the usage, even though it may have existed from time immemorial, must have resulted from accident or indulgence and not from any right conferred in ancient times: *Salisbury* v. *Gladstone* (65). It is also well settled that the period for ascertaining whether a particular custom is reasonable or not, is the time of its possible inception; this is in accord with the observation in the *Tanistry's* case (66), "the commencement of a custom (for every custom hath a commence-

(59) 3 I. A. 259; 26 W. R. 55.
(60) 9 C. 968; 12 C. L. R. 382; 5 Shome L. R. 27.
(61) 21 C. 149; 20 I. A. 193.
(62) (1866) 2 H. L. 239 at p. 259; 36 L. J. Ex. 225; 16 W. R. 44.
(63) (1837) 2 M. & Rob. 129 at p. 136.
(64) (1904) 2 Ch 534 at p. 556; 68 J. P. 479; 74 L. J. Ch 71; 91 L. T. 513; 53 W. R. 57; 3 L. G. R. 385; 20 T. L. R. 609.
(65) (1861) 9 H. L. C. 692 at p. 701; 34 L. J. C. P. 222; 8 Jur. (N. S.) 625; 4 L. T. 840; 9 W. R. 930; 11 E. R 900; 131 R. R 408.
(66) (1608) Davis. 29 at p. 32; 80 E. R 516.

ment, although the memory of man doth not extend to it, as the river Nile hath a spring although geographers cannot find it) ought to be upon reasonable ground and cause, for if it was unreasonable in the original, no usage or continuance can make it good. *Quod ab initio non valet in tractu temporis non convalescet.*" When tested in the light of these principles, no good ground can be assigned why the custom should be condemned as unreasonable. There is no force in the contention of the respondents that because the custom contravenes the rule that a religious office is inalienable, it must be pronounced to be against public policy; if this argument were to prevail, all customs would be unreasonable. Since customs in general involve some inconsistency with the general common law of the realm or are contrary to a praticular maxim, the fact of this inconsistency is not of itself a ground for holding the custom unreasonable and bad: *Tyson* v. *Smith* (58). Thus in the *Tanistry* case (66), it is said that " several customs which have been adjudged void in our books as being unreasonable, against common right or purely against law, if their nature and quality be considered, will be found injurious to the multitude and prejudicial to the commonwealth." To the same effect is Co. Litt. 113*a*: "*Consuetudo ex certa causa rationabili usitata privat communem legem.*" Is there then anything to show that this custom is injurious to the endowment or to the commonwealth? One of the mortgagors has a turn of worship or *pala*; he is entitled in this character to collect the offerings made to the goddess on the day on which his turn falls; he applies a portion of the income for the worship of the goddess and appropriates the remainder for his personal use. It is not material to consider whether he should not apply the whole of the income for religious and charitable purposes; but let us assume that he, and every *shebait* like him who has a *pala*, may be compelled to do so. He transfers his turn of worship to a person who, in certain contingencies, might, in his own right, have been a *shebait* and might have held a *pala*. The transferee, as holder of the *pala*, is under precisely the same obligation to the endowment as the transferor himself. It is difficult to appreciate how a custom which recognises and validates a transfer to members of a limited circle under these circumstances can be detrimental to the endowment or to the public. There is no question that a *pala* of the Kalighat temple is heritable, and it is immaterial whether the heir is a male or a female; the custom in this respect is established beyond doubt: *Janokee* v. *Gopaul* (67). There is also no question that though probably religious offices were originally indivisible, they are now deemed partible: *Trimbak* v. *Lakshman* (52), *Mitta Kunth* v. *Neerunjun* (68), *Elder Widow* v. *Younger Widow* (69), *Sethuramasawmiar Iyer* v. *Sri Meruswami Iyar* (70), *Damodardas* v. *Uttamram* (71), *Nagiah* v. *Muthacharry* (72), *Limba* v. *Rama* (73), *Raman Lalji* v. *Gopal Lalji* (74), *Rajeshwar* v. *Gopeshwar* (42), *Anundi Moyee* v. *Boykantnath Roy* (75), *Ram Soondur Thakur* v. *Taruck Chunder* (76), *Debendro Nath* v. *Odit Churn* (77), *Eshan Chunder Roy* v. *Monmohini Dassi* (78) and *Goopee Kishen* v. *Thakoor Das* (79). Indeed, the very name *pala* or turn of worship shows that the right is partible. This involves, by necessary implication, the attribute of transferability as amongst the members of the family of *shebaits*; partition signifies the surrender of a portion of joint right in exchange for a similar right from the co-owner. There is further no question that a *pala* has not only been deemed heritable and partible, it has also been treated as devisable, as is illustrated by the case of the sister of the first defendant, who obtained a *pala* under the testamentary devise of her father. This, again, involves the recognition of the transferable character of a *pala*; the exercise of the right to make a bequest implies an assertion of the right to make a transfer *inter vivos*. It follows, consequently, that the customary right to make a sale, mortgage, gift or lease of a *pala* in favour of persons within a limited circle is closely associated with and possibly de-

(67) 2 C. 365 at p. 372; 1 Ind. Jur. 737.
(68) 14 B. L. R. 166; 22 W. R. 437.
(69) (1807) 1 Mac Sel. Rep. 239; 6 Ind. Dec. (o.s.) 176.
(70) 4 Ind. Cas. 76; 20 M. L. J. 108; 34 M. 470; 6 M. L. T 319.
(71) 17 B. 271.
(72) 11 M. L. J. 215 at p. 222.
(73) 13 B. 548.
(74) 19 A. 428; A. W. N. (1897) 103.
(75) 8 W. R. 193.
(76) 19 W. R. 28.
(77) 3 C. 390.
(78) 4 C. 683.
(79) 8 C. 807; 10 C. L. R. 439.

veloped out of the heritable, devisable and partible character of a *pala*. A custom of this description clearly cannot be characterised on any rational ground as unreasonable or opposed to public policy. It is further worthy of note that this is not a novel view of the true character of such a custom; for as early as 8th August 1840 the validity of a conditional mortgage of a *pala* effected on the 18th February 1835 was upheld in a contested litigation. Since every custom sanctioned by the Courts must be reasonable, it follows that every case where a custom has been upheld by the Courts is an example of a reasonable custom. When the evidence is examined from this point of view, the case for the mortgagee is materially strengthened; for, as is clear from the record, not only the existence but also the validity of the custom has been repeatedly recognised by the Courts during at least 70 years prior to the institution of this suit, while no single instance has been found where its reasonableness has been successfully assailed. The custom of transferability of a *pala* in favour of a limited circle of transferees must accordingly be held valid, and no good reason has been assigned why it should be deemed unreasonable or opposed to public policy.

As regards the *third* question, it has been argued on behalf of the mortgagors-respondents that as Order XXXIV of the Civil Procedure Code of 1908 applies only to mortgages of immoveable property, the plaintiff is not entitled to a decree for foreclosure; and in this connection, reference has been made to *Ishan Chander Roy* v. *Monmohini Dasi* (78) and *Jati Kar* v. *Mukund Deb* (80) to show that a *pala* or turn of worship is not immoveable property. There is no substance in this connection. It is well-settled that foreclosure is a remedy of the mortgagee which is not confined to mortgages of land; it is equally applicable to mortgages of chattels, as decided by the House of Lords in *Harrison* v. *Hart* (81), *Tanored* v. *Potts* (82) and *Kemp* v. *Westbrook* (83). The case before us is clearly not that of a pledgee of a moveable; such a pledgee, as pointed out in *Harrold* v. *Plenty* (84), is in a very different position from an ordinary mortgagee, as he has only a special property in the thing pledged and may obtain a sale, but not a foreclosure. The plaintiff is a mortgagee, not of immoveable but of intangible property, and he is entitled to foreclose the mortgage quite as much as a mortgagee of chattels. [Jones on Chattel Mortgages, 1908, sections 699 and 776.] It is worthy of note that as early as 1181, Glanville described in detail a remedy applicable to chattel mortgages which is substantially equivalent to the modern procedure for foreclosure and order absolute on failure of the mortgagor to redeem within the period fixed by the Court. [Glanville, Tr. Beames, Book X, Ch. 6-8; Ed. Beale, 1900, pp. 204-210.] It may be added that if the contention of the mortgagors were to prevail, they might find themselves in a worse position than what they would occupy under a foreclosure decree; for if the procedure for foreclosure, with its consequent opportunity to the mortgagor to redeem, is not applicable, the mortgagee may very well contend that the contract between the parties must be strictly enforced, and that as the time for repayment has passed away, the title of the mortgagee to the mortgaged property has become absolute; such a result could hardly have been contemplated by the mortgagors.

The result is that this appeal is allowed and the decree of the District Judge discharged. On account taken of the sum due on the conditional mortgage in suit on the 16th November next, it transpires that the mortgagee will be entitled to Rs. 3,421 for principal and interest up to that date. The decree will direct that if the defendants pay this sum together with costs of all the Courts with interest thereon (as specified in the decree of this Court) on or before the 16th November 1914, the mortgage will stand redeemed. On default, the mortgage will be foreclosed after the decree absolute has been made by the primary Court in due course. The hearing

(80) 11 Ind. Cas. 884; 16 C. W. N. 129; 39 C. 227; 14 C. L. J. 369.
(81) (1726) 1 Comb. 393; 2 Eq. Cas. Abr. 6.
(82) 2 Fonblanque on Equity, 5th Ed., 261n.
(83) 1 Ves. (Sen.) 278; 27 E. R. 1030.
(84) (1901) 2 Ch 314; 70 L. J. Ch. 562; 49 W. R. 646; 85 L. T. 45; 17 T. L. R. 545; 8 Manson 304.

fee in this Court is assessed at thirty gold *mohurs*.

BEACHCROFT, J.—I agree with the proposed order, on the second ground discussed by my learned brother. On the question of estoppel I prefer to reserve my opinion.

Appeal allowed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 20 OF 1912-13 OF LUCKNOW DISTRICT.

August 3, 1914.

Present:—Mr. Tweedy, J. M.

Thakur LAL MUNESHAR BAKHSH SINGH—DEFENDANT—APPELLANT

versus

GAYA BAKHSH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Ejectment, whether by notice or by suit—Perpetual lessee, not liable to ejectment by notice—Oudh Rent Act (XXII of 1886), s. 60.

A perpetual lessee cannot be ejected by notice. The landlord must proceed against him by suit, as provided in section 60 of the Oudh Rent Act.

Appeal from the decree of the Commissioner, Lucknow, dated 16th June 1913.

Mr. *St. G. Jackson*, for the Appellant.

Babu *Bisheshwar Nath Srivastava*, for the Respondents.

JUDGMENT.—I entirely agree with the Commissioner that ejectment by notice cannot be made. It is not necessary for the purposes of this case to decide whether the lease is open to forfeiture if a portion of the holding is sub-let or whether the rent is in arrears. These questions will arise subsequently, but I am clear that the appellant must proceed by suit. Section 56 (*b*) says that a tenant when served with a notice may contest it on the ground that he holds under an unexpired lease. That the respondents do so hold is beyond question, although it is curious that section 60 does not provide for a perpetual lease at all, but only for "long" leases. Whether the grant of a perpetual lease is valid or not is very doubtful, and it is particularly doubtful whether the Court of Wards had power to grant such a lease. In any case, it is quite impossible to hold that in the case of a lease for a term of years there must be a *suit* and that in the case of a perpetual lease a *notice* will suffice. What the appellant's remedy is it is not necessary to decide. He might have a good cause of action in the Civil Court to get the lease cancelled, but if he has any remedy in the Revenue Court it must be by suit under section 60. Appeal dismissed with costs.

This order will govern No. 21.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2135 OF 1911.

May 26, 1914.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Beachcroft.

PRIYAMBADA DASI—PLAINTIFF—APPELLANT

versus

RAM GOPAL GHOSH AND OTHERS—DEFENDANTS—RESPONDENTS.

Gift—Construction of deed—Property gifted to wife for her life only—Reversion, right of, transfer of—Expectancy of succession—Transfer, validity of.

A *heba* gift-deed, executed by a Hindu in favour of his wife for her maintenance and performance of *debsheba*, without any words indicating inheritance or power of alienation usually contained in a deed of absolute gift, is a gift only for life of the donee and the right of ownership *minus* the right of the donee, to enjoy the property for her life remains in the donor. The reversion, which remains vested in the donor in such a case, is different from a mere expectancy of succession as in the case of a reversioner of a Hindu widow, and is, therefore, descendible to and transferable by his heirs.

Appeal against the decree of the officiating District Judge, Murshidabad, dated the 29th of April 1911, affirming that of the Munsif, 1st Court, at Kandi, dated the 9th of June 1910.

Babu *Sajani Kanta Sinha*, for the Appellant.

Babu *Ram Charan Majumdar* and *Naren Chandra Sinha*, for the Respondents.

JUDGMENT.—The plaintiff-appellant purchased an 8-annas share of the properties in execution of a mortgage-decree against one Gobind Gopal on the 15th June 1897, and is said to have obtained symbolical possession of the properties on the 21st November 1897.

It appears that one Lal Mohan was originally the owner of a 4-annas share of the properties. He had two sons, one of them being Gobind Gopal. Lal Mohan executed a *heba patra* in the year 1875 in favour of his 3rd wife, Khetramoni, in respect of the 4-annas share of the properties together with other properties. Khetramoni died in 1903. Both Lal Mohan and Gobind predeceased her, Lal Mohan in 1891 and Gobind in 1896. The plaintiff on the 20th September 1909 instituted the present suit for recovery of possession of an 8-annas share of the properties. It was conceded, however, in the Court below that Lal Mohan had only a 4-annas share, and the plaintiff was, therefore, entitled to claim only a 2-annas share, that being the share of Gobind Gopal. The suit was resisted by the defendants Nos. 1 and 2, the sons of Gobind, and the defendant No. 3, who had purchased their interest, originally on the ground that Gobinda had no right to the properties which devolved upon the defendants Nos. 1 and 2 and their uncle, Nrittya Gopal, on the death of Khetramoni, as heirs of Lal Moni.

The Courts below have concurred in dismissing the suit.

The questions raised in this appeal are, *first*, whether upon a proper construction of the *heba*, only a life-interest was created in favour of Khetramoni, and *secondly*, if so, whether Lal Mohan had any interest which could be inherited and mortgaged by his son, Gobind Gopal, and passed to the plaintiff at the sale held under the mortgage.

The learned District Judge has held that the *heba* was a gift out and out. We are unable to agree with him in the construction put by him upon the document. The *heba* states that it was executed in order to provide for the maintenance of Khetramoni and for the performance of "*debsheba*, &c." It is true the document recites that the debts of Lal Mohan had been paid up by Khetramoni by selling her own properties. That may have been the reason which induced Lal Mohan to make a provision for the maintenance of his wife and the performance of *debsheba*, but there is nothing in the document to indicate that it was an absolute gift. Lal Mohan had two sons by another wife. He would, therefore, naturally make a provision for the maintenance of his third wife and for performance of *debsheba*, but it is also natural that he should intend that the sons should get the properties after the death of Khetramoni. Moreover, the fact that the *debsheba* was also to be performed indicates that the properties could not have been intended to be absolutely given to Khetramoni. As pointed out by the Judicial Committee in the case of *Mahomed Shamsool Huda* v. *Shewakram*(1), in connection with the construction of a Will executed by a Hindu, "it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained in his family; and it may be assumed that a Hindu knows that, as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate." In the present case it was a gift by a Hindu husband to his wife and had it been the intention of Lal Mohan to give the properties absolutely to Khetramoni, one would have expected words of inheritance and power of alienation which are usually contained in a deed of absolute gift.

Reference was made on behalf of the respondents to the provisions of section 8 of the Transfer of Property Act. No doubt under section 8 of the Transfer of Property Act, a transfer of property, unless a different intention is expressed or necessarily implied, passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property and in the legal incidents thereof. But the *heba* was executed in 1875 before the Transfer of Property Act was passed; the provisions of that section are, therefore, inapplicable.

As pointed out, however, by the Judicial Committee in the case of *Kalidas Mullick* v. *Kanhaya Lal Pandit* (2), the rule of law before the Transfer of Property Act was that indefinite words of gift were calculated to convey all the interest of the grantor, but

(1) 21 A 7; 22 W R. 409; 14 B. L. R 226.
(2) 11 C. 121; 11 I. A. 218; 8 Ind Jur. 638; 4 Sar. P. C. J. 578.

that it was necessary to read the whole instrument to gather the intention.

Now, turning to the *heba* it seems to us that the words, "from this date you shall make collections by your own men and on payment of revenue and road-cess, you shall enjoy the *lakheraj* and collectorate properties in the schedule below," must be read in connection with the words which precede and follow them, "in order to provide for your maintenance and the performance of *debsheba*, &c.," and "we think that no objection to this either on my part or on the part of my representatives shall be entertained" refer to objection being raised during the life-time of Khetramoni either by Lal Mohan or his heirs. It appears to us that the indefinite words of gift must be limited by the purposes of the gift and that it was Lal Mohan's intention that Khetramoni should take the properties only for her life for her "maintenance and for *debsheba*, &c."

We may mention that although the learned District Judge held and the respondent has contended in this Court that there was an absolute gift to Khetramoni, the defendants stated in their written statements that the grant to Khetramoni was for her life for her maintenance, and that if it was an absolute gift Gobind had no right to the properties. What the defendants maintained in their defence was that Gobind having predeceased Khetramoni, the defendants Nos. 1 and 2 and their uncle, Nrittya Gopal, inherited the properties as heirs of Lal Mohan on the death of Khetramoni, and that Gobind had no interest which he could mortgage to the plaintiff.

But if the only right created in favour of Khetramoni was a life-interest, Lal Mohan had an interest in the properties subject to the right of Khetramoni to enjoy them during her life, an interest which was descendible to his heirs and capable of being transferred by them. Gobind, therefore, inherited one-half of such interest on the death of his father, Lal Mohan. Had it been merely the interest of a Hindu reversioner expectant upon the death of a Hindu widow, we would have been bound to hold, having regard to the opinion of the Judicial Committee in *Sham Sundar Lal* v. *Achhan Kunwar* (3) and that of this Court in *Nund Kishore Lal* v. *Kanee Ram Tewary* (4), that it could not be the subject of transfer. But in the view we have taken of the *heba*, Lal Mohan gave only a life-estate to Khetramoni. The reversion on the determination of the life-estate given to Khetramoni remained vested in Lal Mohan. It was not a mere expectancy of succession as in the case of a reversioner of a Hindu widow. A Hindu widow has not a mere life-interest; the whole estate is vested in her absolutely for some purposes, though in some respects for a qualified interest. Here the right of ownership *minus* the right of Khetramoni to enjoy the property for her life remained with Lal Mohan. The right, therefore, which was left in Lal Mohan, could be, and was, inherited by his sons, Gobind Gopal and Nrittya Gopal on his death, and Gobind was quite competent to mortgage his interest to the plaintiff. The plaintiff thus acquired a good title to the share of Gobind on the death of Khetramoni at the sale held in execution of the decree based upon the mortgage.

The learned District Judge, however, has not decided the other issues in the case and the case must, therefore, go back for determination of the other issues.

The decree of the Court of appeal below is accordingly set aside and the case remanded to that Court for disposal after decision of the other issues. Costs to abide the result.

Decree set aside; Case remanded.

(3) 25 I. A. 183, 21 A. 71; 2 C. W. N. 729; 7 Sar. P. C. J. 417.

(4) 29 C. 355; 6 C. W. N. 395.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 150 OF 1912.

October 20, 1914.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Spencer.

V. R. M. RAMANATHAN CHETTY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

U. A. U. K. RAMASAMI CHETTY—DEFENDANT—RESPONDENT.

Madras Estates Land Act (I of 1908), ss. 112, 113, 189—Sale under the Act—Suit to contest sale—Jurisdiction—Civil suit barred both before and after sale,

BALDEO SHUKUL *v.* BALBHADAR SINGH.

Section 189 of the Madras Estates Land Act precludes a Civil Court from taking cognizance of a suit for declaration that no valid sale can be effected and therefore a party is not entitled to contest in a civil suit, the validity of a sale under the said Act, and it makes no difference whether the suit is brought before or after the sale.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Ramnad, in Original Suit No. 91 of 1911.

Messrs. *T. R. Ramachandra Aiyar* and *S. Sundara Raja Aiyangar*, for the Appellants.

Mr. *S. Gopalaswamy Aiyangar*, for the Respondent.

JUDGMENT.—This is a suit in ejectment. The Subordinate Judge dismissed the suit, on the ground that the plaintiffs' title to the property had passed to one Sundara Raja Aiyangar and also on the ground that they cannot dispute the validity of the sale under the Estates Land Act under which the property was sold to the defendant and possession was delivered to him by the Collector. The plaintiffs appeal.

The plaintiffs were occupancy tenants. The defendant, the landholder, served notice of intention to sell the holding on the plaintiffs through the Collector under section 12 of the Estates Land Act. Intimation of the date of service was given by the Collector to the landholder under section 113 and the property was sold and the defendant was placed in possession by the Collector. It was open to the plaintiffs to bring a suit under section 112 to contest the defendant's right of sale within thirty days of the date of service on him. Clause 12 of Part A of the Schedule and section 189 precludes a Civil Court from taking cognizance of any dispute in respect of which a suit might be brought before a Collector. The plaintiffs are not, therefore, entitled in a civil suit to question the right of sale. Mr. Ramachandra Aiyar argues that the plaintiffs are only precluded from bringing a suit before the sale, but the section is not a bar to the suit which may be brought for the same purpose after the sale. The words of section 189 do not support this contention. It renders the section practically nugatory. It is not likely that the Legislature would allow the validity of a sale to be impeached after the sale, while prohibiting a suit for a declaration that no valid sale can be effected.

The case in *Gouse Moideen Saib* v. *Muthialu Chettiar* (1) has no application. There a sale was sought to be set aside on the ground of fraud—cases relating to fraud stand on a different footing. The defendant is not a wrong-doer and was lawfully placed in possession in proceedings to which the plaintiffs were parties. He is, therefore, also entitled to show that the plaintiffs had no title to possession. We think the Subordinate Judge is right and dismiss the appeal with costs.

Appeal dismissed.

(1) 21 Ind. Cas. 762, 14 M. L. T. 523; (1914) M. W. N. 55; 26 M. L. J. 36.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1384 OF 1913.

July 20, 1914.

Present:—Mr. Justice Piggott.

BALDEO SHUKUL—DEFENDANT—APPELLANT

versus

BALBHADAR SINGH—PLAINTIFF—RESPONDENT.

Malicious prosecution—Prosecutor, whether defendant must be proved to be—Mental distress—Bodily discomfort—Damages.

In order to succeed in a suit for damages for malicious prosecution, it is not necessary for the plaintiff to prove that the defendant was in fact his prosecutor in the proceedings before the Criminal Court.

The plaintiff was proceeding from the Jaunpur Railway Station to his home when the defendant ran up from behind and arrested him. The plaintiff was eventually put upon his trial on a charge of theft but was acquitted. On plaintiff's suit for damages for malicious prosecution:

Held, that in taking upon himself to arrest the plaintiff, the defendant took upon himself a responsibility far greater than he would have done if he had merely made a report or complaint alleging the commission of an offence of theft before an authority competent to take action in the matter;

(2) that the prosecution of the plaintiff before the Criminal Court was substantially the work of the defendant and that he was, therefore, liable for damages, and

(3) that the plaintiff was entitled to claim damages for his mental distress and bodily discomfort resulting from his arrest and detention in the lock-up.

Second appeal from the decision of the Subordinate Judge of Jaunpur, dated the 23rd September 1913.

FACTS.—The facts appear sufficiently from the judgment.

Mr. *Haribans Sahai*, for the Appellant.—No suit for malicious prosecution could lie against my client, as he did not initiate or carry on the prosecution. He simply gave information to his official superior. It was

the latter's duty to consider the matter and to start the prosecution or not. The gist of an action for malicious prosecution lies not only in initiating the prosecution, but in conducting and carrying it on. I rely on *Baboo Gunnesh Dutt Singh* v. *Magneeram Chowdhury* (1), *Pichuvayengar* v. *Oliver* (2), *Gaya Prasad* v. *Bhagat Singh* (3) and *Dudhnath Kundu* v. *Mathura Prasad* (4).

The case has been tried throughout by the Courts below as a suit for malicious prosecution and it has never been treated as a suit for false imprisonment.

The burden of proving want of reasonable and probable cause lay entirely upon the plaintiff. Second Appeal No. 1132 of 1907 decided by Banerji, J., on 20th April 1910.

Moreover, no damages for mental pain and anxiety can be allowed in law. *Bhooni Money Dossee* v. *Natobar Biswas* (5), *Futrookh Hossein* v. *Fusul Hossein* (6).

Mr. *Jang Bahadur Lal* (for Dr. *Satish Chandra Banerji*), for the Respondent, was not called upon.

JUDGMENT.—Baldeo Shukul, who is the defendant-appellant in this case, was a watchman employed by the Bengal and North-Western Railway Company at their railway station at Jaunpur. He has been sued for damages by the plaintiff, Balbhadar Singh, upon the following allegations:—That in the middle of the night between the 15th and the 16th day of January 1912, Balbhadar Singh, travelling upon his own private affairs, alighted at the railway station above-mentioned and was proceeding from thence to his home. He had gone a short distance from the railway station when the defendant, Baldeo, ran up to him from behind, caught hold of him and raised an alarm of thieves. Another watchman was summoned and the person of the plaintiff was secured. He was then taken before the goods clerk at the railway station, to whom the defendant, Baldeo, accused him of having been caught in the act of stealing a sack of grain from the shed where the defendant was employed as a watchman. Through the goods clerk, the plaintiff was made over to the Police and eventually put upon his trial on a charge of theft. The plaintiff contended further that the defendant, Baldeo, not merely gave false evidence against the plaintiff before the Criminal Court, but also looked after the case and assisted the Police in its prosecution. Finally, it is alleged that all these proceedings on the part of the defendant were taken maliciously on account of previouly existing enmity between the parties. In the Courts below the suit was treated as one for damages for malicious prosecution, pure and simple. The Courts laid upon the plaintiff the full burden of proof which lies upon a plaintiff in such a case. They seem to me to have considered the case with due regard to the principles laid down by their Lordships of the Privy Council in the case of *Gaya Prasad* v. *Bhagat Singh* (3). They have found against the defendant and in favour of the plaintiff on every possible point raised by the pleadings, and have decreed the suit as brought. The defendant, coming to this Court in second appeal, has tendered a memorandum of appeal in which there are six paragraphs. One of these was withdrawn before the appeal was admitted. Another merely asserts a perfectly correct proposition of law, *viz.*, that the evidence given in the criminal case which resulted in the acquittal of the plaintiff, Balbhadar Singh, could not be treated as an evidence in the present suit. As it has not been shown to me that this principle of law was in any way violated by the Courts below I may pass over this plea.

The remaining paragraphs of the memorandum of appeal raise in substance three pleas:—(1) that inasmuch as the defendant, Baldeo Shukul, neither made any report to the Police or complaint to a Magistrate against the plaintiff, Balbhadar Singh, it cannot be said that he was the prosecutor in this case, or that he is liable for damages for malicious prosecution; (2) that the *onus* lay on the plaintiff to prove that there was no reasonable and probable cause for the prosecution and that the defendant was actuated by malice. The suggestion as put forward in argument is that there has been no clear finding on the point by the lower Appellate Court, and (3) it is contended that the amount of damages awarded is

(1) 11 B. L. R. 321; 17 W. R. 283.
(2) 26 M. 260.
(3) 30 A. 525; 12 C. W. N. 1017, 10 Bom. L. R. 1360; 8 C. L. J 337; 5 A. L. J. 665; 35 I. A. 189 (P.C.).
(4) 24 A. 317, A. W. N. (1902) 75.
(5) 28 C. 452; 5 C. W. N. 669.
(6) 1 N. W. P. H. C. R. 292.

excessive and that the damages have been assessed on unsound principles of law. In dealing with this appeal as a whole I certainly feel one difficulty. It seems to me probable that the plaintiff himself was not fully aware of the strength of his legal position on the facts alleged by him, and I have no doubt that the Courts below have underestimated the strength of the plaintiff's position. It may be that the present suit was, in a certain sense and to a certain extent, a suit for damages for malicious prosecution, but it was a great deal more than that. In its essence it was a suit for damages for false imprisonment. When the defendant, Baldeo, took it upon himself to arrest the plaintiff he assumed a responsibility in law far greater, and not as the appellant to this Court would suggest considerably smaller, than he would have done if he had merely made a report or complaint alleging the commission of an offence of theft against the plaintiff before an authority competent to take action on the same. If the Courts below had dismissed the plaintiff's suit, it might have been a matter for serious consideration whether I ought not to order its re-trial, on the ground that the essential nature of the suit had been misconceived. As the case stands, however, the Courts below have simply laid upon the plaintiff a heavier burden of proof than they would have done if they had rightly appreciated his legal position, and nevertheless they have found in the plaintiff's favour. With regard, therefore, to the first of the pleas put forward by the appellant I hold, in the first instance, that it was by no means necessary for the plaintiff in order to succeed in a suit for damages upon the facts alleged in the plaint, to prove that the defendant was in fact his prosecutor in the proceedings before the Criminal Court. The nature of the suit cannot be changed because the Courts below have seen fit to label it a suit for malicious prosecution, although the allegations in the plaint show it to be this and something considerably more. I hold, further, that on the facts found by them the Courts below were entitled to infer that the prosecution of the plaintiff before the Criminal Court was substantially the work of the defendant, and that he was liable for the same in damages. As to the second question, *viz.*, the absence of reasonable and probable cause and the presence of malice, I am clearly of opinion that these points have been decided against the defendant by the Courts below upon evidence which justifies their decisions. The plea to the contrary is based upon detached passages quoted from the judgment of the lower Appellate Court, in which that Court was dealing expressly with the pleas as they stood in the memorandum of appeal before it. In substance the lower Appellate Court has found that there was no theft committed at the time when the plaintiff was arrested, that the plaintiff was going about his lawful business at the time, that he was arrested on account of previous enmity and that the defendant knew perfectly well when he arrested the plaintiff that he had no lawful ground for doing so. The plea as regards damages is based upon the principle, said to be deducibl from certain English cases, that damages fo mental anxiety only cannot be awarded in suits for slander. What the plaintiff in the present case asked the Court to compensate him for over and above his out of pocket expenses, was not merely the injury to reputation, but the distress of mind and the bodily discomfort which he suffered through having been arrested in the middle of the night, sent to the lock-up and detained in custody amongst felons and bad characters for a period of almost a month and a half. In my opinion he was thoroughly entitled to claim compensation on this ground, and I see no reason to hold that the Court below has erred in accepting the moderate sum at which he assessed his sufferings. This appeal, therefore, fails and is hereby dismissed with costs including fees on the higher scale.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 532 OF 1910.

July 17, 1912.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

KULADA PROSAD TEWARY AND OTHERS —DEFENDANTS—APPELLANTS

versus

SADHU CHARAN TEWARY AND OTHERS— PLAINTIFFS & REMAINING DEFENDANS— RESPONDENT.

Partition, how established—Oral evidence—Circumstances, sufficient, for inference of partition—Adverse

KULADA PROSAD TEWARY v. SADHU CHARAN.

possession—Fallow land—Grazing of cattle, whether interrupts operation of adverse possession—Co-sharer, adverse possession of, when presumed—Hostile title.

A partition may be occasionally established by oral evidence which, though not directly proving the *factum* of partition, may be of such a character as to justify the inference that a partition must have been made between the parties or their predecessors.

In a case where there were, *first*, transfer by one member of the family to another of cultivated lands in his occupation; *secondly*, long possession of specific parcels and sub-division among members of a particular branch; *thirdly*, reclamation and improvement of waste lands at considerable cost; *fourthly*, direct admission of parties that there had been a previous partition; *fifthly*, separate occupation of land, and collection of rent from the separate tenants and the institution of suits by the superior landlord against the members of the family as if they were separate tenants, and the separate enforcement of decrees so obtained;

Held, that the circumstances are sufficient to establish previous partition.

Where exclusive possession is taken of such lands as are cultivated during one season and left fallow during the two following seasons, and the owner is ousted, the mere fact that a stranger grazes his cattle during the period that the lands are not under cultivation would not interrupt the operation of adverse possession.

A co-sharer cannot be said to have been in adverse possession merely because he cultivated a larger area than what would fall to his share upon a distribution of all the lands.

In order to constitute adverse possession as against a co-sharer, there must be an assertion of hostile title for more than a period of 12 years before the commencement of the suit.

Appeal against the decree of the Subordinate Judge of Manbhoom, dated the 22nd August 1910.

Babus *Umakali Mukherjee*, *Biraj Mohan Mojumdar* and *Khetra Mohan Sen*, for the Appellants.

Babu *Bepin Behary Ghose* (Junior), for the Respondent.

JUDGMENT.—This is an appeal on behalf of some of the defendants in a suit for partition of joint property. The property was acquired by an ancestor of the parties to this litigation, one Sanatan, under a grant made in his favour on the 28th September 1784 by Raja Raghu Nath Narain. Sanatan left four sons, Brindaban, Janardan, Radha Churn and Ram Chandra. The plaintiffs are the sons of the representatives of the branch of Radha Churn. They are entitled, if their allegation that the property is still joint be true, to one-fourth share therein. But they claim to have acquired by purchase from two of the representatives of Brindaban half of his share, so that they are, according to these allegations, entitled to a six-annas share of the entire property. The defendants, who are the representatives of Ram Chandra, resisted the claim on the ground that there had been a previous partition about 60 years before the commencement of the suit and that consequently the property was not liable to be partitioned. They further pleaded that they had acquired a good title by adverse possession in respect of the parcels in their occupation. The Subordinate Judge has found on the evidence that the parties are in possession of unequal quantities of land; the appellants have in their possession 588 *bighas*, while the plaintiffs have only 286 *bighas*; two other sets of respondents have respectively 136 and 373 *bighas*. The Subordinate Judge has further found that there was no partition, as alleged by the present appellants. The view he has taken is that the parties were, by mutual arrangement, in occupation of different portions of the joint property, but that they did not intend that the distribution should be deemed permanent.

In the present appeal, it has been contended that the Subordinate Judge has taken an erroneous view of the evidence, which tends to prove that there was a partition of a permanent character, if not in respect of all the cultivable lands now in the occupation of the parties to the litigation, at least in respect of a considerable portion thereof. It has not been disputed, indeed, it is the common case of the appellants and the respondents, that the *jungle* lands still constitute joint property; and in any view of the case, they must be divided. The evidence has been placed before us and commented upon at considerable length. We have arrived at the conclusion that the view of the Subordinate Judge that there was no partition at any previous time cannot be supported. As was pointed out by their Lordships of the Judicial Committee in the case of *Budhu Mal* v. *Bhagwan Das* (1) and by the Bombay High Court in *Murari Vithoji* v. *Mukund Shivaji* (2), a partition may be occasionally established by oral evidence which, though not directly proving the *factum* of partition, may be of such a character as to justify the inference that a partition must have been made between the parties or their predecessors. If, for instance, each of the co-tenants has for a long period of

(1) 18 C. 302.
(2) 15 B. 201.

time, occupied a distinct part of the land of the co-tenancy, has apparently exercised the rights of a sole owner and has been recognised by his companions-in-interest as entitled to possession in severalty, these facts may be treated as evidence tending to prove an antecedent partition. To take a concrete illustration, if one co-tenant owns two-thirds and another one-third of three equal parcels of land, the fact that the former was in possession of two of these parcels and transferred them by conveyance purporting to effect a transfer in severalty, may be evidence of partition. Similarly, the circumstance that one of the co-tenants has spent considerable money in improvements of the parcels in his exclusive possession may furnish evidence that the distribution of the land was intended to be permanent. Tested in the light of these principles, the appellants have a strong case. The learned Vakil for the appellants has relied upon the following circumstances in proof of his allegation of a previous partition; *first*, transfer by one member of the family to another of cultivated lands in his occupation; *secondly*, long possession of specific parcels and sub-division among members of a particular branch; *thirdly*, reclamation and improvement of waste lands at considerable cost; *fourthly*, direct admission of parties that there had been a previous partition: *fifthly*, separate occupation of land, and collection of rent from the separate tenants and the institution of suits by the superior landlord against the members of the family as if they were separate tenants, and the separate enforcement of decrees so obtained. In our opinion, these circumstances are sufficient to establish the case of the appellants.

Reference was made in this connection to road-cess returns filed by members of the family in 1872 and 1881. These road-cess returns by themselves are not conclusive upon the question raised. In one of them, filed in 1872, the area of the land in occupation of the persons who made the return is stated to be one-fourth, which would seem to indicate that the entire interest was deemed by the maker to be still joint and undivided. In subsequent returns, however, filed in 1881, the areas in the occupation of the different co-sharers are explicitly stated. These returns would seem to indicate that, at that time, at any rate, the parties assumed that each of them was in occupation of a separate interest. But one of the strongest pieces of evidence in favour of the appellants is furnished by the litigation of 1883 commenced by Watson and Company, the superior landlords, against the members of the family. To recover arrears of cesses, the Watsons brought a suit in which the representatives of the four branches of the family were joined as defendants. They took exception to the frame of the suit on the ground that they ought to have been separately sued, because they held distinct interests in the property for which cesses were claimed. Effect was given to this objection and the decree made in favour of the Watsons was, though drawn up as one decree, really a distinct and separate decree against the representatives of each branch of the family. This was followed in the same year by other suits for recovery of cesses, which were commenced against the representatives of the different branches separately and decreed accordingly. There are also road-cess returns of 1893 which indicate that the parties were in separate possession of different parcels of land in their own right and had different sets of tenants in occupation of the parcels allotted to each of them. In addition to evidence of this class, we have important evidence to show that there were separate transactions by the representatives of each branch of the family. Our attention has been drawn to a decree for rent obtained by the appellants against their own tenants on the 11th September 1890. We also find on the record a conveyance executed on the 7th February 1910 in favour of the plaintiffs by their tenants. The most striking piece of evidence under this head, however, is a mortgage executed on the 8th August 1868 by the defendants first party in favour of the defendants third party. This was followed by a conveyance executed on the 8th July 1879, apparently in satisfaction of the mortgage. The Subordinate Judge has held that effect must be given to this transaction, in other words that the purchaser under this conveyance would be entitled under the decree in this suit to exclusive possession of the property acquired by him. The Subordinate Judge has failed, however, to appreciate the bearing of this piece of evidence upon the question in controversy. Here is a transaction in which there is an implied assertion

accepted by the opposite party, that the property transferred belonged exclusively to the mortgagor-vendor. This is not consistent with the case of the respondents that there was at no time previously a partition between the parties. We have next a conveyance by the defendants first party in favour of the defendants third party on the 13th December 1892, in which there is a recital of a partition of some of the lands owned by the parties. There is also a provision in the conveyance that, after the trees had been cut, the lands would be divided; this fits in with the case of the appellants; the parties contemplated that this decision would take place in continuation of the previous partition. We have also a sale certificate, dated the 1st July 1907, of a purchase made by the plaintiffs at a sale in execution of a decree against two of the defendants. This also would support the contention of the appellants that there had been a previous partition and that what the plaintiffs purchased was really the exclusive property of the judgment-debtors. Our attention was also invited to the plaint and written statement in a suit commenced by the third party defendants against the first party defendants on the 9th February 1897. The judgment in this case, which was not produced in the Court below, has been placed before us, and reliance has been placed on behalf of the appellants upon a recital therein that the entire *mousah* had been admittedly divided and that the co-sharers were in possession of different parcels of land as representing their specific shares. Too much stress, however, need not be placed upon this passage in the judgment even if it be conceded that the judgment is admissible in evidence, because it does not carry the matter further than the admissions in the written statement of the respondents, dated the 5th April 1897. This indicates that there was an admission to the effect that the cultivated lands had been divided, but the statement was qualified to this extent that the division was only approximate. We next come to the litigation of 1903 commenced by the first party defendants for partition of the disputed property. The second party defendants stated in this itigation that there had been a partition. The present plaintiff also stated that there had been a partition; but he qualified this by adding that the partition was a guess. This plaint was filed on the 4th February 1903, but ultimately the suit was withdrawn.

We have, therefore, a considerable body of evidence indicating that the parties have been in possession of separate parcels of land for many years, that they have effected improvements upon the parcels in their possession at considerable cost and labour, that there have been transfers *inter se* and that the parties have acted on the assumption that their possession was not liable to be disturbed at the instance of their co-sharers. Under these circumstances we are of opinion that the inference may legitimately be drawn that there was a previous partition amongst the predecessors of the parties. It is impossible for us, however, upon the evidence, to ascertain the precise lands in respect of which the partition took place. The learned Vakil for the appellants fully appreciated the difficulty in his way created by the undoubted fact that his clients are in possession of a considerably larger quantity of land than any of the other sets of defendants. He attempted to explain this inequality by a suggestion that at the time of the partition valuable cultivated lands might have been assigned to the other parties, whereas in his share fell a larger quantity of waste lands. But there is no foundation laid in the evidence for such a theory. On the other hand, the learned Vakil for the respondents invited our attention to the road-cess returns of 1881, from which it appears that the predecessors of the parties were in occupation of nearly the same quantity of cultivated land and the remainder also was treated as equally owned by them. This, in our opinion, indicates that the original partition was not unequal. In fact, the road-cess returns must have been prepared in consultation, as indicated by the extraordinary resemblance in the recitals contained therein. We may fairly take it, therefore, that in 1881 the common case of the parties was that there was a previous partition under which they were in occupation of nearly equal quantities of land. But the actual areas given in the road-cess returns cannot be implicitly accepted as accurate; in other words, we cannot assume that the parties at the time were in occupation of the

precise quantity, namely, about 55 *bighas* of cultivated land, stated in these documents. If, therefore, we start with the position that there was an equal partition about 60 years before the commencement of the suit and that for a period of 30 years the parties were in occupation of equal quantities of land, the question arises, how have the present appellants come to occupy a considerably larger quantity of land than the representatives of any of the other branches of the family? The reason is not far to seek. Each branch of the family has re-claimed and brought under cultivation the waste lands left joint at the time of the partition. The members of the branch to which the appellants belong, are more numerous than the members of the other branches, and it is not unfair to presume that they have successfully brought under control and cultivation a much larger quantity of land than the representatives of the other branches. The Subordinate Judge, consequently, directed very properly that each party should retain possession of the cultivated land and of all lands upon which they had spent labour and capital. A difficulty, however, arises as regards the present appellants, because upon the figures placed before us, it seems more than likely that they are now in occupation of a larger quantity of land than could be allotted to their share upon a partition of the entire village. It has been stated to us that the quantity of *danga* and the *jungle* lands cover 1384 and 649 *bighas*, respectively. The total quantity of land in the village, therefore, may be approximately taken as 2033 *bighas*, out of which the appellants would be entitled to about 508 *bighas* as representing their share. They are, however, said to be in occupation of 588 *bighas*. The question consequently arises, whether they are liable to be deprived of the lands they hold in excess of what would represent their share in the entire village. On this part of the case, it has been contended by the appellants that they have acquired a good title to this excess by adverse possession. Now, it is fairly clear that the quantity of cultivated lands in the occupation of the appellants is not in excess of a quarter of the entire land of the village. Consequently no question of adverse possession arises in respect of these lands, and the plaintiffs do not, indeed, desire to deprive the appellants of their possession of these lands. The remaining lands in the occupation of the appellants are stated to be *gora* and *danga* lands. The Subordinate Judge has held that the appellants did not spend capital or labour on lands of this description. It has been stated on behalf of the respondents that the Subordinate Judge meant to apply this qualification to lands which at the time of the suit were *gora* and *danga* lands. Lands which at one stage fell within this description but had been subsequently brought by the appellants under cultivation, would fall within the description of cultivated lands. In respect of these *danga* and *gora* lands, it has been contended on behalf of the appellants that they have acquired a good title by adverse possession. This view has been controverted by the respondents and it has been suggested that as these lands are cultivated once in three or four years and as between two periods of successive cultivation, they are used as grazing land where the cattle of strangers as also of the plaintiffs would graze, there was not such adverse possession on behalf of the defendants as could extinguish the title of the plaintiffs. It has further been contended upon the authority of the decisions in *Watson & Co.* v. *Ramchund Dutt* (3) and *Jogendra Nath Roy* v. *Baladeb Das* (4) that there could not be adverse possession as between co-tenants in respect of lands of this character, used in the manner just indicated. On behalf of the appellants reliance has been placed in answer to this argument upon the cases of *Gangadhar* v. *Parashram Bhalchandra* (5) and *Ayennessa Bibi* v. *Sheikh Isuf* (6). In our opinion the contentions of both the appellants and the respondents are unsound. If lands of this character can be used only in the manner indicated, that is, cultivated during one season and left fallow during the two following seasons, when exclusive possession is taken of such lands and the owner is ousted, the mere fact that a stranger grazes his cattle during the period that the land is not under cultivation, would not, in our opinion, interrupt the operation of adverse possession. At the same time we are not able to accept the

(3) 18 C. 10; 17 I. A. 110.
(4) 35 C. 961; 12 C. W. N. 127; 6 C. L. J. 735.
(5) 29 B. 309; 7 Bom. L. R. 252.
(6) 14 Ind. Cas. 722; 16 C. W. N. 849.

contention of the appellants that merely because they cultivated a larger area than what would fall to their share upon a distribution of all the lands, they were in adverse possession. In order to constitute adverse possession as against their co-sharers, there must be an assertion of hostile title; but the evidence does not show that there was such an assertion of hostile title for more than a period of 12 years before the commencement of the suit. The appellants are further met by the difficulty that they are not able to identify the particular lands in respect of which they exercised acts of adverse possession. Under these circumstances, we are not in a position to uphold the contention of the appellants that they acquired a good title by adverse possession in respect of *danga* and *gora* lands as against the plaintiffs. One direction, however, must be given in modification of the decree of the Subordinate Judge. He has rightly held that each of the parties should be retained in possession of the lands upon which they have spent capital and labour. In so far, however, as the appellants are concerned, it must be ascertained in the first instance whether they are really in occupation of more lands than they would be entitled to occupy upon a partition. We, therefore, direct the Subordinate Judge to appoint a Commissioner to make a survey of all the *gora* lands of the village and to ascertain the area thereof. The appellants will be entitled to one-fourth share of the total area. If the area thus determined falls short of the area now in their possession they must surrender the excess; and to determine the lands which they should be called upon to surrender in favour of their co-sharers, such lands only will be taken away from them as they have occupied last. In other words, the Court must take evidence to determine on this part of the case what lands have been recently occupied by the appellants, and they will be deprived of such lands to the extent necessary. If in the process it is found necessary to divide a compact block, the Subordinate Judge will be at liberty to adjust matters by a suitable order for the payment of owelty money. It is to be distinctly understood, however, that this last direction relates only to *gora* and *danga* lands. In so far as cultivated lands are concerned, none of the parties will be deprived of the lands already in their possession. Subject to this modification the other directions given by the Subordinate Judge will stand confirmed. There will be no order for costs in this Court.

Decree modified.

COURT OF THE FINANCIAL COMMISSIONER, PUNJAB.

REVENUE REVISION No. 191 OF 1913-14.

July 22, 1914.

Present:—Mr. Maynard, F. C.

NATHU—PETITIONER

versus

BISHNA AND OTHERS—RESPONDENTS.

Punjab Land Revenue Act (XVII of 1887), ss. 115, 117 (2)—Order by Revenue Officer—Partition—Discretion—Civil Procedure Code (Act V of 1908), s. 11.

When a Revenue Officer is acting, not as a Court under section 117 (2) of Act XVII of 1887, but merely as a Revenue Officer dealing with an application for partition, the proceeding is an administrative adjustment, to which the principle of *res judicata*, as embodied in section 11 of the Civil Procedure Code, does not apply. But it does not mean that the orders passed by a Revenue Officer have no legal finality.

Under section 115 of the Punjab Land Revenue Act, a Revenue Officer has discretionary authority absolutely to disallow an application for partition, and he ought to use this authority in every instance in which the same question has been previously decided, unless it is shown that the circumstances which made the previous order appropriate have changed.

Petition for revision against the order of the Commissioner of Umbala Division, dated the 14th March 1914.

Mr. *Mahabir Pershad*, for the Petitioner.

Mr. *Dwarka Pershad*, for the Respondents.

JUDGMENT.—I have heard Pleaders for the parties. It is admitted that on 14th October 1909, the Assistant Collector of Rupar rejected an application for the partition of the same land which is the subject of the present proceedings. The order against which this application has been lodged is one affirming upon appeal the Collector's order that partition of the land shall proceed, if Nathu (present applicant) fails to sue to establish proprietary right on 2 *bighas* of it by a stated date. And the issue before me is virtually this, whether, by virtue of section 11 of the Civil Procedure Code or by any other

principle of law, the order rejecting the partition in 1909 renders illegal the order permitting the partition in 1913.

It is plain enough that a Revenue Officer acting as a Civil Court under section 117 (2) of Act XVII of 1887 is properly described as a Court trying a suit and that if, in this capacity, a Revenue Officer had decided a partition question in issue between the parties to partition proceedings, section 11 of the Civil Procedure Code, embodying what is commonly described as the principle of *res judicata*, would be a bar to the re-decision of the same question between the same parties. The position is, however, an entirely different one when the Revenue Officer is acting, not as a Court under section 117 (2), but merely as a Revenue Officer dealing with an application for partition. In this capacity, he acts as an administrative authority, not as a Court, the proceeding is an administrative adjustment, not a suit, and the decision is embodied in an order, not in a decree. As was held by the Financial Commissioner in *Mallik Fateh Sher Khan* v. *Mallik Sher Bahadoor Khan* (1), where the question in issue was the form in which a *jagirdar* was entitled to collect revenue, and the claim had been disallowed in 1862, I hold that the matter is an administrative one, to which the principle of *res judicata* as embodied in section 11 of the present Civil Procedure Code has no application.

The Pleader for the applicant has not felt able to argue before me that section 11 of the Civil Procedure Code bars the re-decision in 1913 of the question whether partition should be allowed, but he has urged with very good reason that there must be some finality about the orders of Revenue Officers, and that it would be most inconvenient and improper if every one who had been disappointed over an application for partition were at liberty to start fresh proceedings over the same issue.

There is no doubt that this contention is correct. But the decision that section 11 of the Civil Procedure Code has no application to the partition orders of Revenue Officers does not connote a decision that such orders will henceforth have no legal finality Under section 115 of the Land Revenue Act, a Revenue Officer has discretionary authority absolutely to disallow an application for partition: and he ought to use this authority in every instance in which the same question has been previously decided, unless it is shown that the circumstances which made the previous order appropriate have changed.

A very common instance of a change of circumstances affecting the propriety of a partition is the introduction into a village of a new means of irrigation, converting uncultivable land into cultivable land. But changes in methods of cultivation, whatever the cause, must always tend to carry with them changes in the manner in which land is held: and the recent discovery in the north-west of the Punjab that *barani* cultivation with profit is possible over extensive areas where it was formerly regarded as hopeless, is another instance of a change which may make it reasonable, and even necessary to allow partition of areas where partition has formerly been disallowed.

In the present case, I find that the refusal of partition in 1909 was based upon the belief that the point in dispute between the parties could, and would, be appropriately dealt with by action under section 150 of the Land Revenue Act. It was supposed that Nathu, the present applicant, was prepared to surrender certain land which was in his possession. His subsequent proceedings showed that this was not the case, for he obtained from a Civil Court a decree that he was entitled to retain possession of that land until partition should take place.

In the circumstances I hold that the Officers who dealt with the application in 1913 were justified in declining to exercise their discretionary authority to disallow partition. notwithstanding the opposite decision in 1907. I reject the application for revision.

Revision rejected.

(1) 6 P. R. 1868 Rev.

HASIB-UN-NISSA *v.* MAHMUD-UN-NISSA.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION APPLICATION No. 143 OF 1914.

November 16, 1914.

Present:—Mr. Stuart, A. J. C., and Mr. Kanhaiya Lal, A. J. C.

Musammat HASIBUNNISSA—DEFENDANT—APPELLANT

versus

Musammat MAHMUDUNNISSA—PLAINTIFF—RESPONDENT.

Pre-emption decree—Jurisdiction of Court to extend period fixed for payment—Application for extension of time—Civil Procedure Code (Act V of 1908), s. 148.

A Court has no jurisdiction to extend the period fixed for payment in a pre-emption decree, whether the application for extension is made before or after the expiration of the period permitted:

Narendra Bahadur Singh v. Ajudhya Prasad, 5 Ind. Cas. 443; 13 O. C. 28 and *Bachchu Lal* v. *Raja Ram*, 19 Ind. Cas. 347; 16 O. C. 5, referred to.

Appeal against the order of the Subordinate Judge, Bara Banki, dated 15th October 1914.

Mr. *Mohammad Wasim*, for the Appellant.

Mr. *Wasir Hasan*, for the Respondent.

JUDGMENT.—The Subordinate Judge of Bara Banki has, by his order of the 15th October 1914, extended the time allowed by Decree No. 82, passed in favour of *Musammat* Mahmud-un-nissa, plaintiff, within which she was permitted to exercise a right of pre-emption over certain landed property. The period permitted by the decree expired on Sunday, the 21st June 1914. On the 23rd June 1914, the plaintiff presented an application in which she requested that a period of two months' further grace should be allowed to her. That application was accepted by the learned Subordinate Judge and permission was given in the order of the 15th October. *Musammat* Hasib-un-nissa, a party to the decree, has applied to this Court under the provisions of section 115, Act V of 1908, asking that the order should be set aside as being without jurisdiction. A Bench of this Court decided in *Narendra Bahadur Singh* v. *Ajudhya Prasad* (1) that the general provisions of section 148 of Act V of 1908, this being the section under which the learned Subordinate Judge considered that he had jurisdiction to extend the time, related only to proceedings antecedent to the passing of a final decree, and laid down that when once such decree has been passed the power of the Courts is limited by the general principle that once a judgment has been pronounced and the decree signed such final decree cannot be altered except under the provisions of section 152 or Order XX, rule 3, or those relating to review of judgment, except in cases in which power to grant further extension of time has been expressly reserved to the Court. In that decision the question of jurisdiction to extend the period given in a decree in a pre-emption suit was considered, and the Bench arrived at a finding that no power to grant further extension of time had been given in connection with decrees in pre-emption suits. The same principle was enunciated by a single Judge in *Bachchu Lal* v. *Raja Ram* (2). According to the principles accepted in both these decisions, the learned Subordinate Judge had no jurisdiction to extend the period. He did not apprehend the principle underlying these decisions. He considered that, if the applicant had applied before the period allowed by the decree had expired, he would have jurisdiction to extend the time. On the facts it does not appear that the application in question was made before the period expired. But even had it been so made, the Court had no jurisdiction to extend the period, for the principle laid down in these rulings is that the provisions of section 148 apply to acts prescribed by the Code, and not to acts prescribed by decrees which have become final. Such being the case, it is immaterial whether the application is made before or after the expiration of the period permitted. We have been asked by the learned Counsel for *Musammat* Mahmud-un-nissa to re-consider the question and to arrive at a conclusion different from that at which the Courts have previously arrived. We should not be disposed to act in contravention of the doctrine of *stare decisis* except for very special reasons. No such reasons are present in this case.

We, therefore, find that the learned Subordinate Judge had no jurisdiction to pass the order in question, and as such it is set aside accordingly. *Musammat* Mahmud-un nissa will pay her own costs and those of the applicant in both Courts.

Order set aside.

(1) 5 Ind. Cas. 443; 13 O. C. 28.

(2) 19 Ind. Cas. 347; 16 O. C. 5.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 384 OF 1911.

November 19, 1913.

Present.—Mr. Justice Coxe and Mr. Justice D. Chatterjee.

Sheikh HUSSEIN BUX—DECREE-HOLDER—APPELLANT

versus

Musammat BECHA AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 180—Sale in execution—Application for delivery of possession.

Where an auction sale was confirmed before the Limitation Act of 1908 came into force but the application for possession of purchased property was made after the operation of the Act, it is governed by Article 180 of Schedule I of the Limitation Act of 1908 and is barred, if not brought within three years from the date when the sale became absolute

Appeal against an order of the District Judge, Bhagalpore, dated the 6th May 1911, reversing that of the Munsif, Second Court of that place, dated the 25th of February 1911.

Moulvi Syed *Mahomed Tahir*, for the Appellant.

Moulvi *Khurshed Hossain*, for the Respondents.

JUDGMENT.—This appeal arises out of application by a decree-holder, auction purchaser, to be placed in possession of the purchased property. The sale was confirmed in 1902. He applied for a sale-certificate in December 1908 and obtained a certificate on the 2nd January 1909. This application was presented on the 29th August 1910. The Court of Appeal below has held that the case is governed by the Limitation Act of 1877, but that the application is barred by time on the strength of the decision in *Ranjit Singh* v. *Baldeo Singh* (1). The auction-purchaser appeals. It appears to us that the order of the lower Appellate Court must be affirmed, on the ground that the application is really governed by the Limitation Act, 1908, and not, as the Court below has held, by the Limitation Act, 1877. Under the later Act a purchaser can apply within three years from the date when the sale became absolute, and in this case that period has long expired.

Under the circumstances of the case, it appears to us that the District Judge was wrong in holding that the application was governed by the Limitation Act of 1877, but that the actual order passed by him rejecting the application was right. The appeal must, therefore, be dismissed with costs.

Appeal dismissed.

(1) 30 A. 390; 5 A. L. J. 516; A. W. N. (1908) 162.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEALS NOS. 229 AND 378 OF 1913.

November 16, 1914.

Present:—Mr. Lindsay, J. C.

HAZARI LAL AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

RAM NARAIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption—Oudh Laws Act (XVIII of 1876), s. 10—Decree for foreclosure in respect of under-proprietary lands—Oudh Rent Act (XXII of 1886), ss. 152 and 154—Statutory liability to pay arrears of rent cast upon transferee and land that came into his possession—Pre-emptor's liabilities to pay arrears of rent recovered from vendee.

One *M*, a mortgagee, obtained a decree for foreclosure in respect of certain under-proprietary lands on the basis of his mortgage, but he failed to give the notice required by section 10, Oudh Laws Act. At the time of foreclosure there were outstanding certain arrears of rent, which inspite of his objections were realized from *M* by the *Talukdar*. Subsequently the appellants instituted a suit for pre-emption and claimed a decree on payment merely of the sum which was found to be due under the foreclosure decree.

Held, that after *M* had obtained the under-proprietary tenure by foreclosure, it was impossible for him to escape the statutory liability cast by sections 152 and 154 of the Oudh Rent Act both upon the transferee and upon the land which came into his possession.

Held, further, that plaintiffs who were seeking to have themselves placed in the situation in which *M* had stood at the time he obtained foreclosure, could not avoid any liability to which *M* was then subject.

Held, also, that the payments made by *M* were in the nature of salvage made to save the property from sale, and on that principle also the plaintiffs were bound to pay the amount.

Dakhina Mohan Roy v. *Saroda Mohan Roy*, 21 C. 142; 20 I. A. 160, referred to.

Appeal against the decree of the District Judge, Rae Bareli, dated 28th May 1913, upholding that of the Subordinate Judge, Rae Bareli, dated 1st April 1913.

Babu *Bisheshwar Nath*, for the Appellants.

Messrs. *M. Wasim* and *Sami Ullah Beg*, for the Respondents.

JUDGMENT.—These cross-appeals have arisen out of a pre-emption suit brought by

Hazari Lal and another, the appellants in Appeal No. 229, against Ram Narain and others, respondents. The facts of the case are as follows: Two persons, Paijnath and Jagannath, who were the owners of an under-proprietary tenure, executed two deeds of mortgage in favour of one Manni Ram, who is now represented by defendants Nos. 1 to 3 in the suit. One of these mortgages was dated 21st of November 1893, the other was dated the 10th of September 1895. The mortgages were by way of conditional sale and on the 8th of February 1907, the mortgagee having brought a suit for foreclosure got a decree, which was made absolute on the 9th of September 1907. The amount which was found to be due in respect of the mortgage at the time the decree was made absolute was Rs. 1,883-11-3. This sum included interest, which was awarded under the preliminary decree. At the time when Manni Ram brought his suit for foreclosure, he failed to give the notice which is required by section 10 of the Oudh Laws Act (XVIII of 1876). The present suit for pre-emption was brought on the 25th of October 1912 and was within limitation, it being admitted that the period of limitation in cases of this kind is six years from the date on which the mortgage is finally foreclosed. The defendants who represent the mortgagee did not deny the right of the plaintiffs to have pre-emption, but they denied that they were entitled to have pre-emption upon payment only of the sum of Rs. 1,883-11-3. In addition to this money they claimed two other items which are in dispute in Appeal No. 229 of 1913. One of these was a sum of Rs. 958-11-3, the other was a sum of Rs. 268-1-1½. The first-named sum represented a payment which Manni Ram had to make to the superior proprietor after he foreclosed the mortgage, on account of arrears of rent which were due to the superior proprietor in respect of the under-proprietary tenure. The sum was due in respect of rent accruing prior to the year 1314 *Fasli* for which the superior proprietor, Raja Rameshar Bakhsh Singh, obtained a decree on the 5th September 1905 against *Musammat* Lachmin, the widow of Jagannath, one of the mortgagors. The *Talukdar* took out execution of this decree after Manni Ram had obtained foreclosure. He applied to have the under-proprietary holding sold in execution of his decree. Manni Ram objected that he was not liable to pay the decretal amount, inasmuch as he had not been in possession of the share during the period for which the arrears were payable. His objections were disallowed. It was held that the *Talukdar* was entitled to bring the property to sale in execution of his decree. The consequence was that in order to avoid the sale of the property Manni Ram was obliged to pay Rs. 958-11-3 to the *Talukdar*. Similarly it is said that Manni Ram was further obliged to pay to the superior proprietor a sum of Rs. 268 odd on account of arrears of rent for the years 1314-15 *Fasli*. The defendants in this suit claimed, therefore, that the pre-emptors were not entitled to get possession of the property without paying these two sums, which had been properly spent by Manni Ram in saving the property. It was argued that as these payments had preserved the property from sale, the plaintiffs were bound to re-imburse Manni Ram's representatives for the sums which were thus applied. The contention in appeal is that the pre-emptors were entitled to have pre-emption on payment merely of the sum which was found to be due under the foreclosure decree. The lower Appellate Court found against the plaintiffs on this point. The learned Judge relied upon the terms of section 12 of the Oudh Laws Act, the second clause of which provides that on completion of the purchase the person exercising the right of pre-emption shall be bound to pay to the mortgagee or his successor-in-title the amount specified in the notice, together with interest on the principal sum secured by the mortgage at the rate specified by the instrument of mortgage, for any time which has elapsed since the date of the notice, and any additional costs which may have been properly incurred by the mortgagee or his successor-in-title. The learned Judge was of opinion that these two items which have been referred to above were "additional costs" within the meaning of the expression as used in this section. It would, I think, be difficult to support the reasoning of the learned Judge in this matter, but apart from the language of section 12 it appears to me clear that these pre-emptors were under an obligation to re-imburse to Manni Ram's representatives any sums paid by Manni Ram on account of arrears of rent

accruing for any period prior to the time of his getting possession after foreclosure. In this connection I would refer first to the provisions of sections 152 and 154 of the Oudh Rent Act. Section 152 lays down, if there is a decree for an arrear of rent due in respect of an under-proprietary right, the interest of the judgment-debtor in that right may, subject to the provisions of the Act, be sold in execution of the decree. Section 154, sub-section (2), declares that where after the passing of the Act an under-proprietor transfers his rights or any part thereof in land, and the transferee enters into possession, the transferee shall, subject to any agreement in writing with the proprietor to the contrary, be liable to pay to the proprietor any arrears of rent due in respect of the land at the date of the transfer. It seems to me from a consideration of the language of these two sections that after Manni Ram had obtained this under-proprietary tenure by foreclosure, it was possible for him to escape the statutory liability which these sections cast both upon the transferee and upon the land which has come into his possession. It follows that at the time Manni Ram foreclosed the mortgage he became, by virtue of section 154, sub-section (2), liable for any arrears of rent which were due on the transfer. The sum of Rs. 958-11-3 was due in respect of arrears for the years 1309-1312 *Fasli*, which expired long before he obtained possession by foreclosure. The other sum of Rs. 268 odd is said to have been paid on account of arrears due for the years 1314 and 1315 *Fasli*. The proof of payment of this sum is to be found in Exhibit A2, a receipt for Rs. 730-13-6 paid on the 22nd December 1909, in which sum this amount of Rs. 268 odd is said to be included. Details of the items which go to make up this aggregate of Rs. 730-13-6 are to be found endorsed upon the receipt. From the endorsement it appears that only Rs. 152-6-6 was paid for arrears of the year 1314 *Fasli*. The balance was paid on account of subsequent years. The year 1314 *Fasli* closed on the 21st of September 1907, just about the time Manni Ram got possession. The result, therefore, is to show that when Manni Ram acquired the property by foreclosure, the amount outstanding for arrears of rent was Rs. 958-11-3 *plus* Rs. 152-6-6, total 1,111-1-9. The law as laid down in section 154, sub section (2), of the Oudh Rent Act declares that Manni Ram was liable to pay this amount to the superior proprietor. In default of his making payment, the *Talukdar* could have brought the under-proprietary tenure to sale. Is there then any reason why these plaintiffs who have brought their suit for pre-emption some five years after the date of foreclosure should escape the liability to pay the above amount? The argument is that Manni Ram was under a secondary liability only—the person responsible primarily being the owner of the tenure who was Manni Ram's mortgagor, that Manni Ram's remedy after payment was by way of suit against his mortgagor and that as this remedy has become time-barred and can no longer be made available to the plaintiffs, they are not under any obligation to re-imburse the mortgagee or his successors-in-interest. But according to the language of section 154, sub-section (2), of the Oudh Rent Act above referred, to it would seem that the transferee of the under-proprietary tenure becomes directly liable to the superior proprietor. And it appears to me that the plaintiffs-pre-emptors who are seeking by this suit to have themselves placed in the situation in which Manni Ram stood at the time he obtained foreclosure, cannot avoid any liability to which Manni Ram was then subject.

Lastly, it is not to be denied that Manni Ram's failure to discharge this liability would have resulted in the loss to him of the under-proprietary holding against which the *Talukdar* had applied for execution. The payments made by Manni Ram were made to save the property from sale and on the principle laid down in the ruling of their Lordships of the Privy Council in *Dakhina Mohan Roy* v. *Saroda Mohan Roy* (1), the plaintiffs-pre-emptors are bound to pay. The payments were in the nature of salvage. Manni Ram was in possession under a good title by foreclosure (even if it was liable to be defeated by a suit for pre-emption) and the obligation of the pre-emptors to pay is based upon considerations of justice, equity and good conscience.

I hold, therefore, that the plaintiffs were liable to pay Rs. 1,111-1-9, the sum paid by Manni Ram on account of arrears due for the period previous to his getting possession by foreclosure. Of course, it cannot be claimed that the plaintiffs are liable to recoup Manni Ram or his representatives for any rent paid by them

(1) 21 C. 142; 20 I. A. 160.

while actually in possession. They had the estate in return for the suit. The decree of the Court below must be corrected, for out of the sum of Rs. 268-1-1½ allowed by it to the defendants on account of rents for 1314 and 1315 *Fasli*, only Rs. 152-6-6 was due for any period previous to the date of the mortgagees getting possession by foreclosure. It is necessary, therefore, to reduce the pre-emption price by Rs. 115-10-7½. With this modification in the decree of the lower Appellate Court the plaintiffs' Appeal No. 229 is dismissed.

The Cross Appeal No 378 of 1913 can be disposed of shortly. It relates to two items, one of interest and one of costs. The claim relating to interest has been abandoned. As regards costs, it was conceded by the learned Counsel who supported the appeal after an examination of the decree that he was unable to press his claim in this respect and that the decree is correct. The cross-appeal, therefore, fails. The parties will in each of these appeals pay their own costs.

Appeals dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 680 OF 1913
CIVIL REVISION PETITION No. 382 OF 1913.
December 4, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Tyabji.

ISSAKKANAKATH MALIYAKKAL MUHAMMAD HAJEE—PLAINTIFF—APPELLANT IN S. A. No. 680 OF 1913 AND PETITIONER IN C. R. P. No. 382 OF 1913

versus

POURAKURIKKALAKATH KUNHI MAMMAD AND OTHERS—DEFENDANTS—RESPONDENTS IN BOTH.

Civil Procedure Code (Act V of 1908), O. XLI, r. 20—Parties to suit, struck off before decree was passed—Power of Appellate Court to implead persons interested.

Order XLI, rule 20, of the Civil Procedure Code applies to persons who were parties to a suit; and persons are nonetheless parties because they ceased to be so before the passing of a decree. An Appellate Court is, therefore, authorised to consider whether they are interested in the result of the appeal, and to implead them if it thinks that they are so.

Raja Dhamara Kumara Thimmanayanim Bahadur Varu v. *Bukkapatnam Venkatacharlu*, 6 Ind. Cas. 239; 34 M. 228; 8 M. L. T. 72; (1910) M. W. N. 226; 20 M. L. J. 805, followed.

Second appeal against the decree of the Court of the Subordinate Judge of South Malabar at Calicut, in Appeal Suit No. 668 of 1912, preferred against that of the District Munsif of Tirur, in Original Suit No. 88 of 1911.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsif of Tirur, in Original Suit No. 88 of 1911.

Mr. *T. R. Krishnaswami Aiyar*, for Mr. *T. R. Ramachandra Aiyar*, for the Appellant.

Mr. *N. A. Vaidyanatha Aiyar*, for Mr. *C. V. Ananthakrishna Aiyar*, for the Respondents.

JUDGMENT.

IN S. A. No. 680 OF 1913.—The learned Subordinate Judge observed that he had nothing to do with the question whether certain respondents were necessary parties to the appeal before him, because no appeal would lie against the order of the District Munsif striking off their names and there was no decree in their favour to be appealed against. He, therefore, dismissed the appeal.

We dissent from this decision. The Subordinate Judge's first reason for it is met by reference to *Raja Dhamara Kumara Thimmanayanim Bahadur Varu* v. *Bukkapatnam Venkatacharlu* (1). His second is unsound, because though there was no decree in favour of the defendants in question, the plaintiff had been refused a decree against them in his suit and had obtained no relief in respect of a part of the claim put forward in his plaint. We think that Order XLI, rule 20, of the Code of Civil Procedure clearly authorised the Subordinate Judge to consider whether these defendants were interested in the result of the appeal and to implead them, if he thought that they were so. For that rule applies to persons who were parties to the suit; and the defendants were nonetheless parties to the suit, because they ceased to be so before the passing of a decree.

The second appeal is allowed, the lower Appellate Court's decision being set aside and the appeal being remanded for re-admission and disposal in the light of the foregoing. Costs to date in the lower Appellate Court and here will be costs in the cause.

C. R. P. No. 382 OF 1913.—Second appeal No. 680 of 1913 having been allowed, this civil revision petition is dismissed. There will be no order as to costs of this petition.

Appeal allowed; *Petition dismissed.*

(1) 6 Ind. Cas. 239. 34 M. 228; 8 M. L. T. 72; (1910) M. W. N. 226; 20 M. L. J. 805.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 443 OF 1913 WITH ORDER No. 6302 OF 1913.

July 22, 1914.

Present:—Mr. Justice D. Chatterjee and Mr. Justice Walmsley.

BHAGRAJ SINGH AND OTHERS—DECREE-HOLDER—APPELLANTS

versus

METHUR SINGH—PURCHASER AND ANOTHER—JUDGMENT-DEBTOR—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 170 (3)—Decree, satisfaction of—Purchaser of part of occupancy-holding, whether entitled to make deposit.

The purchaser of a *part* of an occupancy-holding, which is not transferable by local custom or usage, is entitled to make a deposit under section 170 (3) of the Bengal Tenancy Act.

Jugal Mohini Dasi v. *Sri Nath Chatterjee*, 7 Ind. Cas. 477; 12 C. L. J. 609, and *Radhika Nath Sarkar* v. *Rakhal Raj Gayen*, 8 Ind. Cas. 835; 10 C. L. J. 473; 13 C. W. N. 1175, followed.

Sreemutty Dayamoyi v. *Ananda Mohan Roy Chowdhry*, 27 Ind. Cas. 61; 18 C. W. N. 971; 20 C. L. J. 52, referred to.

Appeal against the order of the District Judge, Darbhanga, dated the 5th July 1913, affirming that of the Munsif, Darbhanga, dated the 15th of May 1913.

Babu *Akhoy Kumar Banerjee*, for the Appellants.

Babus *Jogesh Chandra Roy* and *Rajendra Prosad*, for the Respondents.

JUDGMENT.—In this case the question for consideration is whether the purchaser of a portion of an occupancy-holding, which is not transferable without the consent of the landlord, can make a deposit under section 170 (3) of the Bengal Tenancy Act against the wishes of the landlord. The purchaser made the deposit and it was accepted by the learned Munsif. The landlord then objected, but his objection was disallowed. He appealed to the District Judge, who thought the appeal was incompetent. He has now appealed to us and there is an application for the revision of the order of the Munsif. The Full Bench has decided in the case of *Sreemutty Dayamoyi* v. *Ananda Mohan Roy Chowdhry* (1) that the sale of a part of an occupancy-holding which is not transferable by local custom or usage, does confer an interest on the purchaser, and the landlord is not ordinarily entitled to enter on the part sold. The case of a part-purchaser, therefore, is more secure

(1) 27 Ind. Cas. 61; 18 C. W. N. 971; 20 C. L. J. 52.

than that of a purchaser of the entire holding, in regard to whom we have just now held that he is competent to make a deposit under section 170(3), Bengal Tenancy Act. [*Ahammadullah* v. *Harkaru Sahu* (2).] Reliance is placed on behalf of the landlord on the case of *Jotindra Mohan Tagore* v. *Durga Dabe* (3). That case, however, was considered by Mookerjee and Carnduff, JJ., in *Jugal Mohini Dasi* v. *Sri Nath Chatterjee* (4) which supports the contention of the purchaser. The same view was held by Sir Lawrence Jenkins, C. J., and Mukerjee, J., in the case of *Radhika Nath Sarkar* v. *Rakhal Raj Gayen* (5). It is, therefore, quite in accordance with the latest authorities to hold that the purchaser of a part of a holding of an occupancy *raiyat* is entitled to make a deposit under section 170 (3) of the Bengal Tenancy Act. In this view of the case we uphold the order of the learned Munsif. We dismiss the appeal as incompetent with costs, one gold *mohur*.

Appeal dismissed.

(2) 27 Ind. Cas. 176
(3) 10 C. W. N. 438.
(4) 7 Ind. Cas. 477; 12 C. L. J. 609.
(5) 8 Ind. Cas. 835, 13 C. W. N. 1175; 10 C.L.J. 473.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 114 OF 1913.

November 17, 1914.

Present:—Mr. Lindsay, J. C.

Musammat CHET KUNWAR—DEFENDANT—APPELLANT

versus

PUTTU SINGH—PLAINTIFF—RESPONDENT.

Arbitration—Reference to arbitration, resiling from—Appeal against decree passed on award, grounds for.

A party cannot resile from a reference to arbitration at his sweet will and pleasure, and it cannot avail him to show that having once agreed to the reference he afterwards repented of his action.

Where the parties to a suit referred the case to arbitration and a decree was made in accordance with the award of the arbitrators:

Held, that no appeal lies from such a decree, except where the decree is in excess of or not in accordance with the award.

Appeal against the decree of the Subordinate Judge, Hardoi, dated 10th July 1913.

Mr. Syed *Ali Muhammad*, for the Appellant.

Babu *Bisheshwar Nath*, for the Respondent.

JUDGMENT.—A preliminary objection is raised by the respondent to the effect that this appeal is not maintainable, on the ground that no appeal lies.

The appeal is against a decree passed upon an award made by arbitrators, and the learned Counsel for the respondent relies upon the provisions of paragrah 16 (2) of the second Schedule to the Code of Civil Procedure, according to which no appeal lies from such a decree except where the decree is in excess of, or not in accordance with, the award.

No such ground is set out in the memorandum of appeal. On the contrary the case set up by the appellant is that the award and the decree based upon it are of no effect, because the appellant did not give her free consent to the reference to arbitration. The facts are clear and may be shortly stated as follows. The appellant was the defendant in a suit brought by the plaintiff-respondent, Puttu Singh. After issues had been struck in the case, an application was made by both parties for a reference to arbitration. This was on the 29th January 1913. The arbitrator nominated by the defendant-appellant declined to act and under paragraph 5 of Schedule II a notice issued to the defendant to nominate another arbitrator in his place. She was duly served with the notice and appeared in Court and declared her refusal to nominate another arbitrator. She asked for an order superseding the reference to arbitration. This application was refused and the Court, acting under paragraph 16 (2), nominated another arbitrator to act. Another application was presented to the Court thereafter asking again for the supersession of the arbitration proceedings. This was refused in the light of the order previously passed. The appellant also took the step of presenting an application to the arbitrators in which she intimated that she declined to prosecute her case before them. An award was eventually prepared and presented to the Court. The appellant put forward certain objections, but these were withdrawn on an agreement having been made between the parties that the case might be remitted to the arbitrators for a fresh hearing at which the appellant here undertook to present her case and call her evidence. The case was sent back. Chet Kunwar's witnesses were heard and an award was returned unfavourable to her. The award was eventually accepted and a decree was passed upon it. That is the decree now appealed against.

There is no foundation whatever for any argument that the award or the decree is a nullity because the appellant did not give her consent to the reference. On the contrary it is perfectly plain that she did consent to the reference. She signed the petition for reference with her own hand. It is no doubt the fact that for certain reasons she subsequently desired to back out of the reference and to have the case tried out in Court. But a party cannot resile from a reference to arbitration at his sweet will and pleasure, and it avails the appellant nothing here to show that having once agreed to the reference she afterwards repented of her action.

The proceedings in the Court below have been strictly in accordance with law and as the appellant is unable to assert that the decree is in excess of or not in accordance with the award, it follows from the language of paragraph 16 (2) of Schedule II that this appeal is not competent.

The preliminary objection must prevail. The appeal is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 227 OF 1911.

August 17, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

HALLI JHA AND OTHERS—DEFENDANTS—APPELLANTS

versus

Bhaiya LAL SINGH—PLAINTIFF AND OTHERS REMAINING DEFENDANTS—RESPONDENTS.

Minor—Mortgage suit—Guardian ad litem of infant defendants not appointed—Decree—Sale in execution—Decree-holder purchaser, whether acquires infant's title—Father representing interest of infant son unknown to mortgagee.

A decree-holder, purchaser of a property brought to sale in execution of a mortgage decree, does not acquire the right, title and interest in the property of an infant for whom no guardian *ad litem* has been appointed in the suit

In a mortgage suit the interest of an infant of

whose existence the mortgagee had no knowledge, is represented by his father and passes to the purchaser at an auction-sale.

Appeal against the decree of the Officiating Subordinate Judge, Mozaffarpur, dated the 17th February 1911.

Babu *Soroshi Charan Mitra*, for the Appellants.

Babus *Umakali Mukerjee* and *Baldeo Narain Singh*, for the Respondents.

JUDGMENT.—This is an appeal by the third, fourth and fifth defendants in a suit for recovery of possession of immoveable properties purchased by the plaintiffs at a sale in execution of a mortgage decree. The mortgage was created on the 13th November 1896 by the representatives of different branches of a joint *Mitakshara* family. On the 20th June 1913, the mortgagee sued to enforce his security. He joined as defendants the mortgagors as also the infant sons of one of them, namely, Halli Jha and Magnu Jha, who are the third and fourth defendants in this litigation. The fifth defendant (the brother of the two defendants just mentioned) was not a party to that suit; and one of the points in controversy is, whether he was born before the mortgage suit was commenced. The suit was decreed in due course, the mortgaged properties were brought to sale and were purchased by the decree-holder himself. The purchaser has not been able to obtain possession and he has instituted this suit for declaration of title and for recovery of possession and mesne profits. His claim is resisted by the three defendants-appellants, on the ground that they are not bound by the mortgage decree and the proceedings consequent thereon.

In so far as the third and fourth defendants are concerned, their contention is that although they were joined as parties defendants, no guardian *ad litem* was ever appointed for their benefit, and that, consequently, they were essentially strangers to the suit and are not affected by the decree made therein. It appears from an examination of the order-sheet in the suit, that on the 20th January 1903 the mortgagee applied for the appointment of a guardian of the two minor defendants. His prayer was that their father, who was also a defendant to the suit, should be appointed guardian. Notice was served, but there was no appearance on behalf of the proposed guardian and yet the Court proceeded to appoint him as guardian *ad litem*. Subsequently, on the 17th March 1903, the father entered appearance and intimated to the Court that he had not received the notice issued to him. At the same time, he declined to act as guardian on behalf of his infant sons, on the allegation that there might be a conflict of interest between him and them. He, therefore, suggested that Babulal, who was related to the infants, might be appointed guardian. Notice was issued to Babulal, but we cannot trace any order by which he was appointed to act as guardian on behalf of the infants. It is also plain that he did not enter appearance at any stage of the suit to look after the interest of the infants. The result was that, in so far as the infant defendants were concerned, the suit was decreed *ex parte*. The decree shows, however, on the face of it, that the father of the infants was their guardian *ad litem*. This was clearly an error, traceable possibly to the fact that no formal order was passed by the Court to discharge the order of the 12th February 1903, by which the father had been, without his consent, appointed to act as guardian *ad litem* of his minor sons. Subsequently, on the 9th August 1906, the decree-holder applied to have the decree amended. The order made on this application is not on the record, but as the decree has not been altered, we may take it that the application for amendment was rejected. It is clear, upon this statement of the facts, that no guardian *ad litem* was ever appointed in respect of the two infants, and they are consequently in the same position as if they had never been made parties to the suit: *Narsingh Narain* v. *Sheikh Jahi Mistry* (1). It follows accordingly that the decree-holder-purchaser has not acquired the right, title and interest of the infants in the mortgaged properties. This position, indeed, has not been seriously contested on behalf of the plaintiff-respondent. But it has been strenuously contended that the Court should investigate in the present suit, whether the mortgage was executed under circumstances which might make it binding upon these

(1) 13 Ind. Cas. 414, 15 C. L. J. 81

two infants, and if the Court should decide in favour of the mortgagee, a decree for possession might be made in his favour, with liberty to the infants to redeem. We are of opinion that this matter should not be determined in the present litigation. The question of the true character of the mortgage was not raised in the Court below and there has been no investigation by the Subordinate Judge as to the circumstances under which the mortgage was executed. The result, therefore, is that, in so far as these two infants are concerned, it must be declared that the plaintiff has not acquired their shares in the disputed property.

In so far as the fifth defendant is concerned, his case stands on a different footing. The Subordinate Judge has held that he was born after the institution of the mortgage suit and before the mortgage sale took place. From the evidence as to the time of his birth placed before us, it is clear that neither party has correctly stated the age of the fifth defendant. We are not prepared, however, to dissent from the finding of the Subordinate Judge upon this part of the case. But it is plain that even if it be assumed that he was born before the mortgage suit was instituted, the omission to make him a party will not give him the advantage which he claims. There is nothing to show that the mortgagee was aware of his existence. On the other hand, the very fact that the mortgagee joined his two brothers as parties to the suit, indicates that if the mortgagee had been aware of his existence, he would have equally made him a party to the suit. We must take it, then, that the mortgagee had no knowledge of the existence of the fifth defendant. In these circumstances, on the authority of the decision of the Judicial Committee in the cases of *Kishen Parshad* v. *Har Narain Singh* (2) and *Sheo Shankar Ram* v. *Jaddo Kunwar* (3), it must be held that his interest was sufficiently represented by his father and has passed to the purchaser at the auction-sale (*Raghoram* v. *Rajani Kanta*, A. O. D. No. 231 of 1911, decided on the 17th August 1914).

The result is that this appeal is allowed in so far as the third and fourth defendants are concerned and dismissed in respect of the fifth defendant. The share decreed to the plaintiff will be reduced by 1/12th in respect of estate No. 18423 and by 1/18th in respect of estates No. 8398 and 8559 each. The fractions mentioned have reference to the entire sixteen annas of the estate taken as the unit.

The third and fourth defendants are entitled to their costs of this appeal. We assess the hearing fee at five gold *mohurs*. They are also entitled to their costs in the Court below. As the costs of the third, fourth and fifth defendants were assessed in a lump sum, the successful defendants will be entitled to two-thirds of the amount stated in the decree of the Subordinate Judge.

Appeal partly allowed.

(2) 9 Ind. Cas. 739; 38 I. A. 45; 33 A. 272; 15 C. W. N. 321; 8 A. L. J. 256; 9 M. L. T. 343; 21 M. L. J. 378; 13 C. L. J. 345; 13 Bom. L. R. 359; (1911) 2 M. W. N. 395 (P. C.).

(3) 24 Ind. Cas. 504, 18 C. W. N. 968, 16 M. L. T. 175; (1914) M. W. N. 593; 1 L. W. 645; 20 C. L. J. 282; 36 A. 383; 12 A. L. J. 1173; 16 Bom. L. R. 810 (P. C.).

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 101 OF 1913.

November 13, 1914.

Present:—Mr. Lindsay, J. C.

Saiyed ZAHID ALI, THROUGH SARDAR BEGAM—PLAINTIFF—APPELLANT

versus

KEDAR NATH AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Transfer of Property Act (IV of 1882), ss. 60, 62—Redemption of mortgage without payment of deeds of further charge—Deeds of further charge, payment of.

Section 62 of the Transfer of Property Act is a special section supplementary to the general provisions of section 60. It provides a summary remedy which is available to a mortgagor in two special cases of usufructuary mortgage (*a*) where the mortgagee is authorised to pay himself the mortgage-money from the rents and profits of the mortgaged property, (*b*) where the mortgagee is authorised to pay himself from such rents and profits the interest or the principal money. It cannot apply to cases where from the conditions contained in the mortgage, accounts have to be made up between the parties.

It contemplates the existence of only one transaction and does not at all touch the case where a usufructuary mortgage having been executed, other mortgages by way of further charge have been executed by the same mortgagor.

ZAHID ALI v. KEDAR NATH.

Appeal against the decree of the Subordinate Judge, Tahsil Biswan, District Sitapur, dated the 24th July 1913.

Mr. *Sami Ullah Beg*, for the Appellant.
Mr. *A. P. Sen*, for the Respondents.

JUDGMENT.—The facts of this case are as follows. On the 3rd of April 1897, two persons, Zille Husain and his wife Aulia Begam, who between them owned a 4½-*biswas* share in *Mauza* Daryabad, made a mortgage of this share to Misri Lal and Manni Lal to secure a loan of Rs. 3,000. The mortgage was a usufructuary mortgage. The mortgagees were to be put in possession and to appropriate the profits of the land in lieu of interest. There was also a covenant by the mortgagors by which they made themselves liable to pay to the mortgagees any sums which they might be called upon to pay by way of enhancement of land revenue. There was also another stipulation by which the mortgagors made themselves liable for any extra sum which the mortgagees might be obliged to pay in the way of *lambardari* dues. In the years 1897-98 the mortgagors just mentioned sold their equity of redemption by two deeds to one Raghubar Dayal. In the year 1901 one Karam Husain brought a suit for pre-emption in respect of these sales to Raghubar Dayal and he got a decree by which he became the owner of 3. out of the 4½ *biswas*. In the year 1907 Karam Husain mortgaged these 3 *biswas* share to Hafiz Ali who was the father of the present plaintiff, Saiyed Zahid Ali. This suit, therefore, has been brought by Zahid Ali as a suit for possession by redemption. The first six defendants are the representatives of Misri Lal, one of the mortgagees, the 7th and 8th defendants are the representatives of Manni Lal and the 9th and 10th defendants represent Karam Husain from whom the present plaintiff holds as a mortgagee. The mortgagees claimed that redemption could not be had without payments which were due in respect of two deeds of further charge, one of them executed on the 10th of July 1897, to secure a sum of Rs. 200, the other dated the 6th November 1897 for a sum of Rs. 300 and the first point which arises for decision in this appeal is whether the lower Court was right in holding that in no case could the plaintiff here get redemption without paying off what was due on these deeds of further charge. As to the fact that these deeds were executed and that consideration was paid upon them there is now no dispute. The case of the plaintiff in the Court below and his case here is that he was in law entitled to recover possession of the mortgaged property without paying off the sums owing on these two deeds of further charge and for this purpose he has relied upon the provisions of section 62 of the Transfer of Property Act. The learned Subordinate Judge held that that was a particular section and had no application to the facts of this case, and with that view I agree. In my opinion the contention that the plaintiff was entitled to recover possession of this land without paying off the sums due on the two documents above-mentioned is untenable. Section 62 is, in my opinion, a special section which is supplementary to the general provisions of section 60 of the Transfer of Property Act. It provides a summary remedy which is available to a mortgagor in two special cases of usufructuary mortgage: (*a*) where the mortgagee is authorised to pay himself the mortgage money from the rents and profits of the property (*b*) where the mortgagee is authorised to pay himself from such rents and profits the interest of the principal money. It is claimed that this case falls under clause (*b*). The learned Subordinate Judge refused to accept this argument for he pointed out that there were other conditions in the mortgage as well, namely, one by which the mortgagors were bound to re-imburse the mortgagees for payments on account of enhanced land revenue and also another by which the mortgagors were liable to idemnify the mortgagees for sums paid by them on account of *lambardari* dues. That section 62 provides a special and summary remedy seems to be clear from the language employed and from the description of the cases for which the remedy is provided. The section allows the mortgagor to recover possession once the mortgagee has received satisfaction of the debt by the appropriation of the rents and profits, or in cases where the profits are applied to the payment of interest, when the period of the mortgage has expired and the mortgagor comes forward with the principal money. Obviously in cases of this kind there is no accounting to be done. From the conditions contained in the mortgage and from the time which has

elapsed between the date of the execution of the deed and the date on which the suit is brought, the Court is enabled at once to decide whether, the mortgagor is entitled to possession. Further it seems to me that section 62 contemplates the existence of only one transaction and does not at all touch the case where a usufructuary mortgage having been executed, other mortgages by way of further charge have been executed by the same mortgagor. It cannot now be argued that a mortgagor who has executed deeds of further charge on the same property which was first mortgaged, may not be bound, if the deeds so lay down, to redeem all the mortgages together, and it has not been argued that in the present case the deeds of further charge do not render it obligatory on the mortgagor to redeem all the mortgages at one and the same time. I hold, therefore, in agreement with the Judge of the lower Court that section 62 has no application to this case and that the plaintiff was not entitled to recover possession of the mortgaged property merely upon payment of the principal sum due on the first mortgage of the 3rd April 1897. This point, therefore, is decided against the appellant.

Another point raised on his behalf is that the Court below was wrong in not allowing him to redeem the entire 4½-*biswas* share. In order to estimate the merits of this contention it is necessary to refer to the frame of the plaint. In paragraph 8 of the plaint it was stated that under section 62 of the Transfer of Property Act the plaintiff became entitled to recover possession of the mortgaged property from the 18th of May 1912 on payment of the principal money. In paragraph 9 it was said that if for any reason the plaintiff should not be held entitled to restoration of possession, he was ready to redeem three *biswas* out of the four and a half *biswas* or, if the defendants-mortgagees insisted, the whole 4½ *biswas* on payment of such additional amount in respect of other mortgage-deeds as the Court might adjudge. Similarly in the last paragraph of the plaint in which the relief is set out, the plaintiff asked for possession of 4½ *biswas* on payment of the principal sum or of 3 *biswas* on payment of a proportionate amount, and that if for any reason neither of these reliefs could be granted he asked for a decree for redemption of a 3-*biswas* share or of a 4½-*biswas* share if the defendants insisted on his redeeming the entire property. The defendants did not insist on their right to compel the plaintiff to redeem the entire property. They were willing to allow redemption of a 3-*biswas* share only, that is to say, they accepted the offer made by the plaintiff in his plaint and that acceptance having taken place, I think the plaintiff is bound and cannot be allowed to argue here that in these circumstances the Court should have allowed him a decree for redemption of the 4½-*biswas* share. I find this point also against the appellant.

There remains only one other point which has been argued by the plaintiff's learned Counsel, with respect to the rate of interest in one of the deeds of further charge. I have already mentioned that the first deed of further charge bears date of the 10th July 1897. The principal sum secured was Rs. 200 and the agreement was for interest at the rate of 24 per cent. per annum, *i.e.*, Rs. 48 a year for the Rs. 200 loan. The second deed of 6th November, 1897, was for Rs. 300 and the total interest payable in respect of this deed was Rs. 32 a year. With regard to this second deed a plea was taken in the Court below that the rate of interest provided by it was penal. This plea was accepted by the learned Subordinate Judge and I think rightly so, for there can be no question that there is a provision for enhanced interest to run from the date of the execution of the deed in, case default were made in payment of the interest provided by the bond. The learned Judge gave effect to this plea and awarded compensation at the rate of Rs. 32 per annum, simple, on the entire amount. With regard to the other deed, that is to say the deed of the 10th July 1897, the plaintiff was not in a position to raise the plea that the rate of interest was penal but he complained that it was extortionate and unconscionable. The learned Subordinate Judge refused to give the plaintiff any relief with respect to this bond and I agree with what he says in his judgment. It was not made to appear that there was any case of undue influence or oppressive dealing with the mortgagor, and there was no ground upon which the plaintiff was entitled to ask for any mitigation of the terms relating to interest. It is no argument to say, as has been said here, that because the sum which

was advanced in 1897, namely, Rs. 200, has now swollen to over Rs. 6,000 by the accrual of interest, this is any reason for affording relief particularly to a person who is in the position of the plaintiff here. Since the execution of these three deeds of mortgage the equity of redemption has passed through several hands and the plaintiff now holds it as a mortgagee, and it does not lie in his mouth to challenge the rate of interest which was agreed to by the mortgagors many years before he (the plaintiff) had acquired any estate in the mortgaged property. This is the last point which was raised in support of the appeal. The result, therefore, is that the appeal fails and is dismissed with costs.

A cross-objection has been filed by the mortgagees with respect to the lower Court's order regarding the deed of further charge dated the 6th November 1897. It is not complained that the lower Court was wrong in holding that the interest provided by this bond was penal, but the objection is that the compensation which the Court awarded was not in the circumstances reasonable compensation. I have already mentioned that the Court has allowed simple interest at the rate of Rs. 32 a year on the sum of Rs. 300. I am not disposed in appeal to interfere with the discretion of the Judge of the lower Court. It cannot, I think, be said that he has failed to exercise his discretion and having regard to all the other circumstances of the case, I am satisfied that what he has allowed is sufficient. I, therefore, dismiss the cross-objection with costs.

Appeal and Cross-objection dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1144 OF 1913.

July 14, 1914.

Present.—Mr. Justice Chamier.

DEOCHAND—PLAINTIFF—APPELLANT

versus

PEARAY AND OTHERS—DEFENDANTS—RESPONDENTS.

Registration Act (III of 1877), s. 17—Simple mortgage converted into usufructuary mortgage by subsequent arrangement—Mortgagee put in possession—Registration—Mortgagee, right of, to sue on original mortgage.

A simple mortgage of three groves and a house was made in favour of the plaintiff in 1874. In 1877 a part of the mortgage-money was paid by the sale of one of the groves, and it was mutually arranged that the mortgagees should be put in possession of the other two groves for 10 years and receive the profits thereof in lieu of interest upon the amount remaining due and should be entitled to foreclose if the mortgagors should fail to redeem within one year after the expiry of the ten years. The mortgagee sued for recovery of the amount on the basis of an original simple mortgage.

Held, that in order to effect a usufructuary mortgage the proceedings of 1877 ought to have been registered, but not having been registered, they took effect only as an arrangement for the payment of interest and the mortgagee was entitled to sue upon the original simple mortgage.

Second appeal from the decree of the Additional Subordinate Judge of Mainpuri.

Mr. *Jogendro Nath Mukerji*, for the Appellant.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Respondents.

JUDGMENT.—In November 1874 the predecessors-in-title of the respondents made a simple mortgage of three groves and a house in favour of a joint family of which the appellant is now sole survivor. In November 1877 there was due upon the mortgage a sum of Rs. 571. One of the mortgagors then sold one of the groves to the mortgagees for Rs. 130, and on the same date the mortgagors and mortgagees appeared before a Revenue Court and presented petitions setting out that it had been arranged that the mortgagees should be placed in possession of the other two groves for ten years and receive the profit thereof in lieu of interest upon Rs. 441, the amount then remaining due, and that if within one year after the expiry of the ten years the mortgagors failed to redeem the property, the mortgagees should be entitled to foreclose in lieu of the sum of Rs. 441 (*bazarie arzi hasa baibat Kamil bad mead kara leve*). Possession was delivered to the mortgagees accordingly and they have remained in possession ever since. The present suit is for recovery of Rs. 441 by sale of the two groves, on the basis of the original simple mortgage.

The first Court decreed the claim holding that the petitions of 1877 and the delivery of possession effected in pursuance thereof were not intended to supersede the simple mortgage, but were merely intended to provide for the payment of the interest.

On appeal the Subordinate Judge held that the original mortgage had been superseded by the proceedings taken in 1877, which

amounted to an usufructuary mortgage of the two groves, or rather of the trees in the groves, and, therefore, no suit could be maintained upon the original mortgage. In my opinion it is clear that the proceedings of 1877 were intended to supersede the simple mortgage. In the first place, it was obviously intended that the house should thenceforth be released from the mortgage, next, the passage quoted above from the petitions shows that the parties intended that in the event of the morgagors failing to redeem, the mortgagees might claim foreclosure on the basis of the petitions, and lastly, on any construction of the petitions the right to sue on the simple mortgage was suspended for a time at all events.

The Transfer of Property Act had not been passed when the proceedings of 1887 were taken, but the Registration Act of 1871 was in force and the question arises whether the petitions which were intended to effect the usufructuary mortgage, ought to have been registered.

For the reasons which I gave in *Bharosa* v. *Sikdar* (1), I am of opinion that they ought to have been registered and cannot be held to have effected an usufructuary mortgage if the property mortgaged was immoveable property, within the meaning of the Registration Act, and the value of the interest exceeded Rs. 100.

The Subordinate Judge held that the parties intended to mortgage the trees only, and not the land on which they stood. If this view is correct, a question would arise whether the *nim*, *mahua* and mango trees could be regarded as standing timber but, in my opinion, the intention was to mortgage the rights and interests of the mortgagors as grove-holders. The mortgagees were to take possession of the land and enjoy the income of the groves as grove-holders. According to the decision of Richards, C. J., and Banerji, J., in *Sheo Nath Ram* v. *Sheo Ram* (2) what was mortgaged was immoveable property and not merely rights in standing timber, even if all the trees in the groves could be regarded as timber trees. The interest intended to be created admittedly exceeded Rs. 100 in value.

(1) 27 Ind. Cas. 97; 12 A. L. J. 996.
(2) 23 Ind Cas. 963.

For these reasons I hold that the proceedings of 1877 did not operate to create an usufructuary mortgage of the groves, and consequently took effect only as an arrangement for the payment of the interest. The result is that the appellant is entitled to sue, as he did, upon the original simple mortgage.

I allow the appeal, reverse the decision of the lower Appellate Court and remand the case to that Court to be restored to the pending file and disposed of on the merits according to law. Costs of this appeal to be costs in the cause.

Appeal allowed; Cause remanded.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 655 OF 1908.

July 13, 1914.

Present:—Mr. Justice Stephen and Mr. Justice Mullick.

KALI CHARAN MAHATO—PLAINTIFF—APPELLANT

versus

GOURI SANKAR SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), s. 244—Non-transferable occupancy-holding sold in execution of rent-decree—Application by purchaser to set aside sale—Bengal Tenancy Act (VIII of 1885), s. 173—Fraud—Appeal.

A purchaser of a portion of a non-transferable occupancy-holding sold in execution of a decree for rent is a representative of the judgment-debtor within the meaning of section 244 of the Civil Procedure Code of 1882, and therefore, the question whether the sale should be set aside on application of the purchaser on the ground of fraud or under the provisions of section 173, Bengal Tenancy Act, is a question between the parties to the suit or their representatives, and against the decision of such question there is both an appeal and a second appeal.

Appeal against an order of the District Judge, Patna, dated the 28th of November 1908, affirming that of the Munsif, first Court of that place, dated the 3rd of September 1908.

Babu *Surendra Nath Ghoshal*, for the Appellant.

Moulvi *Muhammad Mustafa Khan*, for the Respondents.

JUDGMENT.—The appellant is the purchaser of a portion of an occupancy-holding. The lower Appellate Court appears to have taken it for granted that the holding is not

one transferable by custom, and we conclude that he has come to a finding of fact upon this point with which we cannot interfere in second appeal.

It appears that the holding was sold in execution of a decree for rent on the 20th March 1908 and purchased by one Gouri Sankar Singh. On the 31st March 1908 the appellant made an application to have the sale set aside. The Munsif, who heard the application in the first instance, came to the conclusion that the auction-purchaser was not a *benamidar* for the judgment-debtor and that, therefore, section 173, Bengal Tenancy Act, did not apply. He accordingly dismissed the application. The District Judge, to whom the applicant appealed, held that there was no appeal against an order under section 173 and declined to interfere.

It is brought to our notice by the learned Pleader for the appellant that in his application of the 31st March 1908, the appellant sought relief not only under section 173 of the Bengal Tenancy Act, but also under section 174, Bengal Tenancy Act, and sections 310A, 244 of the Civil Procedure Code of 1882. Now it is clear that section 174 does not apply, because the application has not been made by the judgment-debtor. As regards section 173, the Munsif has found that the auction-purchaser is not a *benamidar* for the judgment-debtor. This being so, section 173 does not apply unless section 244, Civil Procedure Code, can be called to its assistance.

Section 310A, Civil Procedure Code, is no longer applicable to execution proceedings under the Tenancy Act by virtue of section 170, Bengal Tenancy Act, as amended by Bengal Act I of 1907.

There remains, therefore, only section 244 of the Code of 1882, which is the Code applicable to the case. Now the applicant as a purchaser of a portion of a non-transferable occupancy-holding is a representative of the judgment-debtor within the meaning of section 244 [*Sreemutty Dayamoyi* v. *Ananda Mohan Roy Chowdhry* (1)]. This being so, the question whether the sale should be set aside on the ground of fraud or under the provisions of section 173, Bengal Tenancy Act, is a question between the parties to the suit or their representatives. Therefore, there is both an appeal and a second appeal. The case, therefore, must be remanded to the Court of first instance for an investigation into the charges of fraud. The result is that the appeal is decreed with costs which are assessed at Rs. 16, and the order of the lower Appellate Court set aside with the direction that he will remit the case to the Court of first instance for disposal in accordance with the directions herein contained.

The Rule is consequently discharged without costs.

Rule discharged.

(1) 27 Ind. Cas. 61; 18 C. W. N. 971, 20 C. L. J. 52.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 61 OF 1912.

July 11, 1913.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Justice Sir Asutosh Mookerjee, KT.

BIBHUDENDRA MANSINGH BHRAMARBAR RAI—PLAINTIFF—APPELLANT

versus

DEBENDRA NATH DAS—DEFENDANT—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), s 5 (1), (5)—Tenure-holder—Presumption—Lease—Construction of lease.

A lease provided:

(1) that the grant was made in order that the grantee might cultivate the land after making it fit for cultivation at his own expense by his own efforts,

(2) that the grantee might enjoy the land by cultivating it or having it cultivated, and that it would be competent to the grantee to make such other arrangements or adopt such other means as he might consider necessary for cultivating the same and that the grantor would not raise any objection thereto.

There was a period of remission fixed, during which no rent was to be paid for the land itself. The rate of rent itself was fixed in perpetuity and a premium was paid by the grantee to the grantor. The area covered by the lease exceeded one hundred *bighas*

Held, (1) that under section 5 (5) of the Bengal Tenancy Act it was obligatory upon the Court to presume that the grantee was a tenure-holder;

(2) that the terms of the lease read together with the definition of tenure-holder given in section 5 (1) of the Bengal Tenancy Act instead of rebutting supported the statutory presumption; and

(3) that the definition given in the section was not exhaustive.

BIBHUDENDRA MANSINGH v. DEBENDA NATH DAS.

Letters Patent Appeal against the decision of Mr. Justice Richardson, dated the 16th July 1912, in Appeal from Appellate Decree No. 1960 of 1909, against that of the Special Judge of Cuttack, dated the 16th August 1909, affirming that of the Assistant Settlement Officer of Cuttack, dated the 20th December 1907.

FACTS of the case appear from the following judgment of Mr. Justice Richardson appealed against.

RICHARDSON, J.—This appeal is preferred by the defendant from the decree of the Court of Appeal below, which upheld the decree of the first Court in the plaintiff's favour. The suit was brought by the plaintiff under section 106 of the Bengal Tenancy Act for a declaration that the defendant is a tenure-holder under him in respect of the land to which the suit relates and for an order directing that an entry in a Record of Rights published on the 6th July 1907, to the effect that the defendant holds the land as a *raiyat*, be corrected accordingly.

The plaintiff is a minor whose estate is under the charge of the Court of Wards. The genesis of the suit appears from the judgment of the first Court, the Court of the Assistant Settlement Officer of Cuttack, in which an order passed by the Director of Land Records upon an inspection of the Record of Rights after its publication is cited at length.

The facts briefly are as follows. The defendant holds under a lease granted on the 7th June 1901 by the plaintiff's predecessor to Babu Gokulananda Chowdhury, who relinquished his rights in favour of the defendant by an instrument dated the 17th January 1907. The lease covers an area of about 259 acres or considerably more than 100 standard *bighas*. A translation of it is included in the paper-book. In the preamble the lease is described as a *mukarari* lease and paragraphs 1, 5 and 9 contain directions addressed to the lessee to the following effect:—Paragraph 1, "you shall cultivate the same after making it fit for cultivation at your own expense and by your own efforts."

Paragraph 5, "You shall cultivate the lands mentioned in the lease and pay rents." . . . . Paragraph 9, "You shall, by reserving water and raising *bandhs* . . . make it (*i.e.*, the land) fit for cultivation according to your will and shall enjoy the same by cultivating or having it cultivated, and you shall be competent to make such other arrangement or adopt such other means as you consider necessary for cultivating the same and I shall not raise any objection thereto."

I pause to remark that it is not disputed on the plaintiff's side that the lease was granted for the reclamation of lands then waste or that apart from the presumption arising from the extent of the area, its terms are consistent with the creation of a *raiyati* interest. It is contended, however, that so far as the question depends on the construction of the lease, the defendant may at the least be equally well a tenure-holder or a *raiyat*.

In the preliminary proceedings under Chapter X of the Tenancy Act, the defendant was first recorded as a tenure-holder. The defendant lodged an objection which was summarily decided by the Settlement Officer on the basis of a petition of compromise, dated 30th January 1907, filed before him by the defendant and his sub-tenants. In that petition it is stated that the defendant had "reclaimed and made fit for cultivation" about 106 acres of the entire area and that about 48 acres of the 106 were "left in the *nijchas* of the said Babu" and the balance, about 58 acres, were cultivated by "Jagu Singh and others, *raiyats* . . . . on tenure of division of crops." So long as they "gave *bhag* properly" the tenants were not to be ejected, but the defendant was to be competent to eject any one of the tenants "who does not properly cultivate the land and fails to give the *bhag* properly or allows the land to remain waste."

This compromise, it is argued for the defendant, is in no way conclusive as to his status being that of a tenure-holder. The tenants under him might be *raiyats* or under-*raiyats*. As to the description of them as *raiyats*, it is argued that the petition is not of a very formal character and that the word "*raiyat*" is often used popularly to cover various classes of tenants. Moreover, it is said, having the petition

before him, the Settlement Officer entered the defendant in the Record as a *raiyat*, the entry was included in the Record of Rights as finally published and its correctness has not been disputed by the persons more immediately concerned, the defendant's sub-tenants.

No witnesses were called by either party and the only documents, other than those to which I have already referred, which the Courts below appear to have had before them were, *firstly*, a lease dated the 4th October 1903, granted by the plaintiff's predecessor to the defendant of some land in the same village, and *secondly*, two petitions filed by the defendant's sub-tenants before the Settlement Officer of date prior to the petition of compromise. The lease of 1903 is expressed to have been granted for the purpose of building a house required for cultivating the land referred to in the lease of 1901, which again is referred to as an *istimrari* lease for cultivating that land.

As to the two petitions, the learned District Judge observes that they "show that after the first two or three years, the tenants have been cultivating the lands on half produce rents." "The defendant," he says, "was at liberty to cultivate himself or to cultivate by others, and it appears that the defendant first took one course and then the other."

On the materials I have indicated, the lower Courts have held that the defendant ought to have been entered in the Record of Rights as a tenure-holder and not as *raiyat*. They refer to the fact that at the present time something more than a half of the cultivated area is in the occupation of tenants. They also refer to the area of the land and the presumption that a tenant holding more than one hundred standard *bighas* is a tenure-holder [Tenancy Act, section 5 (5)]. They further refer to the circumstances and position of the defendant who does not belong to the cultivating classes, and reading the lease and the petition of compromise in the light of considerations of this kind, they arrive at the conclusion that the presumption created by section 103B, that an entry in a Record of Rights shall be presumed to be correct until it is proved by evidence to be incorrect, has been rebutted. For the defendant reliance appears to have been placed throughout on the terms of the lease and on the quantity of land still to be reclaimed, and it has been contended that the considerations by which the lower Courts were influenced were in the circumstances inconclusive and that there was in effect no evidence to prove that the controverted entry was wrong.

In this Court a preliminary objection was taken that the suit was incompetent because, the real dispute being as to the relations between the defendant and his sub-tenants and the latter not having been made parties, the plaintiff has no *locus standi*. But the objection was not taken below and I will assume that the plaintiff has an interest, pecuniary or other, sufficient to support the suit.

But the plaintiff cannot have it both ways. The suit cannot be treated as in point of form a suit between the plaintiff and the defendant and in point of substance a suit between the defendant and his sub-tenants. As the suit is constituted, the proper subject for inquiry is the contractual relations which exist between the plaintiff and the defendant, and not those which exist between the defendant and his sub-tenants. That being so, the issue to be determined is narrowed to this, whether as between the plaintiff and the defendant, the latter is a tenure-holder or a *raiyat*, holding in either case at a rate of rent fixed in perpetuity. The determination of that question depends primarily on the lease of 1901. If the intention of the parties can be sufficiently gathered from the terms of that document and the condition of things which existed at the time of its execution, there is no need for the present purpose to seek further and the plaintiff can derive no advantage from the compromise between the defendant and his tenants, to which he was not a party, and no advantage from such decisions as that in the case of *Mohesh* v. *Manbharan* (1), which was cited on his behalf. Now in order to ascertain the meaning of the lease, it must be read as a whole and if it be so read and if due regard be had to the state of things to which it applied, in my opinion the primary purpose it discloses was that

(1) 5 C. L. J. 522.

the defendant should bring the land under cultivation by his own efforts and he is fairly entitled as against the plaintiff to claim the status of *raiyat*. In that view, which I conceive is consistent with the series of decisions to which I was referred, beginning with the case of *Durga* v. *Kalidas* (2), and ending with the case of *Raja Promoda Nath Roy* v. *Asiruddin Mandal* (3), the suit ought to have been dismissed.

I wish to emphasize the fact that in arriving at that conclusion I decide nothing as to the relations between the defendant and his sub-tenants, which remain precisely as they were before this ligitation was commenced.

No decision binding upon the sub-tenants can be pronounced in a suit to which they are not parties.

The result is that the appeal succeeds. The suit is dismissed and the defendant is entitled to his costs throughout.

I may add that this judgment has been delayed because I suggested a certain course to the learned Government Pleader which he subsequently found himself unable to adopt.

Babus *Ram Churn Mitra* and *Sris Chunder Chowdhury*, for the Appellant.

Dr *Rash Behari Ghose*, Babus *Narendra Chunder Basu* and *Sures Chunder Chuckerbutty*, for the Respondent.

JUDGMENT.—This is an appeal under section 15 of the Letters Patent against a judgment of Mr. Justice Richardson by which he has reversed a judgment of the Special Judge who had confirmed the decision of the Settlement Officer in a suit under section 106 of the Bengal Tenancy Act.

The plaintiff-appellant instituted this suit for declaration that the defendant was a tenure-holder and not a *raiyat* as determined in the Settlement proceedings. The defendant holds under a lease granted to him on the 7th of June, 1901. The Settlement Officer as also the Special Judge have held that the defendant is a tenure-holder but Mr. Justice Richardson has come to a contrary conclusion.

The area covered by the lease exceeds one hundred *bighas*. Consequently the presumption mentioned in sub-section (5) of section 5 of the Bengal Tenancy Act is applicable. That sub-section provides that "where" as here "the area held by a tenant exceeds one hundred standard *bighas*, the tenant *shall* be presumed to be a tenure-holder until the contrary is shown." It is consequently obligatory upon the Court to presume that the defendant is a tenure-holder. The only question for determination is whether the contrary has been shown. The defendant in support of the contrary view relies upon the terms of the lease of the 7th June 1901. He lays special stress upon the first clause of the lease which shows that the grant was made to the defendant in order that he might cultivate the land after making it fit for cultivation at his own expense by his own efforts. It has been argued that the intention of the grantor was that the land should be rendered fit for cultivation and subsequently be cultivated by the grantee himself. This contention, however, is negatived by the 9th clause of the lease which provides that "the grantee may enjoy the land by cultivating it or having it cultivated, and that it will be competent to the grantee to make such other arrangements or adopt such other means as he might consider necessary for cultivating the same and that the grantor would not raise any objection thereto." It was, therefore, competent to the grantee to cultivate the land himself or to have the land cultivated by means of under-tenants. Consequently it is impossible to say that the terms of the lease negatived the statutory presumption.

The case for the respondent is not strengthened by reference to the definition of the term "tenure-holder." Sub-section (1) of section 5 provides that "tenure-holder" means *primarily* a person who has acquired from a proprietor or from another tenure-holder a right to hold land for the purpose of collecting rent or bringing it under cultivation by establishing tenants on it, and includes also the successor-in-interest of persons who have acquired such a right." It is plain from the very terms of this definition that it is not exhaustive. The word "*primarily*" indicates that this is not an exclusive definition. A person who has acquired from a proprietor a right to hold land for the purpose of collecting rents or bringing it under cultivation by establishing tenants on it, is *prima facie* within the definition, but there may be other persons

(2) 11 C. L. R. 449.
(3) 11 Ind. Cas. 262; 15 C. W. N. 896.

who are tenure-holders, although they may not have acquired a right to hold land for the purpose of collecting rents or bringing it under cultivation by establishing tenants on it; in other words, it is possible for a person to be a tenure-holder although a part of the land in his occupation is cultivated by himself, and was intended to be cultivated by himself. In the case before us, it has been found that the land has been cultivated by under-tenants of the defendant. That is perfectly consistent with the inference that the defendant is a tenure-holder, although he has reserved a portion of the land to be cultivated by himself or by his servants. We are, therefore, of opinion that the statutory presumption has not been rebutted. On the other hand, there are indications in the lease itself that the grant could never have been intended to be *raiyati* grant. In the first place, the grant was for the purpose of reclamation, and the grantee was expected to reclaim the land at his own expense. His position consequently would hardly be intended to be as precarious as that of a non-occupancy *raiyat*. In the second place, there was a period of remission fixed, during which no rent was to be paid on account of the land itself. This is a term which usually finds place in leases of tenures. In the third place the rate of rent itself was fixed in perpetuity and a premium was paid by the grantee to the grantor. Taken as a whole the lease, in our opinion, makes it reasonably plain that the grant was intended to be that of a tenure: we must hold that a correct view of the *status* of the defendant was taken by the Assistant Settlement Officer and the Special Judge and the judgment of the Special Judge ought not to have been reversed in second appeal. The view we take is supported by the observation of Lord Davey in the case of *Gokul Mandar* v. *Padmanund Singh* (4).

The result, therefore, is that this appeal is allowed, the decree of Mr. Justice Richardson set aside and that of the Special Judge restored.

The appellant is entitled to his costs of both appeals in this Court.

Appeal allowed.

(4) 29 C. 707; 4 Bom. L. R. 793 6 C. W. N. 825; 29 I. A. 196 (P. C.).

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 896 OF 1913.

October 15, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Hannay.

MUTHUKARUPA PILLAI AND OTHERS—DEFENDANTS—APPELLANTS

versus

MARUDACHALAM CHETTI—PLAINTIFF—RESPONDENT.

Mortgage—Contemporaneous documents—Sale and agreement to re-convey—Intention to create mortgage.

Where parties execute two documents within an interval of a few days of each other, one purporting to be a sale and another an agreement to re-convey, the intention is rather to create a mortgage than a sale.

Palaniappan v *Subbaraya Gounden*, 22 Ind. Cas. 4; 1 L. W. 80 at p. 84; (1914) M. W. N. 222, 14 M. L. T. 579, *Alderson* v. *White*, 2 De G. & J. 97, 4 Jur. (N. S.) 125; 6 W. R. 242; 44 Eng. Rep. 924; 110 R. R. 38; *Bhagwan Sahu* v. *Bhagwandin*, 12 A. 387; 17 I. A. 98; 5 Sar. P. C. J. 557; *Ayyarayyar* v *Rahimansa*, 14 M. 170 and *Venkata Krishna Rao* v. *Venkatachalam*, 7 M. L. J. 299, distinguished.

Manchester Sheffield and Lincolnshire Railway Company v. *North Central Waggon Company*, 13 A. C. 554; 58 L. J. Ch. 219; 59 L. T. 230, 37 W. R. 305, distinguished.

Balkishin Das v. *W. F. Legge*, 22 A. 149; 27 I. A. 58; 4 C. W. N. 153; 2 Bom. L. R. 52, 7 Sar. P. C. J. 601 and *Wajid Ali Khan* v. *Shaikat Husain*, 7 Ind. Cas. 911; 33 A. 122; 7 A. L. J. 998, distinguished.

Singarava Chettiar v. *Kalyanasundaram Pillai*, 26 Ind. Cas. 1; 1 L. W. 687; (1914) M. W. N. 735, followed.

Second appeal against the decree of the Subordinate Judge of Coimbatore, in Appeal Suit No. 104 of 1912 preferred against that of the Court of the District Munsif of Comibatore in Original Suit No. 453 of 1910.

FACTS of the case appear fully from the judgment.

Mr. *T. Rangachariar*, for the Appellants:—The question is whether there is a contract of sale or mortgage with condition of re-purchase.

The first thing to be considered is the language of the instrument. Here the language is clear and unambiguous and does not amount to saying that "if you do not pay on a particular date the sale is void."

The words used can only convey a permanent right to purchase.

In *Palaniappan* v. *Subbaraya Gounden* (1) it was held that no oral evidence can be ad-

(1) 22 Ind. Cas. 4, 1 L. W. 80 at p. 84; (1914) M. W. N. 222; 14 M. L. T. 579.

mitted to prove that a document is not what it purports to be.

In *Bhagwan Sahai* v. *Bhagwan Din* (2) there were two deeds and an agreement showing conditional sale. In Ghose on Mortgages, page 86, it is said that the inadequacy of price is not a good test.

Mr. *L. A. Govindaragahva Aiyar*, for the Respondent:—In *Bhagwan Sahai* v. *Bhagwan Din* (2) it is clear from the terms of that deed that it was an out and out sale and not a mortgage. That which was intended to be a mortgage was allowed to be redeemed after the stipulated time.

Section 58 of the Transfer of Property Act has made the position very clear.

The transaction is not such as the appellant contends. *Singaram Chettiar* v. *Kalyanasundaram Pillai* (3).

The agreement to sell, is only a convenient mode of enjoying property. It is called an absolute sale. If you do not pay, the agreement is void. In doubtful cases the presumption must be one of mortgage and not of sale.

In *Ramayya* v. *Krishnamma* (4) the agreement of sale is said to be an absolute sale. *Challa Venkata Reddy* v. *Devabaktunni* (5).

He relied upon *Wajid Ali Khan* v. *Shafkat Husain* (6); *Balkishen Das* v. *W. F. Legge* (7).

In *Palaniappan* v. *Subbaraya Gounden* (1) a number of cases are collected. All these cases lay down that one must go to the intention of the parties, and also the terms of the agreement are to be considered. *Ayyavayyar* v. *Rahimansa* (8), *Venkata Krishna Rao* v. *Venkatachalam* (9), *Manchester, Sheffield, and Lincolnshire Railway Company* v. *North Central Waggon Company* (10) can be distinguished.

Mr. *T. M. Krishnasawmy Aiyar*, for the Appellants, in reply:—The point for consideration is the intention of the parties from the common sense point of view.

The cases do not throw sufficient light.

In *Wajid Ali Khan* v. *Shafkat Husain* (6) there was a sale.

Section 58 of the Transfer of Property Act requires the sale to be made conditionally.

A mere agreement to convey does not convey an interest.

[AYLING, J.—In not a single case this method of reasoning was adopted. The method of reasoning now adopted was not taken by your senior in any case].

Mr. *T. M. Krishnasawmy Aiyar*.—The words in *Wajid Ali Khan* v. *Shafkat Husain* (6) are not found in the document.

In *Bhagwan Sahai* v. *Bhagwan Din* (2) it was a matter of grace.

[AYLING, J.—You say the Allahabad High Court is wrong.]

Mr. *T. M. Krishnasawmy Aiyar*.—I say that it proceeds on a misconstruction of the document.

With regard to the Law Weekly cases there are words from which it appears that the sale could not take place.

The earlier cases turn upon the terms of the documents.

JUDGMENT.—The question for determination in this case is whether the transaction covered by the documents Exhibits C and D was a mortgage by conditional sale or a sale with a right of re-purchase. Both the lower Courts have held that the transaction was a mortgage and not a sale. The construction of the documents is a matter of considerable difficulty, but we think on the whole that the conclusion at which the lower Courts have arrived is correct.

The two documents, Exhibits C and D, were executed on the same day and must, in our opinion, be taken together as constituting one and the same transaction in view of this circumstance. It was contended for the appellants that because Exhibit D is described as a deed of agreement and not as a counter part [as was the case in the decision in *Palaniappan* v. *Subbaraya Gounden* (1)] it is to be inferred that the parties intended the two documents to be separate and independent of each other. We think, however, that it is more reasonable to infer from the fact of execution of the two documents on the same date that the parties intended the documents to constitute a single transaction than to infer an opposite intention from the verbal distinction above referred to. Taking

(2) 12 A. 387 (P.C.), 17 I. A. 98; 5 Sar. P. C J. 557.
(3) 26 Ind. Cas 1; 1 L. W. 687; (1914) M. W. N. 735.
(4 23 M 114.
(5) 14 Ind. Cas. 65; (1912) M. W. N. 164.
(6) 7 Ind. Cas. 911; 33 A. 122; 7 A. L. J. 908.
(7) 22 A. 149; 27 I. A. 58; 4 C. W. N. 158; 2 Bom. L. R. 523; 7 Sar. P. C. J. 601.
(8) 14 M. 170.
(9) 7 M. L J 29°.
(10) 13 A. C. 554; 58 L. J. Ch. 219; 59 L. T. 730; 37 W. R. 305.

it, then, that the two documents represent a single transaction, we have to ascertain (to use the words of Lord Chancellor Cranworth in the case of *Alderson* v. *White* (11)] "what, upon a fair construction, is the meaning of the instruments?" And for that purpose we must endeavour to find out what was the intention of the parties in so far as it can be gathered (1) from the documents themselves and (2) the surrounding circumstances. We may for convenience briefly refer here to the previous transactions relating to the land. The first transaction is evidenced by Exhibit E. This document was executed by the two brothers, Rangasawmy and Ramasawmi Naickar, (through whom the plaintiff claims) on 13th December 1875 in favour of one Palaniyandi Udayan for a sum of Rs. 875. The document is described as a deed of conditional sale and it relates to the same land as that dealt with by the subsequent documents, Exhibits A, B, C and E. It contained a stipulation that the brothers were to have a right to re-purchase the land on re-payment of the sum of Rs. 875 within seven years from the date of Exhibit E, and in default of payment the sale-deed was "to become permanent." It is conceded for the appellants that Exhibit E was a mortgage by conditional sale. The circumstance that Exhibit E was discharged (so the lower Courts find), not within the time fixed in Exhibit E but two days later, is significant in that connection.

The next transaction is that covered by Exhibits A and B. These documents were both executed on 13th December 1882. The former is described as a deed of sale and the latter as an agreement. By Exhibit A, the brothers Rangasawmi and Ramasawmi sold the land referred to in Exhibit E to one Jagannadha Aiyangar for Rs. 1,100 and it is recited that out of that sum, Rs. 875 were to be paid to Palaniyandi Udayan with reference to Exhibit E and the balance was taken for family expenses. Exhibit B was executed by Jagannadha Aiyangar to the two brothers and it provided that on the latter paying the sale price of Rs. 1,100 "on 30th April 1893," the sale-deed was to be returned and the land delivered back. There was a provision also that if sugarcane or plantation crop was on the land on the date fixed, the amount would be received and possession delivered after harvest. Finally in default of payment at the said stipulated time, the agreement was to become null and void.

Thus under Exhibit B the two brothers had a right of re-purchase on a fixed date, namely, 30th April 1893, or after the harvest of that year. Notwithstanding, however, that Exhibit B fixed a period of about 11 years for re-purchase, we find from the next set of documents (namely, Exhibits C and D) that Jagannadha Aiyangar was paid off and the land recovered back in 1886, nearly seven years before the date fixed in Exhibit B as the date for re-purchase.

In the same way as Exhibits A and B came into existence to pay off Palaniyandi Udayam and recover the land back from him, so Exhibits C and D were executed to pay off and recover possession from Jagannadha Aiyangar. Exhibit C, like Exhibit A, is described as a sale-deed and on the face of it purports to be an out and out sale. The terms of Exhibit C are practically identical with those of Exhibit A. The points to be noted about Exhibit C as compared with Exhibit A are, (1) that the money raised under Exhibit C was only Rs. 1,000, whereas the sum paid under the earlier document was Rs. 1,100 and (2) that the recital in Exhibit C shows that the object of the transaction was to redeem the land from Jagannadha Aiyangar.

The Tamil word "* * * *" there used is the word generally employed in connection with the redemption of mortgages.

Exhibit D is in terms similar to Exhibit B, except that there is no provision for the postponement of re-purchase until after harvest.

The points which appear to us most strongly to support the view that the parties intended Exhibits C and D to represent a mortgage are these, Exhibits C and D correspond closely in terms to Exhibits A and B, and it is reasonable to suppose that both sets of documents were intended to effect transactions of similar nature. The express reference to redemption in Exhibit C in connection with Exhibits A and B indicates that by those documents a mort-

(11) (1858) 2 De G. & J. 97 at p. 105, 4 Jur. (N S.) 125, 6 W. R. 242; 45 E R 924, 119 R. R. 38

gage was intended. It may perhaps here be noted that Jagannadha Aiyangar, the executant of Exhibit B and vendee under Exhibit A, attested Exhibit C. The view that a mortgage was intended by Exhibits A and B is further supported by the fact that though Exhibit B provided for re-purchase on a fixed date, 11 years after the sale, Jagannadha Aiyangar accepted re-payment seven years before the due date. This fact serves as an indication that Jagannadha Aiyangar regarded the land as security for his money and was more anxious to recover that than to retain the property. Again, although disparity between the value of the land and the sum mentioned in Exhibit C may not be a strong indication one way or the other, still the fact that a sum of Rs. 1,000 only was raised thereunder, whereas a sum of Rs. 1,100 was raised by Exhibit A, tends somewhat to show that a mortgage and not a sale was intended. Otherwise, it is difficult to see why when the land was worth Rs. 1,500 (as found by the lower Courts) and a mortgage thereon had been effected only five years earlier for Rs. 1,100, the owners should have sold the land for Rs. 100 less than they were able to secure by Exhibit A.

For the appellants the cases of *Bhagwan Sahai* v. *Bhagwan Din* (2), *Ayyavayyar* v. *Rahimansa* (8), *Venkata Krishna Rao* v. *Venkatachalam* (9) and *Manchester, Sheffield and Lincolnshire Railway Company* v. *North Central Waggon Company* (10) are relied upon. The first three cases are cited as instances of transactions similar to the present where the documents were construed to be sales and not mortgages. They are illustrations of the rule of law laid down by Lord Chancellor Cranworth in *Alderson* v. *White* (11) that an absolute conveyance, containing nothing to show that the relationship of debtor and creditor is to exist between the parties, does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right of re-purchase. But they are not of much assistance in construing the present documents, inasmuch as in each case there was some indication that nothing more than a sale was intended or else there was no sufficient indication that a mortgage was intended. We think, therefore, it is unnecessary to consider these cases in detail. The case in *Manchester, Sheffield and Lincolnshire Railway Company* v. *North Central Waggon Company* (10) was cited in support of the contention that as there was no loan, there was no debt, and, therefore, no mortgage. As to this the learned Vakil for the respondent referred us to a passage in Dr. Ghose's book on Mortgages at page 85 (4th Edition). There the author in the course of discussion of mortgages by conditional sale observes: "The test, therefore, whether the apparent vendee can exercise the rights of a creditor, cannot with propriety be applied in this country and the broad rule laid down in *Alderson* v. *White* (11) 'no debt no mortgage' may perplex, but cannot guide, our Courts." This passage has been quoted with approval in a recent case in this Court [*Palaniappan* v. *Subbaraya Gounden* (1)]. Seeing that mortgages by conditional sale begin with an ostensible sale and that it is not necessary that the mortgagor should make himself personally responsible for re-payment of the money [*Balkishen Das* v. *W. F. Legge* (7)], the absence of clear indication of the relationship of debtor and creditor is to be accounted for by the peculiar nature of the transaction itself and cannot of itself show that there is no mortgage.

The cases upon which the respondents relied were *Balkishen Das* v. *W. F. Legge* (7), *Wajid Ali Khan* v. *Shafkat Husain* (6), *Palaniapan* v. *Subbaraya Gounden* (1) *Singaram Chettiar* v. *Kalyanasundram Pillai* (3). The secondand fourth of these cases seem to us to approximate somewhat closely to the present. In the case of *Wajid Ali Khan* v. *Shafkat Husain* (6) the only difference appears to be that in the sale-deed in that case there was a term that the sale was to be subject to the contemporaneous agreement to re-sell, thus incorporating the agreement in the sale. This, we think, is not a material difference In the case of *Singaram Chettiar* v. *Kalyanasundaram Pillai* (3) the facts were very similar to the present. As in this case, there was a series of prior transactions in similar terms and the terms of the agreement for re-purchase in that case were very analogous to the terms of Exhibit D.

In both these cases the documents were construed to be mortgages by conditional sale, and not sales.

The respondent also relies upon the observation in the latter case that in cases of this kind the presumption is in favour of a mortgage being intended rather than a sale. The same view is taken by Dr. Ghose at page 87 of his work on Mortgages, where he states that in doubtful cases the Court leans strongly to the construction most favourable to the person claiming the right to redeem. This view may fairly be applied in the circumstances of this case.

On careful consideration of the instruments in question, we accept the contention of the respondent and hold that the lower Courts have rightly construed them as constituting a mortgage rather than a sale with a right of re-purchase. The time for redemption is extended by three months from this date.

The second appeal is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1590 OF 1913.

October 6, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Hannay.

RAMASUNDARAM PILLAI—DEFENDANT—APPELLANT

versus

SAVUNDARATHA AMMAL, *alias* SANKARAIVADAI AMMAL, AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Religious office—Women, right of, to inherit, and get services performed by proxy—Custom—Legality.

A custom allowing women to succeed as heirs to a religious office and getting the duties thereof performed by proxy is not illegal.

Dictum of Sadasiva Aiyar, J., in *Sundarambal Ammal* v. *Yogavana Gurukkal*, 23 Ind. Cas. 72; (1914) M. W. N. 286; 1 L. W. 276, 26 M. L. J. 315, not followed.

Subraya Kakramaya v. *Subraya Padyayya*, 7 Ind. Cas. 715; 8 M. L. T. 325; (1910) M. W. N. 445; *Muttevi Pattabhi Ramanujacharyulu* v. *Peduti Alagasingaracharyulu*, 9 Ind. Cas. 496; 21 M. L. J. 490; 9 M. L. T. 352; (1911) 1 M. W. N. 145; *Bhaiaji Thakur* v *Jharula Das*, 24 Ind. Cas. 501; 1 L. W. 540; 18 C. W. N. 1020; 27 M.L.J. 100; 16 M. L. T. 210; (1914) M. W. N. 635; 12 A. L. J. 1176 (P. C.) and *Mahamaya Debi* v. *Haridas Halder*, 27 Ind. Cas. 400; 19 C. W. N. 208, 20 C. L. J. 183, followed.

Mujavar Ibrambibi v. *Mujavar Hussain Sheriff*, 3 M. 95, 5 Ind. Jur. 190, referred to.

Second appeal against the decree of the District Court of Madura, in Appeal Suit No. 122 of 1912, preferred against the decree of the Court of the Additional District Munsif of Madura, in Original Suit No. 33 of 1911.

FACTS.—The suit was by the plaintiffs to establish the right of the 1st plaintiff to succeed to her deceased husband's six months' turn to the office of *pujari* in the Mottagopuram Mahamuneswarar temple in Madura and the right of the 2nd plaintiff to do the duties of such *pujari* as the proxy appointed by the 1st plaintiff. The contention of the defendant was that the 1st plaintiff, by the custom of the Temple, was disentitled by reason of her sex to succeed to the religious office and that the 2nd plaintiff, the proxy appointed, had no right to perform the duties thereof and that in any event, the 1st plaintiff's right to nominate a proxy was restricted to the family of her husband. Both the lower Courts held against the defendant and decreed the suit. The defendant thereupon preferred this second appeal to the High Court.

Mr *K. Srinivasa Iyengar*, for the Appellant:—The respondent being a woman could not inherit the office of *pujari*. Even if there is such a custom it is illegal. See *Sundarambal Ammal* v. *Yogavanagurukkal* (1). A woman cannot succeed to offices involving spiritual ministrations. See also *Janokee Dabea* v. *Gopaul Acharjea* (2), *Mujavar Ibrambibi* v. *Mujavar Hussain Sheriff* (3). It is not a new principle, but only the logical result of the previous decisions. The cases where woman have been allowed to succeed are cases of succession to property burdened with the service and where the remuneration for the office does not exhaust the income. But where, as in this case, the remuneration is made up solely of voluntary offerings or where the entire income of the property forms the remuneration for the office, a woman cannot succeed thereto and cannot claim to have the services performed by proxy.

Mr. *T. Narasimha Iyengar*, for the Respondents:—The principle enunciated for the

(1) 23 Ind. Cas. 72; (1914) M. W. N. 286; 1 L. W. 276; 26 M. L. J. 315.
(2) 2 C. 365; 1 Ind. Jur. 787.
(3) 3 M. 95; 5 Ind. Jur. 190.

first time in *Sundarambal Ammal* v. *Yogavanagurukkal* (1) is against the current of previous decisions and ought not to be followed. See *Subraya Kakramaya* v. *Subraya Padyayya*(4), *Mutteri Pattabhi Ramanujacharyulu* v. *Peduti Alagasingaracharyulu* (5), *Bhaiaji Thakur* v. *Jharula Das* (6) and *Mahamaya Debi* v. *Haridas Halder* (7). In every one of the above cases a woman was allowed to succeed to a religious office and to get the services performed by proxy. Even in the case of *Sundarambal Ammal* v. *Yogavanagurukkal* (1), the other learned Judge, Tyabji, J., does not agree to the principle contended for.

Mr. *K. Srinivasa Iyengar* in reply:—The cases cited do not lay down that a woman can succeed. The right was not questioned but was taken for granted as existing In *Sundarambal Ammal* v. *Yogavanagurukkal* (1), the right was challenged and decided against

JUDGMENT.—The suit out of which this second appeal arises was instituted to establish the right of the 1st plaintiff to conduct the *puja* of the Mottagopuram Mahamuneswarar Temple in Madura by deputy, and to enjoy the emoluments attached to the office of *pujari*. There were other subsidiary reliefs asked for in the plaint, but this was the chief one. Both the lower Courts have held, against the contentions of the appellant-defendant (1), that the plaintiff was not disqualified by her sex from holding the office and (2) that in selecting a deputy to perform the duties she was not restricted to members of the family of her husband and appellant. In other words she was entitled to appoint the 2nd plaintiff. They have, therefore, decreed in her favour.

Mr. K. Srinivasa Iyengar, who argued the case for the appellant, admits that as regards the second point there are concurrent findings of fact which he is not entitled to question, but as regards the first point he relies on a very recent judgment of this Court reported as *Sundarambal Ammal* v. *Yogavana Gurukkal* (1), and argues that the finding of the lower Courts must be set aside as illegal.

The question whether the 1st plaintiff is debarred by reason of her sex from holding the *pujari* office and (as would follow) from succeeding in the present suit is embodied in the first issue, which runs thus:—

Is it the usage of the institution that a woman cannot inherit to the office, and is the 1st plaintiff not entitled to the interest of her late husband?

The first portion is the material portion, the second being a mere corollary.

The District Munsif on a consideration of the evidence decided in plaintiff's favour, basing his decision very largely on previous admissions by defendant himself of the 1st plaintiff's right to the office.

The District Judge says at the outset of his judgment: "The first contention of the appellant as defendant in the lower Court was that the 1st plaintiff could not inherit the office entitling her to the rights which her husband had to a six months' turn of *puja* in the temple referred to in the plaint. This contention has now been given up. It is conceded that the office has passed to the 1st plaintiff, and the appeal is limited to the question of the extent of her rights of appointment of a deputy, as she, being a woman, is admittedly incompetent to perform the functions of the office herself".

It must, therefore, be taken that there are concurrent findings of both Courts on this issue, which is on the face of it one of fact, and in the District Court the finding was acquiesced in by the appellant who now seeks to attack it. We are asked to set these findings aside, on the ground that they are counter to an absolute rule of law enunciated in the case above quoted by Mr. Justice Sadasiva Aiyar, *i. e.*, that where a woman is disqualified by sex from performing the duties of a religious office, she is equally disqualified from holding the office and performing the duties by proxy. It is only if we accept this as an absolute rule of law that we think we should be justified in interfering.

We have carefully considered the judgment of the learned Judge and are satisfied that he does in effect lay this down as an absolute rule of law; but while appreciating

(4) 7 Ind Cas. 715; 8 M. L T 325, (1910) M. W. N. 445

(5) 9 Ind. Cas. 406; 21 M L J. 490, 9 M L. T 352, (1911) 1 M. W. N. 145.

(6) 24 Ind. Cas. 501; 1 L. W. 549; 18 C. W. N. 1020, 27 M. L J. 100, 16 M. L T. 210; (1914) M W. N. 635, 12 A. L. J. 1176 (P. C.)

(7) 27 Ind. Cas 400; 19 C. W. N. 208; 20 C. L. J. 183.

the cogency of much of the reasoning by which he supports it, we regret that we do not feel prepared to follow him to that extent, any more than did the learned Judge who sat with him in hearing that case. The rule may be salutary, but it seems to us to run counter to ideas which have been commonly accepted by parties concerned and given effect to by the Courts for many years. If we are not mistaken, the most recent authority quoted by the learned Judge in support of his view is *Mujavar Ibrambibi* v. *Majavar Hussain Sheriff* (3), which dates back to 1880; and it is undeniable that since then, this and other High Courts have in numerous cases acted on the assumption (which was not questioned) that women could hold religious offices and get the duties performed by proxy.

Subraya Kakramaya v. *Subraya Padyayya* (4), *Muttevi Pattabhi Ramanujacharyulu* v. *Alagasingaracharyulu* (5), *Bhaiaji Thakur* v. *Jharula Das* (6), *Mahamaya Debi* v. *Haridas Halder* (7) are all instances of this; and the list might, no doubt, be indefinitely extended. It may be that the parties concerned are so accustomed to the idea of female office-holders with proxies that it has usually not occurred to them to question the legality of such a state of affairs and that in the absence of contest, the Courts have somewhat too readily assumed it to be legal without requiring proof of a valid custom in support of it. But in the present case such a custom is found to exist and with all deference, we are not prepared to follow the learned Judge in pronouncing such a custom illegal.

We dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

ORIGINAL CIVIL SUIT NO. 422 OF 1911.

June 15, 1914.

Present:—Mr. Justice Imam.

RAM CHURN LAW—PLAINTIFF

versus

Sahibzadi FATIMA BEGUM AND OTHERS—DEFENDANTS.

Muhammadan Law—Waqf—*Dedication for religious purposes*—*Muharram, observance of, dedication for, whether valid*

Where a Sunni Muhammadan conveyed certain properties of his to his grand-daughter and grandson under a deed of *waqf* for the "service of Imam Hossain and Hassan and for religious purposes".

Held, that the deed was valid and operative as a deed of *waqf* and that the trustee under the deed could not alienate the property by sale or mortgage.

A dedication of property for the observance of the Muharram constitutes the service of man and the good of humanity, though to a limited section, as it entails the feeding of the poor and distribution of alms to the needy.

Mr. *B. Chakravarti* (with him Messrs. *J. E. Bagram* and *Ghatak*), for the Plaintiff.

Mr. *A. Rasul* (with him Messrs. *Zakir Ali* and *Ashraf Ali*), for the Defendants.

JUDGMENT.—In this suit the plaintiff seeks declaration of his title to and possession over a half share in premises No. 63, Dhurrumtola street, in the town of Calcutta and a consequent partition of the said premises. The facts material to this case are shortly these: One Prince Syeduddin, a Muhammadan of the Sunni sect, owned and possessed several valuable properties in Calcutta, one amongst them being the premises of which a half share is in suit. He conveyed the said premises to his grand-daughter, Sahibzadi Fatima Begum, and his grandson, Faizuddin, under a deed of *waqf*, dated the 15th of July 1864, the purpose of the dedication being stated in the deed to be "service of Imam Hossain and Hassan and for religious purposes" in the manner mentioned in the deed. The direction to Fatima Begum and Faizuddin and to their successors in the trust under the endowment is to apply the rents and profits of the premises, after defraying the cost of collection and repairs, "to the due and proper observance of the annual Muhammadan festival of the Mohurrum."

On the 20th September 1907, Fatima Begum mortgaged a half share of the premises to the plaintiff for the consideration of Rs. 16,000 advanced to her by the latter. The debt not having been repaid, the plaintiff sued Fatima Begum on the mortgage and obtaining a mortgage-decree, purchased the half share of the premises at the execution sale. Before the sale Nurul Huq, a son of Fatima Begum, addressed a letter through his Attorney to the Registrar of this Court requesting him to notify to the intending purchasers at the sale Nurul Huq's

protest that the properey was a *waqf* and that Fatima Begum had not a saleable interest. The plaintiff, having failed to secure possession of the half share purchased by him, has instituted this suit against Fatima Begum, Nurul Huq, her son, and the other defendants who are the descendants of Faizuddin. The suit, however, has been contested by the defendants other than Fatima Begum and Nurul Huq. The plaintiff's contention is that the deed of the 15th August 1864, though on its face purporting to dedicate the property as *waqf* to religious uses, was in effect a deed of gift, the donor having adopted the device of a *waqf* in order to preserve the property for the benefit of the donees. The contesting defendants assert the validity of the alleged *waqf* and deny the plaintiff's title to a moiety of the premises. There is only one issue that is material to the decision of this case, namely, whether the deed of the 15th July 1864 is valid and operative as a deed of *waqf*. For the plaintiff, two objections are taken to the deed: (1) that the object of the *waqf* is not valid under the Muhammadan Law, (2) that the conveyance was in reality a gift, dedicating the property "in the way of God" not being the intention of the donor. It is contended for the plaintiff that in the deed there is no indication that a general benefit was intended to be conferred on the Mahomedan public, and a reference has been made to the case of *Delroos Banoo Begum* v. *Ashgur Ally Khan* (1) in support of the proposition that the observance of the Mohurrum by a Mahomedan is a matter essentially of a private character. I cannot accede to the proposition in the general way it has been put. If the observance of the Mohurrum entails the feeding of the poor and distribution of alms to the needy, as it undoubtedly does, the dedication of the property to such use constitutes the service of man and the good of humanity, though to a limited section. Apart from the help to the poor and the needy, the commemoration of the historic events of Karbala, keeping alive, as it does, some of the best traditions of Islam, is to my mind as good a purpose as the followers of a faith can have. I see in it the visualization of the grandest examples of courage and endurance and all that is heroic in man from the pages of Islamic history, and I think it would be wrong to exclude it from objects valid for *waqf*. In the case of *Delroos Banoo Begum* v. *Ashgurally Khan* (1), the decision rested on considerations that do not affect the present case. The Imambara in that case was a part of the private dwelling house of the Begum; in the present instance there is not the maintenance of a Imambara attached to a private house that is the purpose of the *waqf*, but it is the keeping up of the Mohurrum as an institution with all its moral effect on the general Mahomedan public. The contention that Prince Syeduddin adopted the device of a *waqf* and in effect made a gift is not borne out by any of the circumstances of the case. The value of the premises, half of which is in suit, was admitted to be Rs. 1,43,000 only in 1864. The Prince about that time made certain dispositions of his other properties of the value of more than Rs. 58,000 in favour of Fatima Begum and Faizuddin, and the deeds relating to these properties do not show that he adopted any device to preserve them for his grandchildren for all time. Had it been his intention to tie up the properties for their benefit by a device, we should have had a *waqf* of all the properties and not merely of the premises in suit. I hold that the deed of the 15th July 1864 is valid and operative as a deed of *waqf*. In this view Fatima Begum had not a saleable interest in the property and the plaintiff by his purchase obtained no title to it. The suit is, therefore, dismissed with costs on scale No. 2, including reserved costs, if any.

Suit dismissed.

(1) 15 B. L. R. 167; 23 W. R. 458.

RAMA PRASAD ROY v. ANUKUL CHANDRA.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 129 OF 1914.

CIVIL RULE No. 401 OF 1914.

April 1, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

RAMA PRASAD ROY CHOWDHURY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ANUKUL CHANDRA ROY CHOWDHURY AND ANOTHER—DEFENDANTS—RESPONDENTS.

***Execution**—Validity of decree, whether can be challenged in execution proceedings—Civil Procedure Code (Act V of 1908), s 47—Order in execution proceedings, when appealable.*

In execution proceedings it is not open to a party to challenge the validity of the decree. A Court called upon to execute a decree has no power to go behind it, and cannot entertain any objection as to the legality or correctness of the decree.

A decree, even though it is not according to law, is binding and conclusive between the parties till it has been set aside in appropriate proceedings.

An order in execution proceedings can come under section 47 of the Civil Procedure Code only when it determines some question relating to the rights and liabilities of the parties with reference to the relief granted by the decree, not when it determines merely an incidental question as to the mode of conduct of proceedings.

Where a Court has refused to stay execution of a decree on application made, not on the ground that the decree was incapable of execution, but on the ground that as a proceeding to test the validity of the decree was still pending no execution should be allowed till its termination, the order does not in any way determine the rights and liabilities of the parties with reference to the relief granted by the decree and is not appealable.

Appeal from an order of the Subordinate Judge, 24-Parganas, dated the 23rd March 1914.

Mr. *P. N. Dutt* and Babu *Satis Chandra Ghatak*, for the Appellants.

Babu *Surendra Nath Guha*, for the Respondents.

JUDGMENT.—This appeal is directed against an order by which the Subordinate Judge has refused to stay execution of a decree in a suit for partition of joint property. The decree was originally made on the 10th January 1912. One of the parties then applied, on the 18th March 1913, for amendment of the map attached to the decree. The decree was amended on the 13th September 1913. Thereafter the party, at whose instance the amendment had been made applied for execution of the amended decree. One of the other parties thereupon applied to the Court, which had granted the amendment, to set aside the decree, on the ground that the order had been made *ex parte*, without service of notice upon him. He also applied for a stay of proceedings in execution till his objection had been heard and determined. We are informed that the Court has not yet investigated whether the order was made *ex parte*, but it has taken up for disposal the question whether the proceedings should be stayed till the determination of that matter. The Subordinate Judge has refused to stay execution of the amended decree; and the propriety of this order we are invited to consider in this appeal.

A preliminary objection has been taken, on behalf of the respondent, to the effect that the order of the Subordinate Judge refusing to stay execution cannot be challenged by way of appeal. In answer to this objection, two points have been urged on behalf of the appellants: *first*, that it is open to them to contend that the decree has been imporperly amended, and, consequently, should not be executed, and, *secondly*, that the order refusing to stay execution is an order under section 47 of the Code of 1908 and is appealable as a decree.

In support of the *first* ground, reliance has been placed on the case of *Abdul Hayai Khan* v. *Chunia Kuar* (1), which was considered by a Full Bench of the Allahabad High Court in the case of *Muhammad Sulaiman Khan* v. *Fatima* (2). It may be conceded that there are expressions in the judgment in the case of *Abdul Hayai Khan* v. *Chunia Kuar* (1), which tend to support the contention of the appellants; but we are not prepared to hold that it is open to a party, in proceedings in execution of a decree, to challenge the validity of the decree. It has been repeatedly held that a Court called upon to execute a decree must take the decree as it stands. It has no power to go behind the decree; in other words, it cannot entertain any objection as to the legality or correctness of the decree. The principle on which this view is supported is that a decree, even though it is not according to law, is binding and conclusive

(1) 8 A. 377; A. W. N. (1886) 127.
(2) 11 A. 314; A. W. N. (1889) 107.

between the parties till it has been set aside in appropriate proceedings. If any authority is needed for this elementary proposition, reference may be made to the decisions of the Judicial Committee of the Privy Council in the cases of *Sri Rajah Papamma Rao Bahadur* v. *Sri Vira Pratapa Porkasda* (3) and *Grish Chunder Lahiri* v. *Shoshi Shikhareshwar Roy* (4). The Allahabad High Court, in the two cases mentioned, appear to have proceeded on the theory that, when a decree is sought to be enforced against a person, he is entitled to show that there is no valid decree in existence ; but it was overlooked that the validity of an existing and operative decree cannot be determined by the Court which is called upon to execute it. We hold, consequently, that it is not open to the appellants to go behind the amended decree, and to contend, in the proceedings now before us, that the amendment was improperly allowed. They have taken proceedings to test the propriety of the order for amendment ; but until they obtain a decision in their favour in such proceedings, they must be treated as bound by the decree.

In support of the *second* ground, reliance has been placed on the case of *Musaji Abdulla* v. *Damodar Das* (5), which was doubted in the case of *Ramchandra Kasturchand* v. *Balmukund Chaturbhuj* (6), and on the case of *Sivasami Naickar* v. *Ratnasami Naickar* (7), which has been overruled in Madras [*Sivagami Achi* v. *Subrahmania Aiyar* (8)] and has been repeatedly doubted in this Court, *Deoki Nandan Singh* v. *Bansi Singh* (9).

The question, whether the order of the Subordinate Judge is or is not open to appeal, must be determined with reference to the terms of section 47 of the Code of Civil Procedure of 1908. The crucial point is, whether it relates to the execution of the decree and determines a question arising between the parties to the suit on which the decree was passed. Now, the expression "relating to the execution of the decree" is vague and sweeping ; but, as was pointed out in the case of *Deoki Nandan Singh* v. *Bansi Singh* (9), where the authorities on this subject will be found reviewed, the definition of the term "decree," as contained in section 2, must be read along with the provisions of section 47. This makes it plain that it is not every order made in execution of a decree that comes within section 47 ; if that were not so, every interlocutory order in execution proceedings, such as an order granting or refusing process for examination of witnesses, or an order on an application for adjournment, would be appealable. It was pointed out by this Court in *Srinibash Prosad Singh* v. *Kesho Prosad Singh* (10), upon a full examination of the principles and authorities bearing on this topic, that an order in execution proceedings can come under section 47 only when it determines some question relating to the rights and liabilities of the parties with reference to the relief granted by the decree, not when it determines merely an incidental question as to the mode of conduct of the proceedings: *Jogodishury Debea* v. *Kailash Chundra Lahiry* (11), *Mukhtar Ahmad* v. *Muqarrab Hussain* (12). Consequently, if the Court allows execution to proceed, overruling the contention of the judgment-debtor that the decree has become inoperative by lapse of time, the order allowing execution to proceed is an order under section 47, because the order in substance decides that the judgment-debtor is still liable to have the decree enforced against him. On the other hand, when the Court has refused to stay execution of a decree on application made, not on the ground that the decree was incapable of execution, but on the ground that as a proceeding to test the validity of the decree was still pending no execution should be allowed till its termination, it cannot be said that the order does, in any way, determine a question relating to the rights and liabilities of the parties with reference to the relief granted by the decree. An order of this nature is of an interlocutory character and does not involve, directly or indirectly, an adjudication of

(3) 23 I. A. 32; 19 M. 240; 6 M. L. J. 53.
(4) 27 I. A. 110; 27 C. 951 at p. 967; 4 C. W. N. 631.
(5) 12 B. 279.
(6) 29 B. 71; 6 Bom. L. R. 780.
(7) 23 M. 568; 10 M. L. J. 314.
(8) 27 M. 259; 14 M. L. J. 57.
(9) 10 Ind. Cas. 871; 14 C. L. J. 35.
(10) 10 Ind. Cas. 444; 13 C. L. J. 681.
(11) 24 C. 725 at p. 739, 1 C. W. N. 374.
(12) 15 Ind. Cas. 50; 34 A. 530; 10 A.L. J. 56.

the rights and liabilities of the parties: *Mohabir Prosad Singh* v. *Adhikari Kunwar*(13). *Srimantu* v. *Srimantu* (14), *Srinivasa Prosad Singh* v. *Kesho Prosad Singh* (15). We are consequently clearly of opinion that the order of the Subordinate Judge refusing to stay execution is not an order under section 47, which has the characteristics of a decree under section 2 and is appealable as such.

The appeal is dismissed with costs, one gold *mohur*.

The Rule for *ad interim* stay is discharged, without costs.

Appeal dismissed; *Rule discharged.*

(13) 21 C. 473.
(14) 24 M. 358.
(15) 12 Ind. Cas. 745; 14 C. L. J. 489.

PUNJAB CHIEF COURT.
SECOND CIVIL APPEAL No. 1135 OF 1912.
October 22, 1914.
Present:—Mr. Justice Johnstone and
Mr. Justice Shadi Lal.
SHADI BEG—DEFENDANT—APPELLANT
versus
AHMED KHAN—PLAINTIFF—RESPONDENT.

Jurisdiction of Civil and Revenue Court—Mortgage with possession—Landlord and tenant, relationship of—Second appeal—Finding of fact.

A finding to the effect that a certain person is the mortgagee and has paid consideration of the mortgage cannot be challenged in second appeal.

The mere fact that a land is mortgaged with possession and the mortgagors hold it under the mortgagee, does not create the relationship of landlord and tenant, and consequently a suit for possession of such a land is cognizable by a Civil and not by a Revenue Court.

Second appeal from the order of the Divisional Judge, Attock Division, dated the 15th April 1912, reversing that of the Munsif, first Class, Mianwali, dated the 22nd December 1911, dismissing the claim.

Mr. *Badr-ud-Din Qureshi* (for Babu *A. I. Roy*), for the Appellant.

Mr. *Nand Lal*, for the Respondent.

JUDGMENT.—The lower Appellate Court has found that the plaintiff paid the consideration for the mortgage-deed, dated the 27th March 1911, that he is the real mortgagee of the land in dispute and that Nota Ram has nothing to do with this mortgage. This

is a finding of facts and cannot be attacked in second appeal.

The only ground on which the appeal was admitted to a hearing is whether the suit is excluded from the jurisdiction of the Civil Courts. The contention of the defendant is that he was holding the land as a tenant under the mortgagee. But this point was not urged either in the Court of first instance or in the lower Appellate Court. The deed clearly shows that the mortgage is with possession and contains no stipulation that the defendant, mortgagor, will hold the land as a tenant under the mortgagee. On the record there is no evidence to prove the relationship of landlord and tenant between the mortgagee and mortgagor. We must, therefore, hold that the suit is not cognizable by the Revenue Courts and has been properly tried by the Civil Court. We accordingly dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 2301 OF 1911.
April 24, 1914.
Present:—Mr. Justice Chapman and
Mr. Justice Newbould.
RAMDAS MOKHOPADHYA—
DEFENDANT—APPELLANT
versus
BIPRA DAS PAL CHOWDHURY—
PLAINTIFF AND ANOTHER—REMAINING—
DEFENDANT—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), ss. 103A, 105, 109A—Entry in Record of Rights, Court not precluded from enquiring into correctness of—Application by landlord for fair rent—Enhancement—Jurisdiction—Appeal.

Section 103A of the Bengal Tenancy Act precludes a Court from going into the question whether the procedure under the Chapter has been followed and not from inquiring whether the resultant entry in a Record of Rights is correct.

Where on an application by a landlord under section 105 of the Bengal Tenancy Act the Special Judge enhanced the rent of a tenant who was described as *korfa* and the purpose of whose tenancy was residential, on the ground that it was below the prevailing rate:

Held, that the Bengal Tenancy Act did not apply to such a tenancy and the Special Judge had no jurisdiction to enhance the rent.

Section 109A is no bar to an appeal in a case of settlement of rent in which a question of jurisdiction is definitely raised.

SITIKANTHA ROY *v.* BIPRA DAS.

Second appeal against the decree of the Special Judge of Nadia, dated 2nd March 1911, modifying that of the Settlement Officer of that District, dated the 23rd November 1909.

Babus *Jogendra Nath Mookerji* and *Biswanath Sen*, for the Appellant.

Babu *Amarendra Nath Bose*, for the Respondents.

JUDGMENT.—This appeal arises out of a case under section 105, Bengal Tenancy Act. The learned Special Judge has enhanced the rent of a tenancy on the ground that it is below the prevailing rate.

The tenant appeals.

A preliminary objection has been taken by the respondent that, having regard to the provisions of section 109A of the Bengal Tenancy Act, as the decision of the learned Special Judge was one settling a rent, no appeal lies.

As the appeal has been argued, the question that we have to decide is, not whether the rent was rightly settled, but whether the learned Special Judge had jurisdiction to settle a rent at all. We are of opinion that section 109A is no bar to an appeal in a case of this kind, in which a question of jurisdiction is definitely raised.

The first ground taken in appeal is that the learned Special Judge had no jurisdiction, inasmuch as the tenancy was not governed by the provisions of the Bengal Tenancy Act. This was the view taken by the Settlement Officer. It is clear that the reasons which the learned Special Judge gives for overruling the decision of the Settlement Officer on this point are based upon a misconception. He proceeds on the assumption that the tenant had been entered in the record as a *raiyat*. The tenant has not in fact been entered in the record as a *raiyat*. The entry is *korfa*, a word which certainly does not mean "*raiyat*."

We have endeavoured to ascertain what meanings the word *korfa* can bear. We have only been able to find one, namely, "under-*raiyat*." Now the tenant was manifestly not an "under-*raiyat*." The entry was, therefore, clearly wrong in that respect.

Now the entry describes the purpose of the tenancy as residential. This appears to accord also with the facts and with the view of the Settlement Officer. This being so, we hold that the Tenancy Act did not apply. The learned Special Judge had no jurisdiction.

We have had regard to the provision in section 103A of the Act to the effect that the publication of the record shall be conclusive evidence that the record has been duly made under the Chapter. But we understand this provision to mean only that a Court is precluded from going into the question whether the procedure under the Chapter has been followed. It does not preclude a Court from enquiring whether the resultant entry is correct.

The result is that the decree of the Special Judge is set aside and that of the Settlement Officer is restored. The appellant is entitled to his costs in all Courts.

Appeal allowed.

CALCUTTA HIGH COURT

SECOND CIVIL APPEAL NO. 171 OF 1913.

July 18, 1914.

Present:—Mr. Justice Fletcher and Mr. Justice Richardson.

SITIKANTHA ROY—PLAINTIFF—APPELLANT

versus

BIPRA DAS CHARAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 1—Memorandum of appeal unaccompanied by copy of decree, whether effective—Collector, whether a Judge—Acts of Collector presumption as to regularity of.

A memorandum of appeal should be accompanied by a copy of the decree appealed from and, therefore, no appeal is effective under Order XLI, rule 1, unless it is accompanied by a copy of the decree.

A Collector is a Revenue Officer and although he may at times have to perform judicial functions, he is not a Judge and his acts like the acts of all other Executive Officers are presumed to be regular.

Therefore, where a Collector has certified on his order-sheet that he has duly served certain notices to annul incumbrances, a Judge is not entitled without evidence to conclude otherwise.

Appeal against the decree of the District Judge, Bankura, dated the 29th June 1912, reversing that of the Munsif, first Court, Bishnupur, dated the 28th of April 1911.

Babu *Sib Chandra Palit* and *Jadu Nath Mandal*, for the Appellant.

Babu *Jogendra Kumar Dey*, for the Respondents.

SITIKANTHA ROY v. BIPRA DAS.

JUDGMENT.—This is an appeal from the decision of the District Judge of Bankura, dated the 29th of June 1912, reversing the decision of the Munsif.

The plaintiff brought this suit in the Court of the Munsif to recover possession of six plots of land, on the ground that he was the purchaser in execution of a rent decree and that notice had been served, under the provision of the Bengal Tenancy Act, annulling incumbrances, including under-tenures that were not protected.

The Court of first instance partially decreed the suit. The decree of the learned Munsif was in favour of the plaintiff with regard to plots Nos. 1 to 4, and in favour of the defendants with regard to plots Nos. 5 and 6.

Both parties appealed to the District Judge, the appeal of the plaintiff against the decision in favour of the defendants with regard to plots Nos. 5 and 6 being numbered 160 and the appeal of the defendants against the decision of the Munsif in favour of the plaintiff with regard to plots Nos. 1 to 4 being numbered 182. The learned District Judge reversed the decision of the Munsif on both appeals. Two decrees were drawn up by the District Judge.

The plaintiff then appealed to this Court, but the only decree he filed was the decree in Appeal No. 160. Therefore, under the provisions of Order XLI, rule1, Civil Procedure Code, the only effective memorandum of appeal that this Court had before it was the one which was accompanied by the copy of the decree appealed from, that is, the memorandum in the appeal from the decree of the District Judge in Appeal No. 160. The point is not open to argument. It is a condition precedent to there being a valid memorandum of appeal that the memorandum should be accompanied by a copy of the decree appealed from, and the only copy that accompanied the memorandum of appeal in the case was the decree in No. 160. That was the view taken by the Allahabad High Court, and also the view taken by this Court in the case of *Binapani Debi* v. *Shasibhushan Sinha* (1). It is obvious that it was a slip, the copy of the decree in Appeal No. 182 was not also annexed to the memorandum of appeal, and the error appearing subsequently, the learned Pleader conducting the case applied for and obtained leave *ex parte* from a Bench of this Court to file a copy of the decree passed in Appeal No. 182. Of course, that leave given *ex parte* could not do away with the provision of Order XLI, rule 1, Civil Procedure Code, nor could it affect the plaintiff's right as he was not present when the leave was given. The result is that there is no effective appeal from the decision of the District Judge in Appeal No. 182, which has decided that the plaintiff is not entitled to recover plots Nos. 1 to 4.

On the other point on the Appeal No. 160, it is clear that the judgment of the learned District Judge cannot be supported. The District Judge considers that the Collector is a Judge. But the Collector is not a Judge. He is a Revenue Officer, and although in this country he may at times have to perform judicial functions, he is certainly not a Judge. The acts of the Collector, like the acts of all other Executive Officers, are presumed to be regular, and the papers produced from the Collectorate purport to show that proper notices had been served by the Collector in order to annul the encumbrances. The District Judge had no evidence before him which entitled him to come to the conclusion that the Collector had not duly served the notices, he having certified on his order-sheet that he had done so. The view of the District Judge was that the Collector, being a Judge, did not perform his judicial functions in the manner which the District Judge thought satisfactory to himself. It is only sufficient to state that proposition in order to show that there is no foundation for it.

The result is that the decree in Appeal No. 160 must be set aside and the case sent back to the Court of the District Judge for the appeal to be re-heard on the merits. We make no order for the costs of this appeal, nor for the costs of Appeal No. 160 in the Court of the District Judge.

Decree set aside; Case remanded.

(1) 17 Ind. Cas. 119; 16 C. L. J. 133.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1303 OF 1913.

October 1, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Hannay.

NARAYANA PILLAI—PLAINTIFF—APPELLANT

versus

ALAMELU ACHI AND OTHERS—DEFENDANTS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 14—Covenant for title—Impossibility of assessing compensation in money—Contract, whether enforceable.

Where a contract to sell lands is coupled with a security undertaken against a claim to be set up by reversioners in future, it cannot be specifically enforced as the portion of it relating to security, cannot be compensated for in money within the meaning of section 14 of the Specific Relief Act.

Second appeal against the decree of the Court of the Subordinate Judge of Kumbakonam, in Appeal Suit No. 339 of 1911, preferred against that of the District Munsif of Tiruvalur, in Original Suit No. 107 of 1910.

FACTS.—This suit is for the specific performance of a contract to sell lands. Plaintiff is the vendee. He agreed to purchase from defendants Nos. 1 and 2, who are the widow and daughter respectively of a last male owner of certain lands and houses, for Rs. 2,250. That contract was evidenced by a *varthanama* passed between the plaintiff and defendants Nos. 1 and 2, and a sum of Rs. 100 was paid as advance. It was also further agreed between the parties that the defendants Nos. 1 and 2 should execute a security against any claim by the reversioners and that the mother-in-law of defendant No. 2 should join in the agreement. On her refusal to execute the same, it was proposed by the defendants that the plaintiff should accept instead, a security for Rs. 600 over the house of defendants Nos. 1 and 2. That was not accepted by the plaintiff. Then defendants Nos. 1 and 2 sold the lands to defendant No. 3. The plaintiff brought the present suit for specific performance. The District Munsif held that as the failure of the defendants Nos. 1 and 2 to complete the agreement was due to the refusal of the mother-in-law of defendant No 2 to execute the required security bond, the defendants Nos. 1 and 2 were not able to fulfil their part of the contract owing to circumstances beyond their control. He accordingly dismissed the suit. On appeal the Sub-Judge confirmed the decree, but modified it to the extent of re-payment of the Rs. 100 advanced. The present appeal is against that decree.

Mr. *S. Muthiah Mudaliar*, for the Appellant.

Messrs. *C. Madhavan Nair* and *V. Purushothama Iyer*, for the Respondents.

JUDGMENT.—The appellant contends that the case falls under section 14 of the Specific Relief Act and that he should have been awarded a decree for the specific performance of the contract (Exhibit A), except as regards the giving of security by Ammalachi for Rs. 600, and compensation in money for the breach of this latter provision. The difficulty is that as far as we can see, it is practically impossible for the Court to assess the compensation. The security is intended to meet the contingency of a claim being set up to the property by reversioners after the death of the vendors, and this is a risk which it is impossible for a Court to estimate in money. We think the unperformable part of the contract is not one which admits of compensation in money, and that the lower Court has adopted the only course open to it in decreeing damages for non-performance of the whole contract. The appeal is dismissed with costs of the third defendant. Defendants Nos. 1 and 2 will bear their own.

The memorandum of objections is dismissed with costs.

Appeal dismissed;
Objections disallowed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 375 OF 1912.

September 2, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

Rajkumar Babu BISHUN PERGASH NARAYAN SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

FULMAN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Malicious prosecution, suit for—"Prosecution" and

BISHUN PERGASH NARAIN SINGH v. FULMAN SINGH.

"prosecutor", meaning of—Proceeding for furnishing security maliciously taken, ground for suit for damages —Person setting machinery of criminal law in motion, liability of—Prosecution, when commences.

The term 'prosecution' should not be interpreted in the restricted sense in which it is used in the Code of Criminal Procedure. Therefore, a proceeding maliciously taken against a person to compel him to furnish surety to keep the peace may be made the foundation of a suit for damages for malicious prosecution.

If a person maliciously and without reasonable and probable cause sets the machinery of the criminal law in motion, he is responsible for the consequences, and cannot escape liability on the ground that the action by the Court was such as he did not intend or was erroneous in law.

The point of commencement of a prosecution is independant of the result of the prosecution. The prosecution commences when a complaint is made to a Magistrate.

A prosecution exists where a criminal charge is made before a Judicial Officer or Tribunal, and any person who makes or is actively instrumental in the making or prosecuting of such a charge, is deemed to prosecute it and is called a prosecutor.

Appeal against the decree of the Subordinate Judge, second Court of Muzafferpur, dated the 30th May 1912.

Babu *Mohendra Nath Roy* and Moulvi *Muhammad Mustafa Khan*, for the Appellants.

Moulvi *Khurshed Hossain*, for the Respondents.

JUDGMENT.

MOOKERJEE, J.—This is an appeal by the plaintiffs in a suit for damages for malicious prosecution. The suit has not been tried on the merits. After the first witness for the plaintiffs had been examined, the Subordinate Judge stopped the investigation of the facts and heard arguments on the preliminary objection that the plaint did not disclose any cause of action and that the suit as laid was not tenable. He decided this point against the plaintiffs and dismissed the suit. On the present appeal, the question for consideration, consequently, is whether the plaintiffs have any cause of action, and for this purpose we must assume that the allegations of the plaintiffs are well-founded in fact.

According to the plaintiffs, who are wealthy landlords in the district of Champaran, the first defendant, who was formerly in their employ and had been dismissed for misconduct, preferred a complaint against them before the Magistrate in charge of Motihari on the 9th July 1910. In this petition, he stated that the plaintiffs had ordered their servants to surround and beat the complainant on the 6th July 1910 and not to allow him to go to Motihari. He prayed that security and recognizance bond might be taken from them, as otherwise his life and property would be in danger. The Magistrate examined the complainant on oath, who gave details of the incidents mentioned in his petition and stated additional facts in support thereof. He prayed finally that proceedings under section 107 of the Criminal Procedure Code might be taken against the present plaintiffs and their servants. The Magistrate, thereupon, recorded an order in the order-sheet in the following terms: "To Babu N. G. Basak for inquiry and report by 19th July." The Deputy Magistrate, to whom the matter was made over for inquiry and report, issued notice to the parties on the 14th July 1910, to be ready with their evidence at the Modhubani Police Station on the 17th July. On the date fixed, he examined nine witnesses for the first party (complainant), and ordered that those witnesses be cross-examined and the witnesses for the second party examined and cross-examined at the Motihari Court on the 21st July. The order-sheet, with these orders recorded thereon by the Deputy Magistrate, was put up before the Magistrate in charge on the 19th July (the date fixed for the submission of the report); the latter officer recorded the following order thereon: "Put up on 24th July 1910." On the 21st July, five witnesses for the first party were examined and seven were cross-examined; at the same time, the 23rd July was fixed for the examination of the witnesses of the second party. On that date, the examination of the witnesses was completed. The Government Pleader appeared on behalf of the petitioner, and as he prayed for time to be ready for the argument, the 26th July was fixed for the next hearing. The arguments were heard on that date, and on the 28th July the Deputy Magistrate submitted his report. The report is not on the present record, but we find that the Magistrate in charge considered it on the the 2nd August 1910 and passed his orders. He expressed the opinion that the Deputy Magistrate

had held a fuller inquiry than he had intended; his intention had been that the inquiry should be of an executive rather than of a judicial nature. It may be observed, parenthetically, that the order recorded by the Magistrate in charge, when he sent the matter for inquiry and report to the Deputy Magistrate, gives no indication of such intention, and on the 19th July, when the order-sheet was placed before him with the orders recorded thereon by the Deputy Magistrate for the examination of witnesses of both parties, he did not instruct the Deputy Magistrate to make his inquiry of a summary character. However that may be, on the 2nd August, the Magistrate accepted the report and came to the conclusion that even a *prima facie* case had not been made out. He added that the petitioner on his own showing was an unfaithful and treacherous servant and a thoroughly unprincipled man, whose statements required very strong corroboration, and that he had made a number of mis-statements and an intentional concealment of material facts. In this view, the Magistrate declined to proceed further on the application and directed that it be filed. On the 4th April 1911, the plaintiffs instituted the present suit for damages for malicious prosecution, on the allegation that the charges brought against them by the first defendant in his petition and his statement before the Magistrate on the 9th July 1910 were false, and had been made maliciously and without reasonable and probable cause. The Subordinate Judge has held that the action does not lie, as there was no prosecution of the plaintiffs by the defendants. We are clearly of opinion that this view cannot possibly be supported. On behalf of the respondents, a strenuous endeavour has been made to support the decree of the Subordinate Judge from three points of view, namely, *first*, that an application to the Magistrate to take proceedings under section 107 of the Criminal Procedure Code was not a "prosecution;" *secondly*, that if it be assumed to be a "prosecution," no prosecution was commenced as no process was issued by the Magistrate against the plaintiffs; and, *thirdly*, that if it be assumed that a prosecution was commenced, it was not actionable, as the plaintiffs did not suffer any damage therefrom.

In support of the first contention that an application to a Magistrate to take proceedings under section 107 of the Criminal Procedure Code is not a prosecution, reliance has been placed upon the decision in *Kandasami* v. *Subramania* (1), where it was ruled that to sustain an action for damages for malicious prosecution, there must have been a prosecution by the defendants of the plaintiffs for an offence. We are not prepared to accept this view. We adhere to the opinion expressed in *Crowdy* v. *O'Reilly* (2) that the term "prosecution" should not be interpreted in the restricted sense in which it is used in the Code of Criminal Procedure, and that a proceeding maliciously taken against a person to compel him to furnish surety to keep the peace may be made the foundation of a suit for damages for malicious prosecution. It is worthy of note that the defendant invited the Magistrate to take action under section 107 of the Criminal Procedure Code, and an order under that section may ultimately lead to the detention of the person called upon to furnish security, under the circumstances mentioned in section 123: [*Hopcroft* v. *Emperor* (3)]. It is further clear that the defendant stated facts to the Magistrate, which, if true, rendered the plaintiffs liable to prosecution for wrongful restraint and criminal intimidation. We feel no doubt whatever that the action taken by the defendant amounted to prosecution of the plaintiffs, so as to entitle them to claim damages in an action for malicious prosecution. The first ground assigned by the respondents in support of the view of the Subordinate Judge, consequently, fails.

In support of the second contention, that no prosecution was commenced against the plaintiffs, because process was not issued against them by the Magistrate, reference has been made to the decisions in *Meeran Saib* v. *Ratnavelu Mudaly* (4), *De Rozario* v. *Gulab Chand* (5) and *Gulap* v. *Bhola Nath* (6). The first of these cases, *Meeran* v. *Ratnavelu* (4), supports the contention of the respondents; but we are

(1) 13 M. L. J. 370.
(2) 18 Ind. Cas. 37; 17 C. L. J. 105; 17 C. W. N. 554.
(3) 1 Ind. Cas. 737, 13 C. W. N. 151; 9 Cr. L. J. 359; 36 C. 163.
(4) 21 Ind. Cas. 708; 37 M. 18; 25 M. L. J. 1.
(5) 6 Ind. Cas. 877; 37 C. 358.
(6) 11 Ind. Cas. 311; 38 C. 880, 15 C. W. N. 917.

not prepared to accept it as well founded on principle. In that case, on receipt of a complaint the Magistrate issued only a notice to the accused that a preliminary inquiry would be held at a certain time in the matter of the complaint. The accused was represented by Counsel at the preliminary inquiry, and the complaint was ultimately dismissed under section 202 of the Criminal Procedure Code. The accused then brought a suit for damages for malicious prosecution. Bakewell, J., held that the procedure adopted by the Magistrate was not authorised by the Code and could not, therefore, be attributed to the defendant so as to render him responsible for any damage caused thereby to the plaintiff. He also added that the prosecution of an accused commences with the issue of process after the complaint has been entertained by the Magistrate, and the prior proceedings constitute at most an attempt by the complainant to prosecute the accused. We are not prepared to agree with either of the reasons assigned in support of the conclusion that a suit for damages for malicious prosecution was not maintainable. As regards the first reason, it is plain that if a person maliciously and without reasonable and probable cause sets the machinery of the criminal law in motion, he is responsible for the consequences, and cannot escape liability on the ground that the action taken by the Court was such as he did not intend or was erroneous in law. As was said in *Parli* v. *Reed* (7), where this precise question was raised, a void process, procured through malice and without probable cause, is even more reprehensible, if possible, than a lawful process on a complaint which charges a criminal offence. Similarly, it was ruled in *Potter* v. *Giertsen* (8), that if the complainant procures the process to issue, he ought to be responsible for all the consequences even though the facts stated in his complaint do not justify it. In *Pippet* v. *Hearn* (9) the Court observed: "Whether the indictment be good or bad, the plaintiff is equally subjected to the disgrace of it, and put to the same expense in defending himself against it." As regards the second reason, it is equally plain that with a view to determine whether a suit for damages for malicious prosecution lay, the prosecution commenced as soon as the complaint was made to the Magistrate. The prosecution might be infructuous, if, for instance, no notice was served upon the accused. In such a contingency, the action for damages for malicious prosecution would fail, not because there was no prosecution commenced but because there was no damage done to the plaintiff. Reliance has also been placed upon the decisions in *De Rozario* v. *Gulab Chand* (5) and *Golap Jan* v. *Bholanath* (6). These cases are clearly distinguishable. In the former case, a complaint was lodged before the Magistrate, who sent the case to the Police for inquiry and report. The complainant informed the Police Inspector that he would not proceed with the case. The complaint was subsequently dismissed by the Magistrate. A fresh complaint was made through another person and was also dismissed. Fletcher, J., held that as the matter was sent to the Police for inquiry and report and no process was issued by the Magistrate, the prosecution was not commenced. In the present case, notice was issued upon the plaintiffs by the Deputy Magistrate, evidence was taken on both sides, and the Government Pleader appeared in support of the application by the complainant. Obviously, the plaintiffs in the case before us were in a very different position in the Criminal Court from that occupied by the plaintiff in *De Rozario* v. *Gulab Chand* (5). The case of *Golab Jan* v. *Bholanath* (6) also is distinguishable on the facts. But, it must be conceded that there are observations in both the judgments, which tend to support the contention of the respondents. In *Golap Jan* v. *Bhola Nath* (6) Woodroffe, J., is reported to have observed as follows: "If there is a prosecution, the commencement is the laying of the complaint: but it does not follow that that would be the commencement, if the prosecution falls through." With all respect, we are unable to accept the view indicated herein. Surely, the point of commencement of a prosecution is independent of the result of the prosecution. The prosecution—that act of the prosecutor, which renders him liable to be cast in damages, if malicious and not based on reasonable and probable cause – commences when the prosecutor has taken the initial step, namely, has made his complaint to the Magistrate. The prosecution may fail at one or other of various

(7) 30 Kansas 634; 2 Pacific Rep. 635
(8) 37 Minn 386; 34 N. W. 746.
(9) 5 B. & Ald. 634, 1 D. & R. 266; 106 E. R. 1312.

stages, but that cannot affect the time of commencement of the prosecution. The action of damages for malicious "prosecution" is not a creature of any Statute, and it is rather wide of the mark to investigate the precise meaning of the expression 'prosecution,' in the Criminal Procedure Code, or the exact point of time when a prosecution may be said to commence within the meaning of that Code. A prosecution exists where a criminal charge is made before a Judicial Officer or Tribunal, and any person who makes or is actively instrumental in the making or prosecuting of such a charge, is deemed to prosecute it, and is called the prosecutor; thus, a person who lays before a Magistrate an information stating that he suspects and has good reason to suspect another or who prefers a bill against him before a grand jury, is engaged in a prosecution (Laws of England, edited by Halsbury, Volume 19, Article 1433). From this point of view, the rule recognised in *Ahmedbhai* v. *Framji* (10), namely, that a prosecution commences when a complaint is made, is reasonable. Fletcher, J., refused to accept this view, because it is based on *Clarke* v. *Postan* (11), which, according to him, has been questioned in *Yates* v. *Queen* (12), and is supported possibly by a dictum in *Gregory* v. *Derby* (13). Neither of these cases is binding as an authority on this Court, and they are of value only in so far as they give reasons for the respective views. Bosanquet, J., ruled in *Clarke* v. *Postan* (11) that there is a prosecution if a charge is made to the Magistrate with a view to induce him to entertain it; it is not necessary to show that it was taken down in writing and acted upon by the Magistrate. In *Yates* v. *Queen* (12) the question arose under section 3 of the Newspaper Libel and Registration Act, 1881, which enacts that no criminal prosecution shall be commenced against any proprietor, publisher or editor for any libel published in his newspaper, without the written fiat or allowance of the Director of Public Prosecutions in England or Her Majesty's Attorney-General in Ireland being first had and obtained. The Court of Appeal held that the commencement of a prosecution by a criminal information is the filing or exhibiting the information, and that, therefore, the fiat of the Director of Public Prosecutions need not be obtained until the moment before that has been done. Cotton, L. J., considered the question which, he said, was material, though not essentially necessary to determine, namely, when can a criminal prosecution be said to be commenced when it is by way of criminal information. On behalf of the plaintiff in error, it was said that the first application for the rule *nisi* is such commencement. Cotton, L. J., observed that the application to the Court was merely to direct a criminal information to be exhibited, and many things might have to be done before a prosecution could be instituted, as, for instance, the allowance of the Director of Prosecutions must be obtained. Reference was made to the decision in *Clarke* v *Postan* (11), on which reliance had been placed, to show that prosecutions by means of proceedings before a Magistrate commenced when the information was first laid before him. It was pointed out that, in that case, not only had an information been filed, but the plaintiff had been summoned before a Magistrate to answer a charge made against her, so that it was not laying an information or making a charge but the summons before the Magistrate which ought to be considered the commencement of the prosecution. The conclusion, if one may say so without disrespect, does not follow from the premises. It is plain, however, that the actual point required for decision in *Yates* v. *Queen* (12) is of no assistance in the determination of the question raised before us. On the other hand, the case of *Reg.* v. *Wallace* (14), decided in 1797 and mentioned by East in his Treatise on Pleas of the Crown, Volume I, page 186, clearly assists the contention of the appellants. The case arose under section 9 of 8 and 9 W. III, C. 26, which provided that no prosecution shall be commenced for an offence under the Statute after the expiry of three months from the commission of the offence. Wallace was apprehended on the 5th May 1797 for an alleged offence under the Statute, carried before a Magistrate and committed to jail

(10) 28 B. 226; 5 Bom. L. R. 940.
(11) 6 C. & P. 423.
(12) 14 Q. B. D. 648 at p. 661; 52 L. T. 305; 33 W. R. 482; 49 J. P. 436; 54 L. J. Q. B. 258.
(13) 8 C. & P. 749.
(14) (1797) 1 East P. C. 186; 2 M. C. C. 200; Car. & M. 200.

by warrant dated 8th May. The Assizes at Durham were held on the 8th August, so that more than three months had elapsed between the commission of the offence and the preferring of the indictment. The Judges, at a conference, unanimously held that the information before the Magistrate was the commencement of the prosecution. The decision in *Thorpe* v. *Priestnall* (15) also supports the contention of the appellants; there Wright, J., pointed out that *Reg.* v. *Brooks* (16) is to the same effect as *Reg* v. *Willace* (14), and Wills, J., observed that the passages in the judgment in *Yates* v. *Queen* (12), which tended the other way, only amounted to dicta, as the decision in that case related to a prosecution for libel by a criminal information filed by order of the Court. It is worthy of note that the view taken in *Clarke* v. *Postan* (11) is consistent with that adopted in *Dawson* v. *Vansandau* (17) by Cockburn, C. J., Crompton and Blackburn, JJ. Fletcher, J., concedes in *De Rozario* v. *Gulab Chand* (5) that *Thorpe* v. *Priestnall* (15) shows that once summons is issued, the commencement of prosecution must be deemed to be the laying of the information or the making of the complaint. But, if this is so, it is plainly logical to hold that the prosecution commences with the complaint, irrespective of the result of the prosecution or of the stage at which it may fall through. We must accordingly adhere to the view taken in *Crowdy* v. *O'Reilly* (2) that there may be said to have been a prosecution even though no action at all has been taken against the plaintiff. Here, however, the plaintiffs were, as we know, drawn into the inquiry. Notice was given to them by the Deputy Magistrate of the enquiry directed by the special Magistrate. The terms of the notice are not known as a copy is not in the record, but we shall assume that it merely gave the plaintiffs an opportunity to appear and to be heard. The plaintiffs did, as a matter of fact, appear and produce evidence. If they had not appeared, they would have run the risk of either a prosecution or a proceeding under section 107. The defendant, at any rate, cannot be heard to urge that the plaintiffs need not have appeared before the Deputy Magistrate at that stage; it is not open to him to suggest that his complaint was so manifestly false and frivolous, that the plaintiffs might have safely allowed the inquiry, whereof they had notice, to proceed *ex parte*. In our opinion, there is no escape from the position that there was a prosecution against the plaintiffs from the 9th July 1910, when the complaint was made to the Magistrate, to the 2nd August 1910, when the Magistrate decided not to proceed against the accused. The second ground cannot, therefore, be supported.

In support of the third contention, *viz.*, that the prosecution initiated by the defendant was not actionable, reference has been made to *Kandasami* v. *Subramania* (1). That case is clearly distinguishable; the report does not show that the plaintiff was in any way injured by the proceedings taken against him. In the case before us, the plaintiffs assert that the proceedings have caused them loss, pecuniary and otherwise. This evidently is a question of fact which requires investigation. The third ground cannot consequently be supported.

In the view we take of the matter, it is not necessary to discuss at length the contention of the appellants that they are entitled to recover damages for defamation. It may be conceded that the claim was made, though not very explicitly, in the plaint; but the question was not raised in the issues and although the suit did not come on for trial, till more than ten months had passed after the settlement of issues, no attempt was made in the interval to have them amended. In these circumstances the Subordinate Judge rightly refused to entertain the question of damages for defamation, which was sought to be raised in his Court for the first time in the course of argument at the trial.

The result is that this appeal is allowed, the decree of the Subordinate Judge discharged, and the case remanded to him for trial on the merits as a suit for damages for malicious prosecution. The plaintiffs

(15) (1897) 1 Q. B. 159, 66 L. J. Q. B. 248; 45 W. R. 223; 60 J. P. 821.

(16) 2 C. & K. 402; Dear. C. C. 184; 22 L. J. M. C. 121; 17 Jur. 400; 1 W. R. 313, 6 Cox. C. C. 148.

(17) 11 W. R. 516, 32 E. R. R. 842.

are entitled to their costs in this Court; they will also have hearing fee in the Court below, which we assess at ten gold *mohurs*. Under section 13 of the Court Fees Act, we direct that the amount of the Court-fee paid by the plaintiffs on the memorandum of appeal presented to this Court be refunded to them.

BEACHCROFT, J.—I agree.

Appeal allowed; *Case remanded.*

MADRAS HIGH COURT.

ORIGINAL CIVIL SUIT No. 377 OF 1913.

April 28, 1914.

Present:—Sir Charles Arnold White, KT., Chief Justice, and Mr. Justice Tyabji.

THE HINDUSTAN ASSURANCE AND MUTUAL BENEFIT SOCIETY, LTD.—

—PLAINTIFFS

versus

Rai MULRAJ AND OTHERS—DEFENDANTS.

Civil Procedure Code (Act V of 1908), ss. 22, 23, 24, 151—Court not subordinate to High Court, whether s. 23 applicable to—Original side of High Court, suit pending in, whether can be transferred—Inherent power, exercise of—Stay of suit, grounds for—Abuse of process of Court—Forum.

Section 23 of the Civil Procedure Code does not apply where the Court in which the suit has been instituted is not a Court subordinate to a High Court

Therefore a suit pending on the original side of the High Court cannot be transferred under the provisions of the above section nor can the proceedings be stayed when the cause of action or a cause of action arose within the jurisdiction of the Court.

A High Court has an inherent jurisdiction to stay any suit which is an abuse of the process of the Court.

But where the parties in a defamation suit do not reside within the jurisdiction of the High Court and the plaintiff proves that he has been defamed and that the defamatory matter has been published within the local limits of the jurisdiction of the Court and that he has suffered damages within the local limits of the jurisdiction of that Court by reason of the publication, it cannot be said that the institution of the suit in the High Court is such an abuse of the process of the Court as to invoke its inherent jurisdiction to stay the suit

Per *Tyabji, J.*—The plaintiffs have the choice of the forum and their choice should not be restricted because the defendants may find it more difficult to make their defence in one forum than in another.

The case first came up for hearing before Mr. Justice Sankaran Nair in Chambers while sitting on the original side, who referred it to a Division Bench by the following

ORDER.—That the question involved in this application, whether the hearing of a suit may be indefinitely stayed under sections 22, 23 and 24 and 151 of Act V of 1908 and whether this is a fit case in which the hearing should be stayed, and the same is hereby referred to a Division Court under rule 177 of the Rules of the High Court, 1902, and that the plaintiffs do, on or before the 21st day of April 1914, file in Court their counter-affidavit.

Mr. *C. P. Ramaswami Aiyar*, for the Plaintiffs.

Mr. *T. S. Rajagopala Aiyar*, for the Defendants.

ORDER.

TYABJI, J.—This application has been referred to us by Mr. Justice Sankaran Nair sitting in Chambers on the Original Side of the High Court under rule 177 of Order XV of the Rules of the High Court of Madras. We are, therefore, sitting as the High Court in its Original Civil Jurisdiction, and not in the exercise of the Appellate Jurisdiction in appeal from decisions in the exercise of its Original Jurisdiction.

The application is that all further proceedings in this suit which has been instituted on the Original Side of this High Court be "indefinitely stayed under sections 22, 23, 24 and 151 of Act V of 1908." The suit is instituted by a limited liability Company for recovering damages for defamation from the editor, printer and publisher of a newspaper in Lahore.

Section 22 of the Civil Procedure Code refers to cases where a suit may be instituted in any one of two or more Courts, and is instituted in one of such Courts. In such cases an application may be made by any defendant for transfer of the suit to another Court. Section 22 does not provide to which Court the application for transfer has to be made. That matter is provided for in section 23. The sub-section of section 23 which is suggested as being applicable is sub-section 3. That sub-section, however, refers to the case where the several Courts having

jurisdiction are subordinate to different High Courts. One of the difficulties in the way of applying this sub-section to the present case is that the two Courts which the applicant suggests have jurisdiction, *viz.*, (1) the Original Side of the Madras High Court, (2) the Chief Court of the Punjab cannot be side to be "subordinate to different High Courts." The section defining which Courts are subordinate to the High Court is section 3 of the Civil Procedure Code. Section 3 refers to District Courts, but not to the High Court in the exercise of its Original Civil Jurisdiction. Section 2 (4) defines a "District" so as to include the local limits of the Ordinary Original Civil Jurisdiction of a High Court; but it does not refer to the High Court in the exercise of its Ordinary Original Jurisdiction as a District Court. The collocation of words in section 3 does not suggest that it was intended that the expression "District Court" should be applicable to the High Court, and section 3 (15) of the General Clauses Act prevents the High Court in the exercise of its Ordinary Original Civil Jurisdiction being included in the expression "District Judge," and clause (24) of the same section defines a High Court in terms which do not throw any light on the question I am considering.

It seems to me, therefore, very doubtful whether the provisions of sections 22 and 23 can be said in their terms to apply to the present case. Subject to this doubt, I agree with the learned Chief Justice in his remarks on these two sections and his examination of the Indian authorities on this point.

The application is, however, supported before us mainly on the ground that we have under section 151 of the Civil Procedure Code inherent power to prevent abuse of the process of the Court. The existence of the jurisdiction cannot be denied. The circumstances in which the Courts will in the exercise of this jurisdiction stay proceedings on the ground that the process of the Court is being abused, are referred to and explained in *Norton* v. *Norton* (1), *Egbert* v. *Short* (2) and *Logan* v. *Bank of Scotland* (3).

These decisions refer to cases where the cause of action had arisen outside England and where the English Courts were sought to be given jurisdiction on the ground that the defendant was, at the time when the writ was issued, residing within the jurisdiction of the English Courts. In the case now before us, the learned Pleader for the applicants asked us to decide the case on the basis that it must be assumed for the purposes of this application that the whole of the cause of action had arisen in Madras. Where the jurisdiciton is sought to be snatched from a Court by means of the accidental circumstances that the defendant happens temporarily to be within the jurisdiction of a Court other than that in the local limits of which Court he ordinarily resides, the case bears a very different aspect from such a case as the present. For the libel upon which this action is based expressly refers to the local agents of the limited liability Company which is alleged to have been libelled, and "the attention of the local Government of Madras is most respectfully invited to the letters" by the editor of the newspaper. The facts, therefore, that have to be determined in deciding this suit have direct reference to the conduct of the local agents of the Madras branch of the Company. In these circumstances the plaintiffs may well claim that inasmuch as the question on which they seek adjudication has reference to people residing in Madras and the acts that will be subject of investigation have taken place in Madras, it would be more beneficial to the plaintiffs that the suit should be tried by the Court in Madras. It cannot be said that in these circumstances the facts before us have any analogy to such facts as were before the English Courts in the decisions cited to us. There it was clearly pointed out that the plaintiff was seeking to put the defendant in the position referred to by Vaughan Williams, L. J., in *Norton* v. *Norton* (1). He says: "I have come to the conclusion, not only that this is a case in which it is more natural and more convenient to try the question in dispute in India, because the settlement was made in India

(1) (1908) 1 Ch. 471 at p. 481; 77 L. J. Ch. 312; 99 L. T. 267

(2) (1907) 2 Ch. 205 at p. 210; 76 L. J. Ch. 520; 97 L. T. 90, 53, T. L. R. 558.

(3) (1906) 1 K. B. 141; 75 L. J. K. B. 218; 94 L. T. 153; 22 T. L. R. 187; 54 W. R. 270.

and refers entirely to property in India, but, further, that Mrs. Norton has brought the action in England, not for the purpose of any legitimate advantage which she might gain by so doing, but for the purpose of putting her husband in such a position that he would be practically compelled to settle the action." In the present case owing to the facts to which I have referred, it seems to me to be clear that at least on the materials now before us it is impossible to say that the plaintiffs have brought the suit in Madras not for the purpose of any legitimate advantage which they might gain by so doing, but for the purpose of putting the defendants in such a position that they will be practically compelled to settle the action. Conceding for the purposes of the application that the defendants may have some difficulty in proving their cases that they may find it necessary to examine their witnesses on commission, it is the plaintiffs who have the choice of the forum and it does not follow that because the defendants may find it more difficult to make their defence in one forum than in another, the plaintiffs should be restricted in their choice. That difficulty may be a matter which the Judge trying the action may take into consideration when the defence is before him. It does not prevent the plaintiffs from bringing a suit in the Court which they may find more convenient, unless for some such reasons as have been referred to in the decisions of the English Courts.

I, therefore, agree that the application must be dismissed with costs.

WHITE, C. J.—This matter came before the learned Judge sitting in Chambers in the Original Side of this Court and under rule 177 of the Original Side Rules he has referred it to us. A suit has been instituted in this Court for damages for an alleged libel in a newspaper. A Judge's summons has been taken out by the defendants, in which they ask for an order that all further proceedings in the suit in this Court should be stayed and for a direction that the plaintiffs should file their suit in a proper Court in the Punjab. It has not been seriously argued that it would be within our powers to direct the plaintiffs to file the suit in a proper Court in another Province. The contention has been that the case is one in which we ought to make an order staying all further proceedings in the suit in this High Court.

The plaintiffs are a limited liability Company with their registered office at Gujranwala near Lahore. The paper in which the alleged libel was published is printed and published at Lahore. It is not denied that there has been publication of the alleged libel in Madras. The question as to whether the cause of action for this suit arose wholly within the local limits of the jurisdiction of the Madras High Court has not been argued by the learned Vakil for the defendants: but for the purposes of this application he is prepared to assume that it did. Assuming that the matter is libellous, publication within the jurisdiction being admitted, I think there can be no question that *the* cause of action or *a* cause of action with reference to this alleged libel arose within the jurisdiction. We have been asked to make an order staying the suit on two grounds: *first*, under express provisions of the Code, and *secondly*, in exercise of the inherent jurisdiction which is now recognised in section 151 of the Code. The express provisions are sections 22 and 23 of the Code. Section 22 provides as follows: "Where a suit may be instituted in any one of two or more Courts and is instituted in any one of such Courts, any defendant.....may..... apply to have the suit transferred to another Court, and the Court to which such application is made .....shall determine in which of the several Courts having jurisdiction the suit shall proceed." (I assume this suit could have been instituted in a Punjab subordinate Court or in the Madras High Court, though damages are only claimed in respect of the publication in Madras). The first sub-section of section 23 clearly does not apply. Then the section goes on to say: "Where such Courts are subordinate to different Appellate Courts but to the same High Court, the application shall be made to the said High Court." The case does not fall within sub-section (2). Sub-section (3) says: "Where such Courts are subordinate to different High Courts, the application shall be made to the High Court within the local limits of whose jurisdiction the Court in which the suit is brought

is situate." The Court in which this suit has been instituted is not a Court subordinate to a High Court. Therefore, section 28 does not apply. It was argued that section 22 gives the jurisdiction and section 23 could not cut it down. It seems to me, however, that the two sections should be read together and if we find that section 23 contains no provision as to the Court to which the application should be made, it may reasonably be held that section 22 has no application to the particular facts of this case. Moreover sections 23 and 24 deal with the power of the Court to transfer, not with the power of the Court to stay. Certain authorities have been cited. The first case was *Tula Ram* v. *Harjiwan Dass* (4). That was a case in which the application was made under section 24 of the old Code and the suit which was asked to be stayed was not instituted in a High Court, but in a Court subordinate to the High Court, and the learned Judges while intimating that they had jurisdiction declined to exercise it. *Geffert* v. *Ruckchand Mohla* (5) is a decision of Mr. Justice Scott sitting alone. In some respects it is not unlike this case. There the plaintiff brought a suit in the High Court of Bombay claiming damages for libel. He had previously brought a suit in the Court of the Deputy Commissioner of Central Provinces in which he had asked for damages for wrongful dismissal. An application was made by the defendant in the suit in the Bombay High Court asking for an order staying the proceedings in the Bombay High Court. The learned Judge, no doubt, assumed that he would have had jurisdiction to make the order asked for. The question of jurisdiction, however, does not seem to have been argued and on the merits he declined to make any order. With reference to this suit before him, he makes the observation that the plaintiff "desires to vindicate his character in the place where he alleges it has been defamed," and he adds: "I can find no authority for preventing him doing so." Our attention has also been drawn to a decision of the Oudh Judicial Commissioner's Court in *Babban Bibi* v. *Sohadra Bibi* (6). There again the facts were similar to those in *Tula Ram* v. *Harjiwan Dass* (4). The application was for the transfer of a suit pending in a subordinate Court within the jurisdiction of the Oudh Judicial Commissioner's Court and it was asked that the suit should be transferred to a subordinate Court within the jurisdiction of the Allahabad High Court. The learned Judge on the merits made an order that the subordinate Court, subject to the jurisdiction of the Allahabad High Court, was the proper Court, having regard to the real interests of the parties and the general convenience of the witnesses, in which the suit should proceed. The facts in the Oudh case are clearly distinguishable. As regards our inherent jurisdiction, I have no hesitation in holding that apart from the express provisions of the Code there is an inherent jurisdiction in the High Court to stay any suit which is an abuse of the process of this Court. The jurisdiction, in my opinion, existed prior to the Code of 1908 and it is recognised in section 151. Then the question is, in the circumstances, is this suit an abuse of the process of this Court? I do not propose to read the whole affidavit on which the defendants rely, but in so far as the affidavit consists of allegations of fact and not expressions of opinion, I am prepared to accept all the allegations in the affidavit. Do those allegations establish that the bringing of the suit here is an abuse of the process of this Court? We start with this that we are assuming for the purposes of this application—and the assumption seems to me to be well founded in law—that the cause of action arose wholly within the jurisdiction of this Court. The alleged libel is set out in the plaint. It contains this passage: "The attention of the Local Governments of Bengal, Madras, the Central Provinces and the Punjab is most respectfully invited to the letters of our correspondents." These letters the plaintiffs say form part of the libel. That the articles were published in Madras is undisputed. The plaintiffs ask for damages so far as this Presidency is concerned. I do not think it necessary to discuss what may be the legal effect of limiting their claim to damages accruing in this Presidency. But we do find that in the plaint they expressly limit their claim. The learned Vakil for the defendants has not been able to call our attention to any Indian case in which this inherent jurisdiction has been exercised. The

(4) 5 A. 60; A. W. N. (1882) 164
(5) 13 B. 178
(6) 20 Ind. Cas. 758.

principle, however, is well recognised and has been given effect to in several English decisions. I would only refer to two cases, both of which curiously enough were Indian cases. In both cases disputes had arisen between husband and wife and in both cases the question was whether an action should proceed in England or in India.

The first case is *Norton* v. *Norton* (1). That was a suit in which the plaintiff claimed an account under a settlement. The settlement had been made in India. The wife had gone to England and she alleged that she intended to reside in England permanently. The husband and *one of the trustees of the settlement* were served with a writ during their temporary presence in England, and the husband and the other defendant applied to stay the proceedings in England. The application was in the Court of first instance refused, but on appeal an order was made staying the proceedings in England. Vaughan Williams, L. J., in delivering the judgment of the Court of Appeal says at page 479: "In my opinion it must be proved to the satisfaction of the Court that either the expense, or the difficulties of a trial in this country are so great that injustice will be done—in this sense, that it will be very difficult, or practically impossible, for the litigant who is applying for the stay to get justice in this country." It is scarcely necessary to observe that the facts of the present case do not come anywhere near the test suggested by Vaughan Williams, L. J. The other case is the case of *Egbert* v. *Short* (2). There a deed of separation had been executed in India between the plaintiff and her husband. The defendant was the trustee under the deed. There was default in paying the allowance under the deed, and the defendant happened to be in England on a holiday and he was served with a writ. He applied to have the proceedings stayed and they were stayed. The learned Judge in his order in staying the proceedings observes at page 214: "On the whole the conclusion at which I have arrived is that this action is brought in the tribunal in which it has been brought not *bona fide* for the purpose of obtaining justice, but for the purpose of harassing and annoying the defendants, and of obtaining something to which the plaintiff may not in justice be entitled." It cannot be suggested in this case that if the plaintiff proves in this Court that he has been defamed, if he proves that the defamatory matter has been published within the local limits of the jurisdiction of this Court, and that he has suffered damage within the local limits of the jurisdiction,—of this Court by reason of the publication it cannot be suggested that the suit is brought within the local limits of the jurisdiction of this Court "for the purpose," to use the words of the learned Judge in *Egbert* v. *Short* (2), "of obtaining something to which he may not in justice be entitled." It seems to me that the defendants have failed to make out that the institution of the suit in this Court is an abuse of the process of this Court.

I would dismiss the application with costs.

Application dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 338 OF 1913.

July 9, 1914.

Present:—Justice Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice N. R. Chatterjea.

Haji KASSIM MAMOOJI—DEFENDANT No. 2—APPELLANT

versus

K. B. DUTT AND P. CHAUDHURI—RECEIVERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XL, r. 1—Appointment of Receivers—Authority to bring and defend suits conferred by Court—Lunacy Act (XXXV of 1858), inquiry under—Document executed by pardanashin lady—Terms not explained to her—Suit by persons of unsound mind—Next friend, whether a party.

Ordinarily, a suit to recover possession of property can only be brought by him in whom there is a present title to it, and by the appointment of a Receiver no property becomes vested in the Receiver. But this rule is subject to modification by the Legislature, and the Code of Civil Procedure empowers the Court to confer upon a Receiver all such powers as to bringing and defending suits as the owner himself has, even if it may involve the setting aside of a voidable instrument executed by one of the co-owners who thereby purports to deal with the entire estate.

Where, therefore, one of two co-widows brought a suit against the other for a declaration that she was entitled to a half share in the estate of the

KASSIM MAMOOJI *v.* K. B. DUTT.

deceased husband and for partition thereof, and the present plaintiffs were appointed Receivers under Order XL, rule 1 (*d*) of the Civil Procedure Code with the power to bring and defend suits in their own name and to use the names of the plaintiff and the defendant also, and where the present plaintiffs sued to recover possession of certain immoveable property on the ground that a lease of 16th September 1906 purporting to have been executed by one of the widows in virtue of which the present defendant claimed to be a permanent tenant was invalid

Held, (1) that the co-widows were the owners of the property and the suit in which the Receivers had been appointed comprised that propertyand that the Receivers were, therefore, as competent to bring this suit as the widows would have been;

(2) that the omission of the Receivers to get leave in the first suit to bring this suit might have consequences adverse to them in that suit but it could not affect their power to bring this suit.

The Lunacy Act contemplates the question of lunacy or sanity at the time of the inquiry, there is no provision in it that the inquiry shall extend to the ascertainment of the period at which the alleged lunatic first became of unsound mind.

Where, therefore, lunacy proceedings commenced in November 1906 and the widow who had executed the lease in September 1906 was found on the 24th September 1907 to be of unsound mind and incapable of managing her own affairs.

Held, (1) that the finding did not carry things back further than the inquiry which commenced in November 1906 and notwithstanding the result of that inquiry the burden still rested on the plaintiffs of showing that she was of unsound mind on the date of the execution of the lease;

(2) that the executant of the lease being of unsound mind at the time it was executed, it created no title in the present defendant and the plaintiffs' right to possession was not barred;

(3) that even if lunacy be not established, the lease was void as its terms were not adequately explained to the executant, a *pardanashin* lady of weak intellect, and was not understood by her;

(4) that the Receivers were competent plaintiffs even if the lease be held to be not void, but voidable;

(5) that even if a lunatic's manager can sue still there is no established rule of practice in this High Court that requires suits relating to the lunatic's property to be brought by him and not by the lunatic and that on the contrary the Code of Civil Procedure contemplates suits by persons of unsound mind whether so adjudged or not and that though it is true that a person so incapacitated has to sue by next friend, yet a next friend is not a party and the absence of a next friend is immaterial.

Appeal against a decree of the Subordinate Judge of 24-Parganas, dated 9th June 1913.

Dr. *Rash Behary Ghose*, Babus *Binode Behari Mukherjee*, *Kritanta Kumar Bose* and *Satyendra Nath Mukherjee*, for the Appellant.

Mr. *B. Chakraburty*, Counsel, Babus *Provash Chandra Mitra* and *Norendra Chandra Bose*, for the Respondents.

JUDGMENT.

JENKINS, C. J.—This appeal arises out of a suit instituted in the first Court of the Subordinate Judge of the 24-Parganas to recover possession of immoveable property in Bhowanipore, known as 7 Russa Road.

The plaintiffs are the Receivers of the estate of the late Gopal Lal Seal, and the contesting defendant and sole appellant (to whom I will hereafter refer as the defendant) is Haji Kassim Mamooji.

The plaint includes a prayer for a declaration that a lease executed by Nayan Manjari Dassi, one of Gopal Lal Seal's two co-widows, is void and inoperative.

The defendant, on the other hand, maintains that he has a good title to the premises as their permanent tenant and contends that in any case the plaintiffs are not competent to bring this suit. I will first give a short narrative of the events that led up to the appointment of the plaintiffs as Receivers of Gopal Lal Seal's estate.

Gopal Lal Seal, who was admittedly the owner of the property in suit, died on the 25th of May 1897, without issue, but survived by his two widows, Kumudini Dasi and Nayan Manjari Dasi, who thus became his heiresses in the absence of a testamentary disposition. On the 15th of June 1902 Kumudini applied for Letters of Administration to the estate of her deceased husband. The application was opposed, and was numbered as Suit No. 9 of 1902.

On the 21st of July, Gopal Lal Seal's mother and another propounded an alleged Will of the deceased, and their application, being opposed, was numbered as Suit No. 11 of 1902. Mr. Donogh was appointed Administrator *pendente lite* in Suit No. 11 of 1902, but in August 1903, Probate was refused and so his appointment terminated. In the same month Mr. Belchambers was appointed Administrator *pendente lite* in Suit No. 9 of 1902.

On the 8th August 1906 Nayan Manjari commenced Suit No. 666 of 1906 against her co-widow. It was afterwards numbered 427 of 1907.

By this suit Nayan Manjari sought a declaration that she was entitled to a half share in the estate of Gopal Lal Seal for

the estate of a Hindu widow, and prayed that the properties might be partitioned and her share allotted to the plaintiff.

On the 29th January 1908 Suit No. 9 of 1902 was withdrawn, and Mr. Belchambers, the Administrator *pendente lite*, was discharged. On the same day a decree was passed in Suit No. 427 of 1907 and thereby Messrs. Shamal Dhone Dutt and Norendra Lal Dey were appointed Receivers of the moveable property and of the rents, issues and profits of the immoveable property belonging to the estate of Gopal Lal Seal.

By an order of the 8th January 1910 in Suit No. 427 of 1907 the present plaintiffs, Mr. P. Chowdhuri and Mr. K. B. Dutt, were appointed Receivers in the place of Mr. Halder, who had succeeded Messrs. Dutt and Dey in that office with all the powers provided under Order XL, rule 1, clause (*d*), of the Civil Procedure Code, subject to certain exceptions not material to this case, and it was further ordered that the Receivers should have power to bring and defend suits in their own name and also should have power to use the names of the plaintiff and the defendant who were to be indemnified out of the estate and effects of the intestate.

On the 25th of October 1911 this suit was instituted and on the 22nd March 1912 an order was made in Suit No. 427 of 1907 that the Receivers be at liberty to continue the present suit.

It is in these circumstances that the plaintiffs claim that they are competent to maintain this suit. But before I deal with this point, I will explain the defendant's relations with the property.

As far back as 1893 the defendant became a tenant of the property, and though a difficulty was experienced in obtaining a formal lease, this at length was granted for a term of 15 years to expire in November 1908. The person named as lessee was Ismail Khan Mohammad, but it has been accepted by both sides before us that he was a *benamdar* for the defendant, Haji Kassim Mamooji.

But though this tenancy terminated on the 15th November 1908, the defendant claims to be a permanent tenant under a lease of 16th September 1906, which purports to be executed by Nayan Manjari Dasi. It is the plaintiffs' case that this lease is invalid, and so it is that they claim to be entitled to recover possession. First, then I will consider the plaintiffs' right to sue in their own names.

Ordinarily, no doubt, a suit to recover possession of property can only be brought by him in whom there is a present title to it, and by his appointment no property becomes vested in a Receiver.

But this rule, like all others, is subject to modification by the Legislature and the only question for our consideration is whether in India there has not been such a modification in favour of a Receiver.

It is profitless to discuss the English cases on the subject or to seek for guidance from American decisions; in England there is no such statutory rule as there is here, and I have no means of ascertaining what the American Law is.

Moreover, there is ample material in Indian enactments and authorities to afford a clue to the solution of the problem propounded. Originally a Receiver could not sue; this is shown by the decision of Phear, J., in *Wilkinson* v. *Gangadhar Sirkar* (1). That decision was in 1871. In 1877, however, was passed the Civil Procedure Code of that year; and in it was contained the provision which now finds a place in Order XL, rule 1, of the present Code (*see* section 503 of the Code of 1877). The present Code empowers the Court to confer upon a Receiver all such powers as to bringing and defending suits as the owner himself has.

This provision is shown by decisions in Calcutta, Madras and Bombay to have been understood by those Courts as authorising suits by Receivers, and though I am not aware of any judgment in Allahabad to the same effect, I have not met with any decision in a contrary sense.

The words of Order XL, rule 1, warrant this view, and I see no reason for putting a narrower construction on the words, or for holding that they do not empower Receivers to bring a suit for recovery of possession of immoveable property, even though it may involve the setting aside of

(1) 6 B. L. R. 486.

a voidable instrument executed by one of the owners who thereby purports to deal with the entire interest.

The co-widows of Gopal Lal Seal are the present owners of the property: and the suit in which the Receivers have been appointed comprises that property. The Receivers, therefore, are as competent to bring this suit as the widows would have been. It is true, they did not get leave to institute this suit in Suit No. 427 of 1907. This omission may have consequences adverse to them in that suit, but it cannot affect their power to bring this suit, nor has any reliance been placed on this omission before us.

The next point that calls for consideration is whether the instrument of the 16th September 1906 furnishes the defendant with an answer to the plaintiffs' claim for possession.

If it was a valid document, it would, for it purports to create a permanent tenancy in the defendant's favour. Its validity, however, has been attacked on many grounds. Thus it is said (1) that Nayan Manjari, the sole executant, was of unsound mind, (2) that at any rate she was an illiterate *pardanashin* lady of weak intellect, whose execution of the lease was procured without explanation to her of its terms or comprehension by her of its effect, (3) that at the time of its execution Mr. Belchambers was Administrator *pendente lite* and that she had no interest in or power over the property, and (4) that her interest in the property did not extend beyond a half share.

On all these points the Sub-Judge has come to a conclusion adverse to the defendant against whom he has passed the decree from which the present appeal has been preferred.

First, then, I will deal with the plea of Nayan Manjari's insanity. This unhappy lady's predicament has been so constantly before the Court in the several litigations in which she is involved that it is particularly necessary that we should be on our guard not to import into this case knowledge derived from other sources, and to see that our decision is based only on the materials afforded by the record in this suit.

The issue for determination is whether Nayan Manjari was of unsound mind on the 16th September 1906.

We start with this that Nayan Manjari is admittedly now of unsound mind.

She was found to be of unsound mind in proceedings under Act XXXV of 1858 instituted as far back as November 1906. By his order in those proceedings of the 24th September 1907 the District Judge of the 24-Parganas held that there could be no reasonable doubt that she was of unsound mind and incapable of managing her affairs. The Act, however, contemplates only the question of lunacy or sanity at the time of the inquiry; there is no provision in it that the inquiry shall extend to the ascertainment of the period at which the alleged lunatic first became of unsound mind: *Bodhnarain Singh* v. *Omrao Singh* (2). So the finding of the learned District Judge does not carry us back further than the inquiry, which commenced in November 1906; so notwithstanding the result of that inquiry the burden still rests on the plaintiffs of showing that she was of unsound mind on the 16th of September 1906. The learned Judge was satisfied that this burden was discharged and his estimate of the evidence on this point must necessarily carry great weight with us on appeal. It may, I think, be fairly said here, as it was in the Privy Council decision I have cited, that the burden becomes of a much lighter character when we find that the inquiry which resulted in the adjudication of lunacy supervened within two months of the critical time, the date of the execution of the lease. There is no reason to suppose that this unsoundness of mind could be fairly attributed to anything that occurred in the interval. On the contrary we find the lady's mental condition called in question, though unsuccessfully, as far back as 1892. But more significant of the estimate formed in the family of her previous mental condition is the application on the 14th of July 1906 preferred by her two paternal uncles under Act XXXIV of 1858. This apparently was rejected simply owing to their failure to procure a medical certificate in support of their allegations, a failure

(2) 13 M.I.A. 519; 6 B. L. R. 509; 15 W. R. (P. C.) 1; 2 Sar. P. C. J. 607; 20 E. R. 644.

due, no doubt, to the fact that she was then residing in the house of her maternal uncle, Kuchil Lal Sen, in Muktaram Babu's Street. Kuchil Lal Sen, who had every opportunity of knowing Nayan Manjari's mental condition, has deposed before the Subordinate Judge that in July and September 1906 it was the same as in July and September 1907, and on this the learned Judge relied as he certainly was entitled to do, and I say this, notwithstanding the contention before us, that Kuchil was entrapped into this estatement. In addition to this there is the evidence of Gour Mohun Dey, the brother of the co-widow Kumudini. He deposes to her insanity from 1903. His evidence is undoubtedly open to criticism, and the learned Judge does not expressly refer to it, so that it would be safer not to attach any great weight to it.

The Subordinate Judge was obviously not impressed with the evidence by which it was sought to prove Nayan Manjari's sanity at the date of the lease, and on this I am in full agreement with him. In so saying I do not forget that, in course of the argument before us, we were repeatedly reminded of the part taken by the Registration Clerk, but I attach little or no importance to it. The Sub-Judge, therefore, was (in my opinion) justified in his conclusion that it is clear that in September 1906 Nayan Manjari was of unsound mind and incapable of managing her affairs

But if she was of unsound mind then, it is conceded, in view of the interpretation placed by the Privy Council on the Contract Act, that the lease was void. If our decision were final, this would be sufficient for the disposal of this appeal; but as the case may go further, it is right that I should discuss it on the hypothesis that lunacy on the critical date was not established: *Tarakant Banerjee* v. *Puddomoney Dossee* (3). This, therefore, I will proceed to do, though it must not be supposed that in so doing I feel any doubt as to the Subordinate Judge's conclusion on the question of Nayan Manjari's sanity. Nayan Manjari on the 16th September 1906 was a *pardanashin* illiterate lady, apparently with no knowledge of English, and even if, as I assume for the present purpose, she was not a lunatic, she undoubtedly was of weak intellect. And yet it is to her that the defendant went for his permanent lease, though there was an Administrator *pendente lite*, Mr. Belchambers, and a senior co-widow a co-sharer with Nayan Manjari, as to whose sanity there never had been any question. The evidence further shows that at this time there was a firm of Attorneys acting for Nayan Manjari; still they were not consulted, and the lawyer who is supposed to have represented her in this transaction is Monoj Mohun Bose, a Police Court Pleader. It is clear beyond doubt that this Police Court Pleader in no way protected Nayan Manjari, and did not even take the trouble to ascertain the facts necessary for giving her sound advice, nor did Kuchil in any way look after the lady's interests or give her any effective advice. As he himself says: "the transaction was completed in hot haste," such "hot haste" indeed was there that the lease still contains blanks. The evidence that the document was read or explained to her or its contents or purport understood by her is not worthy of credit, and this omission is all the more serious as the document was in English, a language Nayan Manjari is not shown to have understood. The Subordinate Judge on a consideration of the evidence came to the conclusion that the document was not read over and explained to Nayan Manjari, that she did not know what she was doing, but executed the lease without knowledge of its contents, and that she had no independent advice.

In my opinion this conclusion is justified by the evidence and I agree with it. Even, therefore, if my finding that Nayan Manjari was insane be not accepted, still the transaction is one which cannot stand.

It has, however, been argued that apart from lunacy the transaction would be voidable and not void, and, therefore, it is urged it could not be avoided by any one but Nayan Manjari and in a suit to which her manager was a party. I am not aware of any case in which it has been directly discussed and determined whether such a transaction is void or voidable, but in *Lala*

(3) 10 M. I A. 476 at p. 488, 5 W. R. (P. C.) 63; 1 Suth. P. C. J. 631, 2 Sar. P. C. J. 184, 19 E. R. 1052.

Mahabir Prasad v. *Musammat Taj Begum* (4) Lord Moulton, delivering the judgment of the Privy Council in the case where the bond of a *pardanashin* lady came in question, said: "It follows, therefore, that as against the present appellants it must be taken that the terms of the mortgage-bond were extortionate and that the lady, the mortgagor, did not understand the effect of the deed by reason of its not having been adequately explained to her. The deed is, therefore, void and cannot be enforced against her."

It is argued before us that Lord Moulton's remarks were not directed to the distinction between a deed that was void and one that was voidable, and that, therefore, they must not be read too literally. In the absence of a more searching argument than that addressed to us, I must refrain from expressing any definite opinion on the question whether the deed of a *pardanashin* woman is void or voidable, or whether each case must not depend on its own peculiar circumstances. And I am the more impelled to this course, for, in the view I take and have already expressed, the Receivers are competent plaintiffs even if the lease is not void but voidable. It is sufficient for the purpose of this case to hold, as I do, that the evidence does not satisfy me that the lease on which the defendant relies was explained to the lady or understood by her.

Therefore, the defendant has failed to discharge the burden of proof that lay on him, and the Receivers are entitled to rely on this defect in his proof whether the lease be void or voidable. I do not overlook the argument that if the lease is only voidable, the suit is incompetent in the absence of the manager. It is contended that to avoid the transaction the manager is a necessary party. There is authority in England for the view that the Committee should ordinarily be a party where a transaction is sought to be avoided on the ground of lunacy; but on the hypothesis with which I am now dealing, the lease is impugned on the ground not of the lady's lunacy, but of the inadequate protection of a *pardanashin* lady. Moreover, even if a lunatic's manager can sue, still there is no established rule of practice in this High Court that requires suits relating to the lunatic's property to be brought by him, and not by the lunatic.

On the contrary the Code of Civil Procedure contemplates suits by persons of unsound mind, whether so adjudged or not (see Order XXXII, rule 15, and Appendix A, "Descriptions of parties in particular cases"). It is true that a person so incapacitated has to sue by a next friend; but a next friend is not a party, and the absence of a next friend in this suit is immaterial. In any case the objection is one of pure technicality and it cannot be suggested that the absence of the manager has affected the merits of the case. And section 99 of the Code provides that no decree shall be reversed or modified for error or irregularity not affecting the merits or jurisdiction. To sum up, then, this appears to me to be a peculiarly gross case of overreaching a lady who was in a special degree in need of advice and protection. I have already expressed my opinion that she was of unsound mind at the date of the lease. If I am wrong as to that, still it can hardly be denied that her mind was seriously unbalanced. In this transaction, she received no advice and no protection, and in place of her ordinary Attorneys, an uninformed Police Court Pleader professed to act for her. No explanation is forthcoming why the defendant should have gone to her for the lease, and not to the Administrator *pendente lite* or the senior and apparently sane co-widow, and in the absence of explanation the course pursued is eminently calculated to excite suspicion. And over and above all this the transaction was one of grave and obvious improvidence.

I, therefore, hold that the lease on which the defendant relies has created no title in him which bars the plaintiffs' right to possession, though they only sue as Receivers appointed by the Court. It was somewhat feebly suggested in the course of the appellant's opening that certain Small Cause Court proceedings estopped the plaintiffs from denying that the defendant was a monthly tenant and so entitled to notice to quit. But the defendant declines to be treated as a monthly

(4) 23 Ind. Cas. 642; 27 M. L. J. 13; 1 L. W. 959; 19 C. W. N. 162.

tenant, and when the Vakil for the respondent proposed to deal with this point in the course of his argument, he was stopped by his opponent, who said he did not press it. I, therefore, need not deal further with this plainly unsustainable plea. No other argument than those with which I have dealt was advanced as affording an answer to the plaintiffs' claim for possession.

The result then is that the plaintiffs have (in my opinion) been rightly awarded a decree for possession. They are also entitled to the mesne profits which have been decreed, subject to a small reduction of Rs. 63, the sum accepted by both parties as representing the brief period during which mesne profits would not be payable. The plaintiffs had filed a cross-objection as to the amount awarded in respect of mesne profits, but they were out of time, and were abandoned without our being asked to excuse the delay. The only topic that remains for consideration is the direction as to the new rooms alleged to have been constructed by the defendant. This has been left for determination in execution. But this is a survival of a procedure frequently condemned and no longer countenanced. It was a device commonly employed for the purpose of showing a more satisfactory return of work, but is not now sanctioned. The question involved is one that must be decided in the suit before a decree is passed, and both sides agree to our sending down an issue for the purpose of arriving at a final decision. We, therefore, send down the following issues: —What structures were erected by defendant No. 2 on the land in suit prior to the 15th of November 1908? A description should be given of the structures so erected, distinguishing such of the structures as come within clause 10 of the lease. Both parties will be at liberty to adduce evidence on this point, and the return to this Court should be made in four months. When the return is made, we will dispose of the whole case and will deal with the question of interest on the Government papers in respect of which a claim is made by the appellants.

N. R. CHATTERJEA, J.—I agree.

Case remanded.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 192 OF 1912.

August 17, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

Babu LOKENATH SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

Babu DHWAKESHWAR PROSAD NARAYAN SINGH—PLAINTIFF—RESPONDENT.

Adverse possession—Bengal Land Registration Act (VII of 1876), s. 78—Registration of name, whether proves possession—Possession of co-tenant, when becomes adverse—Character of evidence required to prove it—Assertion of hostile title—Knowledge of co-tenant out of possession—Suit for partition—Court-fee—Actual or constructive possession not proved—Plaintiff not entitled to maintain suit—Proper remedy—Leave to amend plaint—Costs.

The registration of the name of a person, under the Bengal Land Registration Act, is some evidence of possession, but does not necessarily prove that the person who has been able to get his name substituted in the place of that of his vendor is in possession of any share of the estate.

To enable one of several co-tenants to acquire title by adverse possession as against the others, his possession must be of such an actual, open, notorious, exclusive and hostile character as to amount to an ouster of the other co-tenants, that is, must have been such as to render him liable to an action of ejectment at the suit of the co-tenants.

The evidence to show adverse possession by one co-tenant must be much clearer than between strangers to the title, and the hostile intent of the co-tenant in possession must be shown by unequivocal conduct.

The ouster of the other co-tenants, in order to render the possession adverse, need not be by violent or intimidating expulsion or repulsion; nor need notice of the adverse holding be actually brought home to the other co-tenants by personal or formal communication; but it is sufficient, if the contrary is not proved, that the circumstances show that such knowledge may reasonably be presumed.

A person who has failed to prove that he had possession, actual or constructive of any share of the disputed property, is not entitled to maintain a suit for partition. His remedy is by a suit for joint possession and partition and he may be allowed to amend his plaint on terms as to payment of costs. On the plaint in a suit so framed, Court-fees must be paid *ad valorem*.

Appeal against the decree of the Subordinate Judge, second Court, Gaya, dated the 11th June 1912.

Dr. *Rash Behari Ghose*, Babus *Jogesh Chandra Ray* and *Baktim Chandra Mukherjee*, for the Appellants.

Mr. *S.P. Sinha*, Babus *Umakali Mukherjee*, *Hari Bhusan Mukherjee*, *Gonesh Dutt Singh* and *Ambicapada Choudhuri*, for the Respondents.

LOKENATH SINGH *v.* DHWARESHWAR PROSAD.

JUDGMENT.—This appeal is directed against the preliminary decree in a suit for partition of joint property. The subject matter of the litigation is village Pasraila, an estate which bears No. 2562 on the Revenue Rolls of the Collector of Gaya. The case of the plaintiff is that one Gomti Koer had an one-anna share in this estate in respect whereof she was registered under the Land Registration Act, that on the 12th January 1910 she conveyed her interest to him for a consideration of Rs. 3,500, that he has got his name substituted in the place of that of his vendor in the register, and that he has been in possession since the date of his purchase. He consequently seeks partition of the estate, so that separate lands may be allotted to him in respect of his share. The defendants resist the claim on the ground, amongst others, that neither the plaintiff nor his vendor had any title to the property and that, in any view, the plaintiff cannot sue for partition as he was not in possession of his alleged share at the date of the institution of the suit. On these pleadings, six issues were framed of which the first two raised the question, whether the plaintiff has possession of the share sought to be partitioned and whether the suit was maintainable. The other issues raised the questions of title and limitation. The trial was not restricted to any special issue, so far as we can gather from the order sheet. The Subordinate Judge, however, has dealt with the case in his judgment as if only one issue had been raisod, namely, whether the plaintiff was in possession of an one-anna share. On this question he has found in favour of the plaintiff and has made a preliminary decree for partition according to the shares stated in the plaint. The defendants have appealed to this Court, and have contended that, on the evidence, it should have been held that the plaintiff was not in possession of his alleged share, and the suit for partition should consequently have been dismissed. The first point for investigation is, whether the plaintiff was, at the date of the suit, in possession of the share of the estate claimed by him.

The oral evidence adduced by the plaintiff to prove his possession is extremely unsatisfactory. The first witness who pledged his oath in support of the allegation that the plaintiff was in possession of the share purchased from Gomti Koer, had no concern with the village and was a casual visitor, though he gradually committed himself to assertions that he had seen the collections from tenants and had even supervised them. The plaintiff does not, however, produce any collection-papers, and the tenants from whom rent is said to have been collected have come forward on the side of the defendants to deny that they ever paid rent to the plaintiff. The second witness who alleged that he actually collected rent from the tenants named by him is equally unreliable. He does not produce collection-papers, which, if he is to be believed, were actually prepared. He admits that he was imprisoned in a criminal case. The third and last witness is a solitary tenant who alleges that he and others pay rent to the plaintiff. This evidence in its sum-total is not very convincing and is valueless when contrasted with the evidence on the side of the defendants. Five of the tenants mentioned by the witnesses of the plaintiff depose that they have never paid rent to the plaintiff. They are supported by the *patwari*, who proves collection of the entire rent on behalf of the defendants from the tenants and produces collection-papers to corroborate his story. The genuineness of these papers does not appear to have been seriously contested in the Court below. The oral evidence, as a whole, negatives the assertion that the plaintiff was in possession of a share of the estate. The conclusion derivable from the oral evidence accords with the indication furnished by the fact of two criminal cases. The purchase by the plaintiff is dated the 12th January 1910, and an order by the Revenue Authorities was made on the 21st November 1910 to substitute his name in the place of that of his vendor. But dispute arose at once between the plaintiff and the defendants, with the result that proceedings were instituted under section 144 of the Criminal Procedure Code on the 23rd December 1910. On the 25th March 1911, the Magistrate held that the *semindari Kachary* to which the dispute related was in the possession of the defendants. About the same time, one of the men under the plaintiff instituted a case against the present defendants under sections 147 and 379 of the Indian Penal Code, arising out of a dispute as to possession of some *khud-kasht* land in

the village. On the 24th March 1911, the Magistrate held that there was great doubt whether the master of the complainant had any land in the village, and refused to take steps against the accused. The present suit, it is significant, was instituted immediately afterwards on the 31st May 1911.

On behalf of the plaintiff, it has been strenuously argued, however, that the possession of the plaintiff is proved by the circumstance that his name was registered under the Land Registration Act. In support of this position, reliance has been placed upon the cases of *Ram Pershad Singh* v. *Lukhpati Koer* (1) and *Shyama Sundari Dessya* v. *Mahomed Zarip* (2). It may be conceded that the registration of the name of a person under the Land Registration Act is some evidence of possession, but the weight to be attached to this fact must depend upon the circumstances of each case. In the present instance, the name of the vendor of the plaintiff was on the register, and consequently, under section 50 of Act VII of 1876, notice would issue to the transferor alone when the plaintiff applied to have his own name substituted. There is nothing to show that the defendants had notice of the application by the plaintiff or opportunity to contest it. We know, on the other hand, that when the plaintiff attempted to obtain a footing in the village purchased by him, the defendants offered resistance, leading to criminal proceedings which terminated in their favour. The mere fact that if the plaintiff were to sue the tenants for rent they might have no defence to the claim in view of the provisions of section 78 of the Land Registration Act and section 60 of the Bengal Tenancy Act, does not show that the plaintiff had possession at the date of institution of the suit by receipt of rent from the tenants. We hold, accordingly, that the fact that the plaintiff has been able to get his name substituted in the place of that of his vendor does not necessarily show that he is in possession of any share of the estate.

It has finally been argued on behalf of the plaintiff that, inasmuch as he is a co-sharer with the defendants in respect of the property in suit, he must be deemed in possession through the latter, because there can *prima facie* be no adverse possession between co-tenants. In support of this proposition, reference has been made to the cases of *Baroda Sundari Deby* v. *Annoda Sundari Deby* (3), *Ittappan* v. *Mana Vikrama* (4), *Ujalbi Bibee* v. *Umakanta Karmokar* (5), *Jogendra Nath Rai* v. *Baldeo Das* (6) and *Shashi Bhushan* v. *Jatindra Nath Roy* (7). This position has been controverted on behalf of the defendants and it has been contended that there may be adverse possession by one tenant-in-common against his co-tenants, if there is exclusion or ouster, and that whether there has been exclusion or ouster in any concrete case must be determined in view of the relationship of the parties, their possession, the mode of life in the particular community to which they belong, the character of the property and other circumstances of a like nature. In support of this proposition reliance has been placed upon the cases of *Bandacharya* v. *Shrinivasa Chariya* (8), *Gangadhar* v. *Parashram* (9), *Amrita Ranji* v. *Shridhar Narayan* (10), *Ayenessa Bibi* v. *Sheikh Isuf* (11), *Doe dem Fisher and Taylor* v. *Prosser* (12) and *Culley* v. *Doe dem Taylerson* (13). We are of opinion that the proposition formulated on behalf of the plaintiff is too widely stated and is not supported by the cases cited.

Every co-tenant has the right to enter into and occupy the common property and every part thereof, provided that in so doing he does not exclude his fellow-tenants or otherwise deny to them some right to which they are entitled as co-tenants; and they, on their part, may safely assume, until something occurs of which they must take notice and which indicates the contrary, that the possession taken and held by him is held as a co-tenant and is in law the possession of all the co-tenants, and not adverse to any of them. It cannot be questioned, however, that one co-tenant may

(1) 30 C. 231; 7 C. W. N. 162; 5 Bom. L. R. 103; 30 I. A. 1.

(2) 3 Ind. Cas. 693; 9 C. L. J. 91 at p. 94.

(3) 3 C. W. N. 774.

(4) 21 M. 153; 8 M. L. J. 92.

(5) 9 C. W. N. 32; 31 C. 970.

(6) 6 C. L. J. 735; 12 C. W. N. 127; 35 C. 961.

(7) 10 Ind. Cas. 483; 38 C. 681; 15 C. L. J. 443.

(8) 5 Bom. L. R. 742.

(9) 7 Bom. L. R. 252; 29 B. 300.

(10) 11 Bom. L. R. 51; 33 B. 317.

(11) 14 Ind. Cas. 722; 16 C. W. N. 849.

(12) 1 Cowper 217; 98 E. R. 1052.

(13) 14 A. & E. 1008 at p. 1014; 3 P. & D. 539; 9 L. J. (N. S.) Q. B. 288; 52 R. R. 566; 113 E. R. 647.

ousst the others and set up an exclusive right of ownership in himself, and an open, notorious and hostile possession of this character for the statutory period will ripen into title as against the co-tenants who were ousted. Thus although, as a general rule, the possession of one co-tenant is not deemed adverse to the other co-tenants, the existence of the relation of co-tenancy does not preclude one co-tenant from establishing an adverse possession in fact as against the other co-tenants, and though the co-tenant enters in the first instance without claiming adversely, his possession afterwards may become adverse. In order to render the possession of one co-tenant adverse to the others, not only must the occupancy be under an exclusive claim of ownership, in denial of the rights of the other co-tenants, but such occupancy must have been made known to the other co-tenants, either by express notice or by such open and notorious acts as must have brought home to the other co-tenants knowledge of the denial of their rights. The same principle is involved in the familiar statement that to enable one of several co-tenants to acquire title by adverse possession as against the others, his possession must be of such an actual, open, notorious, exclusive and hostile character as to amount to an ouster of the other co-tenants, that is, must have been such as to render him liable to an action of ejectment at the suit of the co-tenants. No comprehensive formula can be framed to test whether the possession of a co-tenant in a particular case is adverse to the other co-tenants. But it has been stated that the evidence to show adverse possession by one co-tenant must be much clearer than between strangers to the title, and the hostile intent of the co-tenant in possession must be shown by unequivocal conduct. It is indisputable that acts which might properly be held to show adverse possessin as between strangers, do not necessarily have such effect as between tenants-in-common; acts of ownership by one co-tenant may not in themselves amount to the disseisin of the other co-tenants, and may, indeed, be so explained as to show a consistency with the joint title. But the ouster of the other co-tenants, in order to render the possession adverse, need not be by violent or intimidating expulsion or repulsion; nor need notice of the adverse holding be actually brought home to the other co-tenants by personal or formal communication; but it is sufficient if the contrary is not proved, that the circumstances show that such knowledge may reasonably be presumed. From this point of view, it has been maintained that sole possession by a co-tenant becomes adverse to his fellow-tenants by his repudiation or disavowal of the relation of co-tenancy between them and any act or conduct signifying his intention to hold, occupy and enjoy the premises exclusively and of which the tenant out of possession has knowledge or of which he has sufficient information to put him upon inquiry, amounts to an ouster of the co-tenants; but what is essential is that the overt acts which constitute a definite and continuous assertion of an adverse right must be of an unequivocal character, clearly indicating an assertion of ownership of the premises to the exclusion of the right of the other co-tenants. No useful purpose would be served by an elaborate analysis and examination of the various cases in which these principles have been applied; but reference may be made to the more important amongst them, *Doe d. Fisher* v. *Prosser* (12), *Wynne* v. *Styan* (14), *Holt* v. *Horrocks* (15), *Culley* v. *Doe dem Taylerson* (13), *Thornton* v. *France* (16), *Doe d. Draper* v. *Lawley* (17), *Balling* v. *Hobday*(18), *Sanders* v. *Sanders*(19), *Burroughs* v. *M'Creight* (20), *Murphy* v. *Murphy* (21), *Doe d. Hellings* v. *Bird* (22), *Townsend's case* (23), *Doe d. Read* v. *Taylor*(24), *Hovenden* v. *Annesley* (25), *Thomas* v. *Thomas* (26), *Correa* v. *Appuhamy* (27). Among recent cases in Indian Courts, reference may, in addition to the cases already mentioned, be made to *Amrita Ranji* v. *Shridhar Narayan* (10), *Bhaiji*

(14) 2 Phil. 333, 41 E. R. 939; 78 R. R. 96.
(15) 1 C & K. 566.
(16) (1897) 2 Q. B. 143, 66 L. J. Q. B 705; 77 L. T. 38; 46 W. R 56
(17) 13 Q B 954; 116 E. R 1527.
(18) 31 W. R. 9
(19) 19 Ch. D. 373, 51 L. J. Ch 276, 45 L. T. 637; 30 W. R 280.
(20) 1 J. & L 290, 7 Ir Eq. R. 49.
(21) 15 Ir. C. L. R 205.
(22) 11 East 49, 103 E. R 922.
(23) 4 Leon. 52, 74 E. R 724.
(24) 5 B & Ad. 575; 2 N. & M. 503; 3 L. J. K. B. 67, 110 E R. 903
(25) 2 Sch. & Lef. 607; 9 R. R. 119.
(26) 2 K. & J. 79; 25 L. J. Ch. 159, 1 Jur. (N. S.) 1160; 4 W R. 135; 69 E R. 701.
(27) (1912) A C. 280; 81 L. J. P. C. 151; 105 L. T. 886, 10 S. E. C. (N S.) 61,

Shamrao v. *Mohamed Amin* (28), *Jagjivandas* v. *Bai Amba* (29), *Tajuddin Sahib* v. *Ali Ahmad Sahib* (30), *Sellam* v. *Chinnammal* (31), *Chiranjimal* v. *Nathia* (32), *Parbati* v. *Ram Prasad* (33), *Har Charan* v. *Binda* (34), *Mihin Lal* v. *Badri Prasad* (35), *Raj Bahadur* v. *Bharat Singh* (36), *Muhammad Ishaq* v. *Nathu* (37), *Faizuddin* v. *Rajee* (38).

Tested in the light of these principles, the contention of the plaintiff that even if the defendants be found to be in exclusive possession of the property, their possession must be deemed to be on his behalf in respect of his share, proves wholly groundless.

The case for the plaintiff is that he was in possession of his share. That case has completely failed. The possession of his share by the defendants (assuming that he has acquired a title thereto) is presumably adverse to him; when the specific case made by him has failed, he cannot turn round and contend that the defendants were in occupation on his behalf and for his benefit. He does not belong to the same family as the defendants, and no concievable hypothesis has been suggested in support of the view that the possession of the defendants was permissive, there was no fiduciary or *quasi*-fiduciary relation between the parties. We hold, accordingly, that the plaintiff has failed to prove that he had possession, actual or constructive, of any share of the disputed property. He is consequently not entitled to maintain a suit for partition: *Bidhata Roy* v. *Ram Charitar Roy* (39). In that case it was pointed out that the fundamental rule is that partition is not a substitute for ejectment, because partition implies an existing joint possession and enjoyment, to be converted into possession in severalty. The remedy of the plaintiff is by a suit for joint possession and partition, and on the plaint in a suit so framed, Court-fees must be paid *ad valorem*.

(28) 15 Ind. Cas. 500; 14 Bom. L. R. 314.
(29) 25 B. 362; 3 Bom L. R. 47.
(30) 18 Ind. Cas. 358, (1913) M. W. N. 381.
(31) 24 M. 441.
(32) 4 A L. J. 473; A. W. N. (1907) 195.
(33) 5 A L. J. 511; A. W. N. (1908) 239.
(34) 5 Ind. Cas. 559; 32 A. 389; 7 A. L. J. 296
(35) 27 A. 436; A. W. N. (1905) 36, 2 A. L. J. 107.
(36) 27 A. 348; A. W. N. (1905) 15; 2 A. L. J. 110.
(37) 16 Ind. Cas. 342, 10 A. L. J. 59.
(38) 20 Ind. Cas. 584.
(39) 6 C. L. J. 651; 12 C. W. N. 37; 3 M. L. T. 33.

The plaintiff has, as a last resort, prayed that if the Court should hold that he was not in possession at the date of the suit, he may be permitted to amend the plaint. This application, as we have already intimated to the parties, may be granted but only on terms as to payment of costs.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside, and the case remitted to him. The plaintiff is allowed leave to amend the plaint according to his prayer in the petition presented to this Court, copy whereof will be forwarded to the Court below. But the plaintiff will have this indulgence only on condition that he deposits in the Court below, to the credit of the defendants, the costs incurred by them up to this stage in both Courts. The deposit must be made within one month after the arrival of the record in the Court below has been notified to the plaintiff. If the deposit is not so made, the suit will stand dismissed with costs throughout. If the deposit is made, the plaint will be amended, and the defendants will be allowed to file a fresh written statement, the issues will also be re-settled, and the suit will then be re-tried on fresh evidence to be adduced by both parties.

As regards the amount of costs allowed by the lower Court, we observe that the hearing fee has been calculated on the basis of the value of the entire estate. The controversy between the parties, however, related really to an one-anna share, and the hearing fee will be reduced accordingly. The hearing fee in this Court is assessed at twenty gold *mohurs*. Although, ordinarily in a suit for partition, pure and simple, the parties have to bear their own costs of the suit up to the stage of the preliminary decree, the plaintiff must, in this case, pay the costs of the defendants, who have successfully contested his claim for partition. *Nawab Dildar Ali Khan* v. *Bhowani Sahai Singh* (40), *Satya Kumar* v. *Satya Kripal* (41), *Landell* v. *Baker* (42).

The amount of costs payable by the plaintiff to the defendants under our order will be specified in the decree of this Court.

Appeal allowed.

(40) 5 C. L J. 642.
(41) 3 Ind. Cas. 247; 10 C. L. J. 503.
(42) 6 Eq. 268.

BOODHAN GOPE *v.* SAIRA.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 2938 OF 1912.
May 29, 1914.
Present:—Mr. Justice Coxe and
Mr. Justice Walmsley.
BOODHAN GOPE AND OTHERS—DEFENDANTS—APPELLANTS
versus
Musammat SAIRA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Evidence—Land revenue reports, whether admissible in evidence—Judicial notice.

A Court is not entitled to take judicial notice of land revenue reports, and they cannot be admitted in evidence unless they are proved satisfactorily.

Second appeal against the decree of the District Judge, Patna, dated the 6th June 1912, modifying that of the Munsif, Behar, dated the 20th December 1911.

Babu *Harihar Prasad Singh*, for the Appellants.

Moulvi *Muhammad Mustafa Khan*, for the Respondents.

JUDGMENT.—The only question which has been seriously argued in this appeal is, whether the lower Appellate Court ought to have allowed rent to the plaintiffs for the *rabi* crop of 1316. The Munsif found that the plaintiffs failed to prove that there was any *rabi* crop that year. The Judge assessed three maunds a *bigha*. The only reason he gave for this assessment was that the finding of the Munsif that there was no *rabi* crop was not in accordance with the land revenue reports of that year. But the land revenue reports were not proved, and there is nothing to show that the Court was entitled to take judicial notice of them. The lower Appellate Court did not rely on any other evidence, and as the land revenue reports cannot be accepted, the decision on this point must be set aside.

The appeal also relates to the finding of the Judge with regard to the payment of rent for 1316 and 1317. But this point has not been strenuously pressed and is evidently concluded by the finding of fact.

The result is that the appeal will be allowed to this extent that the sum of Rs. 67-4-9 will be deducted from the amount decreed. We make no order as to costs.

Appeal partly allowed.

KALI KUMAR ROY *v.* KAILASH NATH ROY.

CALCUTTA HIGH COURT.
LETTERS PATENT APPEAL No. 49 OF 1913.
March 18, 1914.
Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice D. Chatterjee.
KALI KUMAR ROY CHOWDHURY AND OTHERS—DEFENDANTS—APPELLANTS
versus
KAILASH NATH ROY CHOWDHURY—PLAINTIFF—RESPONDENT.

Abwab, *meaning of—Suit for rent—*Zilla kharach, *provision for payment of—Regulation V of* 1812, *s.* 3—*Regulation VIII of* 1793, *s.* 54.

Abwab means an arbitrary and indefinite imposition levied by the landlords on their tenants. An item which forms part of the consideration for which the lease is granted is not an *abwab*.

Where a lease executed prior to the passing of Regulation VIII of 1793, which forbade imposition of *abwabs*, specifically provided for the payment of *zilla kharach*:

Held, that as this was a part of the rent agreed upon, the landlord was entitled to recover it under section 3 of Regulation V of 1812.

Appeal against the following judgment of Mr. Justice Chapman, dated 17th March 1913, in Second Civil Appeal No. 2987 of 1910.

CHAPMAN, J.—This appeal arises out of a suit for rent. The appellants contend that the learned Subordinate Judge should not have allowed the plaintiff a certain sum claimed by him on account of *zilla kharach*. The contention is that this amount should have been disallowed on the ground that it is an *abwab*. The relations between the plaintiff and the defendants have to be determined with reference to a permanent lease dating from the year 1783. It was lease of jungle land not cultivated at the time of the lease. From the terms it is clear that the parties contemplated that three years at least would expire before the land became of full value. The agreement was that the rental for the first year should be Rs. 12, for the second year Rs. 18 and for the third year Rs. 22-12; and that after the lapse of three years from the time the land becomes fit for full value, the tenant would pay *zilla kharach* at the rate of 2 annas 7 *karas* a rupee.

Now one of the first questions which a Court asks itself in determining whether an item in a lease is *abwab* or not is,

was it an imposition subsequent to the establishment of the *asul* or original standard rent; or, to put it in other words, did it form part of the consideration for which the land was leased to the tenant? It makes no difference that an objectionable name such as *silla kharach* is used to describe the item. The leaning of this Court has been to treat such items as part of the consideration, unless they are provided for in a perfectly distinct clause in the *kabuliat* or lease.

Now it seems to me, having regard to all these considerations, that this item was part of the consideration for which the land was leased and, therefore, was not an *abwab*. The appeal is dismissed with costs.

The respondent has mentioned that the learned Munsif was in error in saying that Rs. 15-8-6 had been paid into Court by the defendants and in directing that that amount should be credited. This is a matter which I cannot conveniently deal with in second appeal. The matter may be dealt with by the Munsif on an application for review.

Babu *Girija Prasanna Roy Chowdhury*, for the Appellant.

Babu *Surendra Nath Guha*, for the Respondent.

JUDGMENT.

JENKINS, C. J.—In the absence of any indication as to what *silla kharach* includes, I am doubtful as to what my view would have been, had the case come before me in the first instance and had I not enjoyed the advantage of hearing the opinion of four other Judges by whom the case has been heard. I am influenced by the findings of the lower Appellate Court and by the concurrence of opinion of the Munsif, the Subordinate Judge, Mr. Justice Chapman and my learned colleague, and in these circumstances I think I ought to express my agreement with what has been decided.

The appeal is dismissed with costs.

D. CHATTERJEE, J.—In this case the *zemindar* claimed a certain amount as *silla kharach*. The lower Courts have held that this amount was not an *abwab*, but was a part of the rent as agreed upon between the landlord and the tenant under the lease that was granted to the latter in 1783.

It is contended before us that the Courts below ought to have found that this was an illegal *abwab*, and, therefore, not recoverable from the defendants.

The lease was executed in this case ten years before the Permanent Settlement Regulations. Regulation VIII of 1793 in section 54 provided that the impositions upon the *raiyats* under the denomination of *abwab*, *mathat* and other appellations were to be consolidated with the *asal jama*, and no new *abwabs* were to be imposed. This was, however, in respect of certain impositions then known as *abwabs* and realized arbitrarily and indefinitely from the *raiyats*. Subsequently in Regulation V of 1812 it was provided that the proprietors of land were entitled to grant leases on any terms convenient to both parties, provided that they did not make any imposition of arbitrary and indefinite cesses. Section 3 of that Regulation further said that "the Courts shall maintain and give effect to the definite clauses of engagments contracted between the parties, or in other words, enforce payment of such sums as may have been specifically agreed upon between them." I think that the amount claimed in this case was specifically agreed upon between the landlord and the tenant, and the landlord was, therefore, entitled to recover it.

In this view of the case I think the judgment of the learned Judge of this Court ought to be maintained.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 497 OF 1910.

June 15, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

F. F. CHRISTIAN—PLAINTIFF—APPELLANT

versus

TEKAITNI NARBADA KOERI AND OTHERS—DEFENDANTS—RESPONDENTS.

Mining lease—Grant—Maintenance grant for life without any provision as to opening mines—Grantee, whether has power to grant mining lease—Construction of lease—Conduct of parties—Mine, when open—Intention—Damages, measure of.

Where a deed of grant is one for maintenance for life of the grantee and does not contain any express provision which authorises the grantee to open new mines and use the minerals thereof, the grantee has no right to grant a mining lease for the purpose of opening and working new mines.

CHRISTIAN v. TEKAITNI NARBADA KOERI.

Only in the case of ancient grants whose terms are ambiguous, reliance may be placed on the conduct of the parties to ascertain the intention of the grantor.

Attorney-General v. *Drummond*, (1842) 1 Dr. & War. 353 at p. 368, 58 R. R. 292, *Drummond* v. *Attorney-General*, 2 H. L. C. 837 at pp. 861, 863; 14 Jur. 137; 9 E. R. 1312; 81 R. R. 433, referred to.

"Whether a mine is open or not," is a question of intention. A mine is said to be open when it has been devoted, by the person lawfully entitled to do so, to the purpose of making a profit by the working and sale of the minerals therein

Chaytor v. *Trotter*, 87 L. T. 33; *Elias* v. *Griffith*, 8 Ch. D. 521; 38 L. T. 871; 26 W. R. 869, referred to.

The measure of damages is the value of the minerals wrongfully abstracted as at the date of abstraction *minus* the expenditure of converting them into chattel and of carrying them to the pit's mouth.

Trotter v. *Maclean*, 13 Ch D. 574 at p. 586, 42 L. T. 118; 28 W. R. 244; 49 L. J. Ch. 256, *Prince Mahomed Bakhtyar Shah* v. *Rani Dhojawati*, 2 C. L. J. 20; *Livingstone* v. *Rawyards Coal Co.*, (1880) 5 A. C. 25; 42 L. T. 334; 28 W. R. 357; 49 J. P. 392, referred to.

Appeal against the decree of the Subordinate Judge of Hazaribagh, dated the 19th August 1910.

Babu *Mahendra Nath Ray*, Mr. *G B. Macnair*, Babus *Tarakeswar Pal Chowdhury* and *Ambicapada Chowdhury*, for the Appellant.

Dr. *Rash Behary Ghose* and Babu *Kshetra Mohan Sen*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff in a suit for declaration that the first four defendants have no right to open new mines and to raise minerals therefrom on the disputed property, for a perpetual injunction to restrain them from further working three new mines which they have opened and from opening and working new mines, and for incidental reliefs. The case for the plaintiff may be briefly stated. One Paresnath Singh, proprietor of Taluka Gadi Domchanch in the District of Hazaribagh, left two sons, Churaman Singh and Moharaj Singh. After the death of Paresnath Singh, Churaman Singh succeeded to the property; after his death, it passed to his son, Tahalnarain Singh, on whose death it vested in his brother, Moharaj Singh. On the 6th December 1894, Moharaj Singh executed a deed of maintenance grant in favour of Narbada Kumari, junior widow of his brother Churaman Singh. The controversy in this litigation turns upon the true construction of this deed; the plaintiff maintains that the grantor did not part with his right to the minerals by this document, while the defendants contend that, as there was no express reservation of subsoil rights, the generality of the terms of the instrument shows that the mineral rights vested in the grantee. The plaintiff has acquired the right, title and interest of the proprietor of the estate, *first*, by a conditional mortgage from him, dated the 7th June 1901, and, *secondly*, by purchase at a sale in execution of a decree against him, held on the 1st March 1904 and confirmed on the 22nd July following. The plaintiff also purchased on the 28th July 1907 one-fourth share of the interest of certain mortgagees who were in possession of the property. The plaintiff may, consequently, be treated as proprietor in partial possession of the property. Of the nine defendants to the suit, the first is Narbada Kumari, the widow of Churaman Singh. The next three defendants are a family of Mahatos, who obtained a mining lease from the two widows of Churaman Singh on the 25th November 1906. The remaining defendants are the mortgagees, a fraction of whose interest has been purchased by the plaintiff. The gist of the claim of the plaintiff is that although Narbada Kumari had no authority, under the terms of the maintenance grant, to give a lease of mining rights, she did so on the 25th November 1906, and that the lessee defendants have wrongfully opened three new mines in village Raidih and have carried away mica worth Rs. 25,000. On the 3rd February 1908, the plaintiff commenced this action for declaration of title, for injunction and for damages. The first four defendants resisted the claim substantially on two grounds; namely, *first*, that the grantee under the maintenance grant was vested with subsoil rights and was competent to grant mining leases; and, *secondly*, that the three mines, to which exception is specifically taken, were not new mines, but had been opened and worked before the maintenance grant was made. The Subordinate Judge has, upon the second ground of defence, overruled the contention of the defendants, but, upon the first ground, he has decided in their favour, with the result that he has dismissed the suit. The plaintiff has appealed to this Court and has contended that the Subordinate Judge has taken an

erroneous view of the legal effect of the maintenance grant of the 6th December 1894. This has been controverted on behalf of the defendants, who have, in their turn, attacked the conclusion of the Court below that the three mines mentioned in the plaint were new mines opened by them after they had taken the mining lease of the 25th November 1906. Two questions, consequently, emerge for consideration, namely, *first*, did the mineral rights continue in the proprietor, notwithstanding the maintenance grant of the 6th December 1894; and, *secondly*, were the three disputed mines in village Raidih opened before the maintenance grant was made on the 6th December 1894 ?

As regards the *first* question, it is to be observed that the deed recites that, as according to the usage of the family and the country, the grantor had taken possession of the estate of the last full owner, provision had to be made for his mothers, so that they might spend their lives respectably, comfortably and with dignity in the accustomed manner. The grantor then states, by way of apology as it were, that he wished to give the widows more properties than he actually did, but as the estate was encumbered, he could not do so. Then follows this clause : "I give the under-mentioned properties only to the said Tikaitni Narbada Kumari for her maintenance, so that she may hold possession and occupation thereof and appropriate the produce thereof independently until her death .... She shall have full right and power to hold possession and make collection in the undermentioned properties during her life-time as the proprietrix thereof. After her death, the aforesaid properties shall, without any dispute therein, revert to me or my heirs." A provision is added to the effect that the grantee shall pay to the grantor Rs. 19 annually for revenue and such cesses as might be assessed according to law. The deed concludes with the statement that the grantor had, of his free will and accord, granted the *khoreposh sanad* as *pattah* at a fixed annual rent, that it might be of use when required. There can be no room for controversy that the terms in the body of this document, as set out above, do not vest the mineral rights in the grantee. But it is argued that the specification of the properties given in the schedule is conclusive in favour of the defendants. That specification is in these terms :—"Entire sixteen annas of each of the *Mouzahs* Raidih and Kushana together with all their limits and boundaries, and all sources of income of every kind appertaining to the said *mouzahs* for the realization, and appropriation and settlement of which the said proprietor has and can have the power, without the exception of anything and any right, together with the *khudkasht* land called Dakkhingwah below the Sumadrahan, situate in *khas* Gadi Domchanch, the boundaries whereof are given below, and half the income from forest collections from *bankar* (forest right), price of wood. Godi Domchanch, Pergunnah Kharagdiha, Thana Kodarama, Sub-Registry Giridhi, District Registry and Collectorate Hazaribagh." Then the boundaries of the *khudkasht* lands mentioned are described. Finally, the nature of the deed is stated to be "*pattah* of *khoreposh* grant for life by way of *sanad*, amount of the annual rent which the grantee has agreed to pay to the grantor is Rs. 19." Stress is laid on behalf of the defendants on the words of the schedule which describe the property granted as all sources of income of every kind appertaining to the villages for the realization, appropriation, and settlement of which the proprietor has and can have the power, without the exception of anything and any right. It is contended with reference to these words that they are of the widest possible generality, and sufficient to divest the proprietor of subsoil rights in the property. We are not prepared to accept this contention as well-founded. Section 108 of the Transfer of Property Act, which defines the rights and liabilities of lessor and lessee, provides in clause (*o*) that the lessee must not work mines or quarries not open when the lease was granted. This is, no doubt, qualified by the introductory words of the section, namely, "in the absence of a contract or local usage to the contrary." No question of local usage arises in the case before us. The only point is, whether there is a contract to the contrary, that is, a contract that the lessee may work mines or quarries not open when the lease was granted. No such contract is plainly contained in the body of the instrument, and we are not prepared to hold that such a contract is embodied by implica-

tion in the specification of the properties in the schedule, which would, if the contention of the defendants were accepted, enlarge the scope of the grant as made in the body of the deed itself. The position, consequently, is hat there is no express provision in the instrument by which the lessee is authorised to work mines or quarries not open when the lease was granted. There are, on the other hand, weighty reasons against the adoption of the view that the grantor intended to vest the grantee with authority to open and work new mines. The grant was only for life of the grantee for the purposes of her maintenance. It is improbable that the grantor would authorise the grantee to enjoy a right the value and extent of which could not possibly be ascertained at the time. The deed further stated that, on the death of the grantee, the property would revert to the grantor or his heirs: the grantor could not have intended that the grantee might open out mines and take away the minerals, possibly with the result that when the property would revert to the grantor, it might have become wholly valueless. It must also be remembered that if it be held that the grantor intended to vest the grantee with authority to open and work new mines, it would imply that the grantee had authority to open mines, whatever the kind of mineral might be, whether it was mica, coal, iron, or any of the precious metals. We feel no doubt that the grantor did not intend to vest in the grantee the right to open and work new mines, and that the general words which occur in the description of the villages named in the schedule, apply only to surface rights or rights in mines or quarries already open, to which the grantee would have a right under the terms contained in the body of the deed as also under the provisions of the Transfer of Property Act. Reference, however, has been made on behalf of the defendants to judicial decisions which, it is said, support their contention; but an examination of the cases confirms the view we propose to take.

In *Tituram* v. *Elias E. Cohen*(1), it was ruled by this Court that it is inconsistent with the ordinary conception of a grant for maintenance, whether limited to the life-time of the grantor or to that of the grantee, that it should confer, either on the grantee or on his transferee, the right to open new mines within the grant and raise and appropriate to his own use the product of them. This view was affirmed, when the case was taken on appeal to the Judicial Committee : *Tituram Mukerjee* v. *Cohen* (2). Sir Arthur Wilson stated that a *khoreposh* grant would be assumed to be only for the life of the grantee, and that such a grant, regarded as one for the life of the grantee, could not be presumed to be more than a grant of rents and profits and could not be presumed to carry with it a right to open mines and remove minerals which are a portion of the soil. The same view had been adopted by this Court, before the decision of the Judicial Committee, upon a full examination of the authorities on the subject in *Prince Mahomed Buktyar Shah* v. *Rani Dhujamani* (3). In the case of *Kumar Hari Narayan Singh Deo Bahadur* v. *Sriram* (4), which reversed the decision in *Sriram Chakravati* v. *Hari Narain Singh* (5), and in *Durga Prasad Singh* v. *Braja Nath Bose* (6), which reversed the decision in *Brojonath Bose* v. *Durga Prasad Singh*(7), the Judicial Committee held that mineral rights were vested in the *zemindar* and must be presumed to have remained in him, in the absence of proof that he had parted with them. In each of these two cases, under-ground rights were claimed by persons who asserted that they were permanent tenure-holders, though in the first case the Judicial Committee do not appear to have recognized the permanent tenure. This Court held that the *zemindar* must be presumed to have parted with all his rights except the right to receive the fixed rent, and that the tenure-holders had, consequently, acquired a right to the minerals. But the Judicial Committee took precisely the opposite view, which had

(1) 1 C. L. J. 517.

(2) 33 C 203; 2 C. L. J. 406; 15 M. L. J. 379, 7 Bom. L R. 920; 9 C. W. N. 1073; 3 A. L. J. 59; 32 I. A. 185.

(3) 2 C. L. J. 20.

(4) 6 Ind. Cas. 785; 37 C. 723; 14 C. W. N. 746 (P. C.) 11 C. L. J. 653, 7 A. L. J. 633; 8 M. L. T. 51; 12 Bom. L. R. 495; 20 M. L. J. 569; (1910) M. W. N. 309; 37 I. A. 136.

(5) 33 C. 54; 3 C. L. J. 59; 10 C. W. N. 425.

(6) 15 Ind. Cas. 219; 16 C. W. N. 482; (1912) M. W. N. 425; 11 M. L. T. 337; 9 A. L. J. 462; 14 Bom. L. R. 445, 23 M. L J. 26; 39 I. A. 133; 39 C. 696; 15 C. L. J. 461.

(7) 34 C. 753; 5 C. L. J. 583; 12 C. W. N. 193.

meanwhile been adopted in *Rajah Jyoti Prasad Singh* v. *Lachipur Coal Co.* (8). It may be noted that in the earlier cases of *Ali Quader Hussain Ali* v. *Jogendra Narain Roy* (9) and *Megh Lal Pandey* v. *Rajkumar Thakur Giridhari Singh* (10), which were decided before the decision of the Judicial Committee in *Hari Narayan Singh Deo Bahadur* v. *Sriram* (4) and *Durga Prasad Singh* v. *Braja Nath Bose* (6), the view had been maintained that in the case of a grant of a permanent tenure without reservation of mineral rights in the proprietor, they must be presumed to have been transferred to the grantee. It is needless to consider whether this view can any longer be maintained in the face of the pronouncement by the Judicial Committee; but in any event, it cannot be of any assistance to the defendants, whose title is based on a mining lease by the holder of a maintenance grant for life. This conclusion is in accordance with that adopted as well settled in the law of England, where the rights of limited owners in mines and minerals are governed by the doctrine of waste. Working new or unopened mines or quarries is waste, but working open mines is not waste; it is enjoyment of profits of the estate: *Campbell* v. *Wardlow* (11), *Dashwood* v. *Magniac* (12). The right to commit waste is not incidental to the estate of a tenant for life: *Whitfield* v. *Bewit* (13), *Viner* v. *Vaughan* (14). Consequently, a tenant for life may work opened mines, but may not dig in new mines: *Clavering* v. *Clavering* (15), *Campbell* v. *Leech* (16), *Viner* v. *Vaughan* (14), *Bagot* v *Bagot* (17), *Campbell* v. *Wardlow* (11), *Dashwood* v. *Magniac* (12). No doubt, in the instrument under which the estate of the tenant for life arises, there may be an express provision which authorises him to open new mines, or which gives him an estate without impeachment of waste and thereby enables him to open new mines: *Campbell* v. *Wardlaw* (11), *Ridge In re*, *Hellard* v. *Moody* (18). In the case before us, the deed is one for maintenance and for the life of the grantee, and it does not contain any express provision which authorises the grantee to open new mines and to appropriate the minerals therefrom. We must hold accordingly that under the maintenance grant of the 6th December 1894, the grantee had no right to grant a mining lease for the purpose of opening and working new mines.

In the Court below, reliance was placed on behalf of the defendants on the conduct of the parties to ascertain the intention of the grantor. This course could not be properly adopted except in the case of ancient grants, where the terms are ambiguous: *Attorney General* v. *Drummond* (19); *Drummond* v. *Attorney General* (20). But as Cranworth, L. C., said in *Sadlier* v. *Biggs* (21), if there is a deed which says, according to its true construction, one thing, you cannot say that the deed means something else, merely because the parties have gone on for a long time so understanding it; or, as Halsbury, L. C., observed in *North Eastern Railway Co.* v. *Hastings* (22), the words of a written instrument must be construed according to their natural meaning, and no amount of acting by the parties can alter, or qualify words which are plain and unambiguous. The conduct of the parties, however, is really of no assistance in this case. Reference is made to a mortgage-deed executed by Churaman Singh, on the 2nd December 1889, which makes express mention of mica and excludes other minerals. This, it is contended, shows that the grantor, Moharaj Singh, was aware of the existence of mica mines when he made the maintenance grant in 1894. Let such knowledge on his part be assumed for purposes of argument; the fact is really inconclusive. The view may well

(8) 12 Ind. Cas. 482; 14 C. L. J. 361; 38 C 845; 16 C. W. N. 241.
(9) 16 Ind. Cas. 441; 16 C. L. J. 7.
(10) 34 C. 358; 11 C W. N. 527, 5 C. L. J 208.
(11) (1883) 8 App Cas. 641.
(12) (1891) 3 Ch. 306 at p. 327; 65 L. T 811; 60 L. J. Ch. 809.
(13) (1724) 2 P. Wms. 240; 24 E. R. 714.
(14) (1840) 2 Beav. 466, 48 E. R. 1262; 4 Jur. 432; 50 R. R. 245.
(15) (1726) 2 P. Wms. 388, Sel. Ch. Ca. 79, Mos. 219; 24 E. R. 780.
(16) (1775) Ambler 740; 27 E. R. 478.
(17) (1863) 32 Beav. 509; 33 L. J. Ch 116, 9 Jur. (N. s.) 1022; 9 L. T. 217; 12 W. R. 35; 55 E. R. 200; 138 R. R. 851.
(18) (1886) 31 Ch. D. 504; 55 L. J. Ch. 265; 54 L. T 540; 34 W. R. 159
(19) (1842) 1 Dr. & War. 353 at p. 368; 58 R. R. 292.
(20) (1849) 2 H. L. C 837 at pp. 861, 863; 14 Jur. 137; 9 E. R. 1312; 81 R. R. 433.
(21) (1853) 4 H. L. C. 435 at p. 458; 94 R. R. 172; 10 E. R. 531.
(22) (1900) A. C. 260 at p. 263; 69 L. J. Ch. 516 82 L. T. 429; 16 T. L. R. 325.

be maintained that if he intended to vest all the subsoil rights in the grantee, he would have explicitly stated so, as he did in the mortgage instrument of the 2nd December 1889. Reference has also been made to the fact that the grantor, on the 16th March 1896, granted a usufructuary mortgage to Jadunath Mukherjee in respect of open and unopened mines to the exclusion of lands in the occupation of persons holding under public or private sales, gifts, *khoreposh*, *mokarari*, *brahmatar*, *shivattar*, *durga* and *jagir* grants. It is suggested that this had reference to the *khoreposh* lands granted to the first defendant; but there is no foundation for this view. The object of the proprietor was plainly to exclude from the usufructuary mortgage all such lands as were in the possession of persons who held under a valid title derived from him. Reference has finally been made to the circumstance that the first defendant, on the 25th July 1896, granted a mining lease to Jahar Mal and Bahadur Mal and that there was no protest by the proprietor of the estate. To this there are two obvious answers. In the the first place, the lease of the 25th July 1896 is open to the construction that it related only to mines already opened; in the second place, even if the document be interpreted as of wider scope, there is nothing to show that it was ever brought to the knowledge of the proprietor or that the lessees thereunder ever opened and worked new mines; at best, it would only show what the lessee considered to be his right. Reference has also been made to the recitals in the same document to the effect that mining leases had been granted by the first defendant to several persons from time to time. These recitals, by themselves, are not admissible against the plaintiff and in favour of the defendants. But, even if they are used against the plaintiff, they are valueless, as there is nothing to show that the leases mentioned were granted with a view to open new mines, and that the lessees did actually open and work such mines. Reliance has not been placed, it may be added, on the mining lease granted by the first defendant to Gopal Mahto on the 2nd January 1907, for the obvious reason that it bears a date subsequent to the grant of the lease on which the title of the defendants is founded. We are, accordingly, of opinion that the conduct of the parties, even if reliance can be placed upon it, does not support the contention of the defendants. The inference follows that the first defendant did not acquire the right to open and work new mines under the life grant for maintenance in her favour.

As regards the *second* question, namely, whether the three mines, to which exception is specifically taken in the plaint, were open, as the defendants allege, before the maintenance grant was made on the 6th December 1894, or were opened, as the plaintiff alleges, by the lessee defendants after they had obtained the mining lease of the 25th November 1906, the Subordinate Judge has found in favour of the plaintiff. Upon an examination of the evidence, we are satisfied that the Court below has come to the correct conclusion on this point. The most important witness on the side of the plaintiff on this matter is Bhairo Dosadh. He has pledged his oath that these three mines or pits stand on the land of his holding, and were excavated by the defendants about four years before the time when he gave his deposition in 1910, and he adds that before that time the area, which covers about 7 *cottas*, was under his cultivation. This statement, which is corroborated by a number of witnesses on the side of the plaintiff, has been accepted as true by the Subordinate Judge, and we see no reason to differ from him in his estimate of the evidence. The evidence adduced by the defendants to rebut this case is of the vaguest description. An attempt is made to make out that the proprietor had, before the maintenance lease was granted, let out the village from time to time, to persons, who made surface excavations which yielded no profit, and consequently discontinued the work sooner or later. It is not shown, however, that the pits excavated and successfully worked by the defendants had any connection with the surface work undertaken by previous prospectors. In this Court, it is sought to be argued that as some shafts had been sunk in the village previously, the three pits now in dispute are open mines. This contention is clearly fallacious. A mine is said to be open when it has been devoted, by a person lawfully entitled to do so, to the purpose of making a profit by the working and sale of the minerals therein: *Elias* v. *Griffith* (23). Whether a

(23) (1878) 8 Ch. D. 521; 38 L. T. 871; 26 W. R. 869.

mine is open or not, is a question of intention, and the intention may be evidenced in various ways: *Chaytor* v. *Trotter* (24). If the mine has been worked and the produce sold, it is clear that it is open, even if no profits have been made: *Elias* v *Snowdon State Quarries Co.* (25). If a lease has been granted and the lessee has actually worked the mine, it is equally open. It has also been held that although the lessee has never actually worked, the mine is open, if he has paid or become liable to pay a dead rent [*In re Kemeys-Tynte* (26)], though the contrary view was maintained by Lord Cairns in *Elias* v. *Snowdon State Quarries Co.*(25). An actual working is, in any view, not essential if a shaft has been sunk or other development made, the mine intended to be worked by such development is treated as open: *Chaytor* v. *Trotter* (24). On the other hand, it is not every working which will render a mine open, for instance, if the working be wrongful or purely experimental, the mine is not open: *Chaytor* v. *Trotter* (24), *Ecclesiastical Commissioners* v. *Wodehouse* (27). When a mine is open, the sinking of a new pit, if it is on the same vein or seam, or, breaking ground in a new place, if it is on the same rock, is not necessarily opening a new mine; but as a rule, the existence of an open mine on one part of an estate does not make the other mines open mines: *Campbell* v. *Wardlaw* (11), *Elias* v. *Snowdon State Quarries Co.* (25), *Clavering* v. *Clavering* (15), *Spencer* v. *Scurr* (28) *Cowley* v. *Wellesley* (29), *Bagot* v. *Bagot* (17), *Greville Nugent* v. *Mackenzie* (30), *In re Maynerds' Settled Estate* (31). *In re Chaytor* (32). Tested in the light of these principles, the case for the defendants proves wholly unsubstantial. Even Floyd, the most reliable witness on their side and manager of Dirgopal who carried on mining operations from 1890 to 1893, is not able to give any definite evidence as to the nature and extent of the operations in Raidih in his time; on the other hand, his evidence indicates that there was nothing beyond prospecting work at Raidih, and it is fairly clear that whatever work was attempted, was not at the place where the disputed pits have been sunk, but at Araria, nearly one third of a mile from the place where the houses of the tenants stood. Nor is there any reason to think that old workings, such as they were, were on the same vein or seam as the pits in dispute. On a careful scrutiny of the whole evidence, we are of opinion that the evidence as to the mining or prospecting operations before 1894 is so indefinite in respect of their nature, locality and extent, that it is impossible for the Court to hold that the disputed pits or mines were open mines as alleged by the defendants; on the other hand, their allegations that these pits were not new, made in 1906, but were in existence before 1894, has been conclusively proved to be untrue.

The result is that this appeal is allowed, the decree of the Sub-ordinate Judge reversed and the suit decreed. The plaintiff will have a declaration that the first four defendants have no right to open and work new mines in village Raidih. A permanent injunction will also issue, to restrain these defendants from further working the three mines mentioned in the plaint, and from opening and working new mines in Raidih. The decree will also direct that defendants Nos. 2, 3 and 4 do render an account of the mica abstracted by them from the three mines mentioned, from the 25th November 1906 (the date of their lease) to the 3rd February 1908 (the date of institution of the suit). No order is made as to the mica, if any, abstracted *pendente lite*, as the claim is limited in the plaint to damages for mica taken up to the date of the institution of the suit. As regards the measure of damages, the value of the minerals, wrongfully abstracted, must be calculated as at the date of the abstraction, and the defendants will be allowed both the expense of converting them into chattel and of carrying them to the pit's mouth: *Trotter* v. *Maclean* (33), *Prince Mahomed Buktyar Shah* v. *Rani Dhoja-*

(24) (1902) 87 L T. 33.

(25) (1879) 4 A C 454 at p 467, 48 L. J. Ch. 811; 41 L. T. 289, 28 W. R. 54.

(26) (1893) 2 Ch. 211; 61 L J Ch 377; 66 L. T. 752, 40 W. R 423.

(27) (1895) 1 Ch 552; 64 L. J Ch. 329; 13 R. 372, 72 L. T 257; 43 W R. 395; 60 J. P. 200.

(28) (1862) 31 Beav. 334; 31 L. J. Ch. 806; 9 Jur. (N. S.) 9; 10 W. R 878; 54 E R. 1167; 135 R. R. 454.

(29) (1868) L. R. 1 Eq. 656, 35 Beav 635, 14 L. T. 435, 14 W. R. 528; 147 R. R. 334; 55 E. R. 1043.

(30) (1900) A. C. 83 at p. 88; 69 L. J. P. C. 1; 81 L. T. 793; 16 T L. R. 43.

(31) (1899) 2 Ch. 347; 68 L. J. Ch. 609; 63 J. P. 552; 48 W. R. 60; 81 L. T. 163.

(32) (1900) 2 Ch. 804; 69 L. J. Ch. 837; 49 W. R. 125; 16 T. L. R. 546.

(33) (1879) 13 Ch. D. 574 at p. 586; 42 L. T. 118 28 W. R. 244; 49 L. J. Ch. 256.

mani(3), *Livingstone* v. *Rawyards Coal Co.* (34) Laws of England, edited by Halsbury, Volume 20, Article 1372. The plaintiff will have his costs both here and in the Court below, assessed upon the value of the claim for injunction. We assess the hearing fee in this Court at Rs. 300. The cost of Court-fees in respect of the claim for damages, paid on the plaint and on the memorandum of appeal to this Court, will abide the result, and the plaintiff will have such cost only or the sum ultimately decreed in his favour. The costs of the inquiry in the Court below will be in the discretion of that Court.

Appeal allowed; Suit decreed.

(34) (1880) 5 A. C. 25, 42 L. T. 334, 28 W. R. 357, 44 J. P. 392.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 35 OF 1913.

June 16, 1914.

Present:—Mr. Justice Beaman and Mr. Justice Hayward.

ANANDIBAI BHASKAR NILKANTH—PLAINTIFF—APPELLANT

versus

NARAYAN DHONDDEV TATTOO AND OTHERS—DEFENDANTS—RESPONDENTS.

Bombay Land Revenue Code (Bom. Act V of 1879), s. 135J—Presumption attaching to entries in Record of Rights - Mortgage - Properties mortgaged—Ownership of mortgagor—Suit between mortgagee and third party—Burden of proof—Registration Act (XVI 1908), s. 60—Endorsement by Registering Officer—Evidence.

Section 135J of the Bombay Land Revenue Code enacts that entries in the Record of Rights shall be presumed in effect to be a true statement of their contents Therefore, in the absence of any other evidence, a Court would be obliged to be guided by any facts so entered in the Record of Rights.

In a suit between the mortgagee and a third party the onus of proving that the properties comprised in the mortgage-deed belong to the mortgagor, lies upon the mortgagee.

The Registering Officer's endorsement on a registered document is evidence, though, of course, necessarily not conclusive of the truth of the facts set forth therein.

First appeal from the decision of the First Class Subordinate Judge at Poona, in Suit No. 303 of 1910.

Mr. *J. R. Gharpure*, for the Appellant.

Mr. *M. D. Daru*, for Respondent No. 2.

Mr. *P. D. Bhide*, for Respondents Nos. 3 and 4.

JUDGMENT.—The plaintiff in this appeal has raised three contentions: (1) that the Court below was in error in holding that of the alleged consideration of Rs. 5,000, Rs. 1,300 were not proved to have been paid; (2) that the Court below was in error in exempting from the operation of the mortgage five Survey Nos. 183 and 185 held by the Court below to belong to defendant No. 3, and Nos. 155, 156 and 157 held by the Court below to belong to defendant No. 4; (3) that the instalments allowed by the Court below are unjustifiable in all the circumstances of the case; and that this Court ought to alter that part of the decree of the Court below, even though it confirms the rest of the decree. Upon all these points after hearing very full arguments on behalf of the appellant and of the respondents Nos. 3 and 4, we are of opinion that the appellant is entitled to succeed. We think that the Court below took much too strict a view of the requirements of proof in respect of Rs. 1,300, having regard to the obvious disadvantage under which the plaintiff lay.

Here again the appellant's case for the purpose of argument may be divided into three parts. The plaintiff, who was a minor and represented by a guardian, who himself knows nothing whatever of these transactions, endeavoured to convince the learned Judge below that the alleged consideration was fully paid, upon three main grounds of inference. *First*, in respect of an assistance suit, the plaintiff contended that inasmuch as the defendant therein made no reference to any failure of consideration and for the purposes of that suit the consideration was impliedly the alleged consideration of Rs. 5,000, it is unreasonable to suppose that the defendant's contention here is well-founded. If he really had this grievance in respect of a partial failure of the consideration money he would have certainly said so in the assistance suit; *secondly*, in regard to the consideration of a second usufructuary mortgage of Rs. 2,366, the plaintiff's argument is that had the defendant been still entitled to Rs. 1,300 from him on the prior mortgage, he would certainly have refused to acknowlege the debt of Rs. 2,366 without a reference to this sum to which he would then have been entitled; and *lastly*, that the rent-notes admittedly executed by

the defendant imply that the principal sum of the mortgage was Rs. 5,000. This is arrived at by assuming that the rate of interest was 13 annas per cent. per mensem, and when calculated on Rs. 5,000 for a period of nine months or three-quarters of a year, yields a rent of as nearly as possible Rs. 370 which was the rent agreed to be paid by the defendant for nine months. We think that all these inferences are very cogent, and that the Court can hardly have expected more from the plaintiff in the circumstances of the case by way of strict proof. It is very easy for the defendants simply to deny the receipt of a part of the consideration, knowing well that the minor plaintiff is not in a position to have very accurate information as to the events which happened in 1892. But we do think, after carefully considering the record as it stands and the arguments founded upon it, that there is no sufficient reason whatever to doubt that, as appears on the mortgage-bond, the consideration money advanced was Rs. 5,000, and not merely Rs. 3,700 as now alleged by the defendant. For what they are worth the entries in the Record of Rights, to which we must assume that the defendant here was a party, confirm our conclusion. In one of these entries, the mortgage is referred to and the consideration is stated to have been Rs. 5,000, and not Rs. 3,700. We are, therefore, satisfied that the learned Judge below was in error in refusing to decree to the plaintiff Rs. 5,000 as principal on the mortgage.

The next point relates to the lands which the learned Judge below has declared not to be covered by the plaintiff's mortgage. Here again the onus of proof was thrown, and rightly thrown no doubt in the first instance, upon the plaintiff, but we think that the plaintiff has satisfactorily discharged it. It is to be observed in this connection that neither of the defendants Nos. 3 and 4 appear to have taken the least interest in the conduct of the suit. They restricted themselves to their written statements denying the plaintiff's claim so far as the mortgage was sought to be extended to these lands, but they did not appear before the Judge, or so far as we can see, offer any evidence with the single exception of Exhibit 78 in support of this contention. How Exhibit 78 got on the record is not very clear.

The facts, so far as they are disclosed upon the evidence relating to these lands, are briefly these. First of all, Survey Nos. 183 and 185. These appear to have been mortgaged by the predecessor-in-title of the present mortgagor in 1878 and this is evidenced by Exhibit 81. We see no reason whatever to doubt the genuineness of that paper or the truth of the transactions which it proves. So that in 1878 at any rate, the defendant or his predecessor-in-title appears to have been the owner of Nos. 183 and 185. In 1892 these two lands are embraced in the mortgage upon which this suit is brought, and the plaintiff under the provisions of the Record of Rights Act was compelled to annex to his plaint extracts from that record relating to lands in suit. It is upon these extracts from the Record of Rights and upon these alone that defendants Nos. 3 and 4 rely. In fairness we ought to say here that defendant No. 3 also is a minor and to that extent labours under something like the same disadvantages as the plaintiff. The defendant No. 4 appears to have been an old Mali woman, and according to her own story has for many years been in *Vahivat* of the other three numbers to which we will presently refer. The Record of Rights appears to have been written up touching these five numbers in the year 1907, and Nos. 183 and 185 are shown in the name of the *khatedar*, defendant No. 3. The mortgagor is described as the tenant. It is noteworthy, however, that defendant No. 3 is entered in this record as *khatedar* since 1905. When these entries were made and when this suit was filed, the old Record of Rights Act of 1903 had not been repealed, and under that Act entries in the record appear to have had no probative value. At any rate no Court was under any legal obligation to attach any evidentiary weight to them. In 1913, that is to say, after the trial of this suit the old Record of Rights Act was repealed and incorporated as Chapter XA in the Land Revenue Code. There we find section 135J, which introduces a great change in this respect. It enacts that entries in the record henceforth shall be presumed in effect to be a true statement of their contents, and in the absence of any other evidence, I suppose, the Court under this section 135J would be obliged to be

guided by any facts so entered in the Record of Rights. Whether a provision of that kind should be interpreted in appeal retrospectively is a question of nicety, for it is evident that when the Judge below dealt with materials before him, these extracts from the Record of Rights might have been entirely neglected had he wished to neglect them. Had he adopted that attitude, it is clear that there would have been absolutely no evidence in respect of Nos. 183 and 185 to be set against the plaintiff's evidence that his mortgagor was the owner of those lands in 1878, that he professed to be the owner and to mortgage them in 1892, and, therefore, it established a *prima facie* case, at any rate, that when defendant No. 1's father executed this mortgage he was the owner of these lands. There is, of course, the oral evidence of defendant No. 1 who now appears to be siding with defendants Nos. 3 and 4. But we do not think that that could have carried any weight, had the learned Judge below not desired to give full effect to the entry in the Record of Rights. Further, it is to be noted that defendant No. 1 himself stood surety to the mortgage-deed upon which the plaintiff now sues. But even assuming that section 135J has retrospective effect, we still do not think that those entries should necessarily lead to the conclusion which the Court below has adopted. Assuming that the mortgage of 1892 was duly effected by the mortgagors, who were then the owners of the land, it is quite conceivable, indeed quite likely, that by the year 1907 this defendant may have entered into other arrangements, trafficked with parts of the mortgagad property, and so got the entry relating to lands Nos. 183 and 185 made in the Record of Rights, and if that be the truth of the matter, we are at a loss to understand how it can affect the mortgagee's rights under his mortgage of 1892

With regard to the other three lands, namely, Nos. 155, 156 and 157, the entry in the Record of Rights shows that the *khatedar* was one Gopal, and defendant No. 4 appears to have been his *vahivatdar*. It is significant that this Gopal is the executant of the deed exhibited as Exhibit 92 of the year 1892 and entered into about one month before the plaintiff's mortgage. That deed purports to have been a relinquishment by Gopal, a *bhaubund* of the defendant, mortgagor of these lands. It has been strenuously contended on behalf of defendant No. 4, the Mali woman, called the *vahivatdar* in the Record of Rights, that Exhibit 82 has not been proved. This is a registered document, and the defendant who has been throughout the case hostile to the plaintiff has proved his father's signature thereon. There is also the Registrar's note which may be evidence, though of course necessarily not conclusive evidence, of the truth of the facts set forth therein. This is especially provided by section 60 of the Registration Act, and a consideration of the decisions upon that section leaves no doubt in our minds that such an official endorsement may be used and ought to be used as evidence, and in first appeal, where this Court is in a position to make use of whatever materials are available upon questions of fact as well as questions of law, may well be taken along with the signature of Dhondu and the surrounding circumstances to be evidence of the truth of the facts stated therein. So that we think that this document is quite sufficiently proved for the limited purpose for which it was produced by the plaintiff. It was not sought to give effect to this document, but merely to use it as collateral proof of the legal relations of certain parties touching these three Survey numbers. Here again, we think, that the plaintiff's evidence is distinctly superior to that of defendant No. 4, if indeed there can be said to be any evidence at all in favour of that party. The Record of Rights, as I have said, shows that the executant of Exhibit 2 was declared to be the *khatedar* of this land in 1907, and that defendant No. 4 was then merely a *vahivatdar*. How this can possibly affect the mortgagee's rights acquired in 1892, if at that time the mortgagor was the owner of the land in suit, we do not understand, and we take that to be the true state of facts. We believe that in 1892 the defendant mortgagor was the owner, not only of Nos. 183 and 185, but also of Nos. 155, 156 and 157. We are, therefore, of opinion that these lands are subject to the plaintiff's mortgage.

As regards the instalments allowed by the learned Judge below, we think all we need do is to increase the amount of these instalments, having regard to the increased

amount we are now decreeing to the plaintiff from Rs. 900 to Rs. 1,500 a year, leaving all the other conditions annexed to the payment of such instalments so enhanced as in the decree of the Court below. The decree will be for Rs. 10,000 (Rs. 5,000 principal and Rs. 5,000 interest). There will be interest at 6 per cent. on Rs. 10,000, from the date of the suit till satisfaction. The plaintiff must have his costs throughout all these proceedings. Defendants Nos. 3 and 4 to pay half the costs of this appeal. Plaintiff to pay defendant No. 2's costs such as they are of this appeal, and he should recover the remainder of his costs from defendant No. 1 throughout.

Decree varied.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 822 OF 1910.

March 12, 1914.

Present:—Sir Alfred Kensington, KT., Chief Judge, and Mr. Justice Chevis.

MAHARAJ DAS—DEFENDANT—APPELLANT

versus

GIAN SINGH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Contract to sell, with a reciprocal contract to mortgage by promisee—Failure to mortgage—Gross carelessness on part of promisee—Specific performance, whether allowed.

The defendant agreed to sell to the plaintiff two shops for Rs. 5,900. Rs. 200 were paid in advance as earnest money, Rs. 2,300 were to be paid before the Sub-Registrar, and for the remaining Rs. 3,400 the plaintiff was to mortgage the two shops with possession to the defendant. Both the sale-deed and the mortgage-deed were to be executed and registered within two weeks. In case of default on the plaintiff's part, the defendant was to retain the earnest money, and in case of default on the defendant's part, the plaintiff was to receive back the Rs. 200 and a further sum of Rs. 200 as damages. Both the deeds were duly executed but not registered, owing to the plaintiff's failing to produce the mortgage-deed before the Sub-Registrar for registration. According to the plaintiff the deed was eaten or carried off by rats. The plaintiff sued for specific performance:

Held, (1) that it is discretionary with the Courts to give a decree in such cases; (2) that assuming the facts to be as stated by the plaintiff, the gross carelessness which he had exhibited was such that he did not deserve a decree for specific performance.

First appeal from the decree of the District Judge, Amritsar, dated the 28th April 1910.

Rai Bahadur Pandit *Sheo Narain*, for the Appellant.

The Hon'ble Mr. *Shadi Lal*, R. B., and Mr. *Kanhaya Lal*, for the Respondents.

JUDGMENT.

CHEVIS, J.—On the 16th October 1909 the plaintiffs entered into an agreement with the defendant, the principal terms of which were as follows. The defendant was to sell to plaintiffs two shops for Rs. 5,900. Rs. 200 were paid in advance as earnest money, Rs. 2,300 were to be paid before the Sub-Registrar at time of registration, and for the remaining Rs. 3,400 plaintiff was to mortgage the two shops with possession to the defendant. Both sale deed and mortgage-deed were to be executed and registered within two weeks, *i. e.*, by 30th October 1909. In case of default on plaintiffs' part defendant was to retain the Rs. 200 earnest money. In case of default on defendant's part plaintiffs were to receive back the said Rs. 200, and a further sum of Rs. 200 as damages.

Both deeds were duly executed, but not registered, owing, so it appears, to plaintiffs' failing to produce the mortgage-deed before the Sub-Registrar for registration. According to plaintiffs the deed was eaten or carried off by rats. Plaintiffs sue for specific performance.

The District Judge framed as a preliminary issue the following: "On the facts stated in the pleadings is the suit for specific performance maintainable?" Then comes an order, "I have heard arguments both on the preliminary issue, and on the case at large, orders to morrow." Then comes the judgment, in which the learned District Judge overrules a plea on behalf of the defendant that certain persons to whom he has since mortgaged the shops should be made parties, and also decides the preliminary issue above quoted in favour of the plaintiffs, but proceeds to dismiss the suit on the ground that plaintiffs' failure to get the mortgage-deed registered is no answer to their demand that defendant should fulfil his part of the bargain, as in the nature of things the sale deed must precede the mortgage-deed, plaintiffs being unable to mortgage the property until they have become the owners, and it being impossible to register both deeds simultaneously. So the learned District Judge gives plaintiffs a decree.

The defendant appeals to this Court.

We do not think the reasons given by the District Judge are sound. In our opinion the agreement to mortgage to the defendant was part of the whole agreement, and had plaintiffs demanded that a sale-deed should be executed and the whole of the remaining sale price, *i. e.*, Rs. 5,700 paid in cash, we think the defendant would have been quite justified in refusing to sell on such terms. Whether the deeds could be registered simultaneously or not is a matter of no importance, for documents take effect from time of execution and not from registration.

Having disposed of the preliminary issue in plaintiffs' favour, we think, the District Judge should have ascertained from the parties whether they wished to produce evidence. It is complained before us that defendant was quite taken by surprise when the District Judge gave judgment in plaintiffs' favour.

It certainly cannot be said that all the facts are admitted. The defendant denies that the mortgage-deed was lost or destroyed as alleged, and the plaintiffs deny the allegation of the defendant that he subsequently lost the sale-deed In fact both parties are entirely at issue as to which party is to blame for the non-fulfilment of the bargain. The defendant asserts that the plaintiffs hung back and falsely pretended that the mortgage-deed had been lost, thus driving the defendant, who was in urgent need of the money, to mortgage the houses elsewhere, while the plaintiffs' allege that the defendant, having repented of his bargain, has taken advantage of the plaintiffs' having accidentally lost the mortgage-deed. What the precise facts are cannot be said, for until both parties have been allowed due opportunity of proving their allegations, it would be improper to pronounce which party is to blame. But even if we admit for the sake of argument that the defendant's conduct in the matter is not straightforward and that plaintiffs' allegations are correct, it is still obvious that plaintiffs are greatly to blame for their gross carelessness in allowing the mortgage-deed, which had been duty executed and was to be presented for registration, to be destroyed or carried off by rats. When the plaintiffs took the document into their custody it was their duty to take proper care of it, and not to leave it unguarded. It is discretionary with the Courts to give a decree in such cases, and we are of opinion that assuming the facts to be as stated by the plaintiffs, the gross carelessness which they have exhibited is such that they do not deserve a decree for specific performance.

At the same time we do not think that the blame lie all on one side; we are extremely sceptical as to the truth of defendant's statement that he has since lost the sale-deed and defendant's counsel has expressed his willingness to refund the Rs. 200 received as earnest money. We think, therefore, that the plaintiffs may well be given back the Rs. 200 which they advanced.

We accept the appeal and reverse the decision of the learned District Judge, but we grant the plaintiffs a decree for Rs. 200. The parties will bear their own costs in both Courts.

KENSINGTON, C. J.—I agree with the conclusion of my learned colleague that the merits of this case are properly met by a money-decree to plaintiffs for Rs. 200, and regret that delivery of judgment has been accidentally delayed. I have only to add that the arguments before us covered a good deal of rather technical ground, which need not be discussed in view of our ultimate conclusion. The real point which we had to consider was whether there ought to be a remand for evidence before we could dispose of the case. After hearing the explanations of both sides at some length, we found that a remand would serve no useful purpose and that it was to the interest of all parties that this unsatisfactory dispute should not be allowed to drag on with no reasonable prospect of any more definite result. It is sufficiently clear that the sale negotiations of 1909 fell through because the parties were not really in agreement and that neither side acted in a straightforward manner. It is, under these circumstances, impossible to allow plaintiffs' decree for specific performance to stand, and no evidence which could be now produced would be of material assistance.

The appeal is accepted and the decree in plaintiffs' favour will be modified as proposed.

Appeal accepted; Decree modified.

HANNAH v. JAGANNATH & CO.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 58, 65 AND 66 OF 1913.

May 19, 1914.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Justice Sir Harry Stephen.

G. S. HANNAH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

MESSRS. JAGANNATH & Co. AND OTHERS—PLAINTIFFS—RESPONDENTS.

Trade-mark, law of—Trade-mark, whether can be assigned or can descend in gross—Originator of trade-mark, right of—Good-will, meaning of—Good-will, transferee of, right of—Evidence Act (I of 1872), s. 117—Licensee—Estoppel.

In India the law of trade-marks is not governed by Statute: there is no Statutory system of registration, and the rights and liabilities in connection with trade-marks are determined by reference to the principles of the Common Law of England.

British American Tobacco Co. Ld. v. Mahboob Bulsh, 7 Ind. Cas. 279; 15 C. W. N. 290; 38 C. 110, referred to.

It is in the inherent nature of a trade-mark that it cannot be assigned or descend in gross, for it is a mode of representing the origin of the goods to which it is attached, or their trade association.

The representation of a trade-mark may perhaps only be true of its originator, but usage has sanctioned a more liberal treatment based on the principle of identification by succession and, therefore, successors in business have been allowed to use their predecessors' trade-marks where the representation still continues to be substantially true.

An originator of a trade-mark of a natural product, who certifies to their good quality, is entitled to it and has a right to alienate it.

A trade-mark can only be assigned together with the good-will of the business to which it relates.

Where, therefore, the trade-marks of jute-balers were assigned together with the business of jute-balers, the transfer was held to be valid.

Good-will is the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old established business from a new business at its first start.

A transferee of the good-will is entitled to use the name in which the business was carried on and to represent himself as carrying on that business.

Under section 117 of the Evidence Act a licensee of a trade-mark shall not be permitted to deny that his licensor had, at the time when the license commenced, authority to grant such license.

Appeal against the judgment of Mr. Justice Imam, dated 7th April 1913.

FACTS of the case fully appear from the judgment of Mr. Justice Imam reported in 22 Ind. Cas. 372.

Messrs. *S. P. Sinha*, *W. Gregory*, *Buckland*, *Longford*, *Aratoom* and *Hyam*, for the Appellants.

Messrs. *H. D. Bose*, *B. C. Mitter* and *A. N. Chaudhri*, for the Respondents.

JUDGMENT.—The plaintiffs, Messrs Jagannath & Co., are described in the heading of the plaint as a firm carrying on business as jute-balers and shippers and merchants at No. 117, Harrison Road, in the town of Calcutta.

The defendants are E. C. H. Cresswell, H. A. Smyth and Geofrey Watson, who carry on business in co-partnership as jute-balers, brokers and merchants, under the name of Messrs. Moran & Co. at 11, Lall Bazar Street, Calcutta, and G. S. Hannah and C. L. Smallwood, who carry on business in co-partnership as jute-balers, brokers and merchants, under the name of Messrs. W. Haworth & Co. at No. 1, Mission Row. It is alleged in the plaint that the plaintiff firm has been and is the proprietor of four jute trade-marks set forth in the schedule, and the plaintiffs' case is that on the 8th of July 1911 the defendants Moran & Co., and on the 1st of March 1912 the defendants Haworth & Co. acquired the right to use and permit the use of these trade-marks and that in return the defendant firms severally covenanted to maintain the reputation of these marks and to pay an annual fixed royalty of Rs. 10,000 in cash and Rs 13,000 in bills. These agreements were repudiated by Haworth & Co. on the 2nd July and by Moran & Co. on the 15th August 1912; and the plaintiffs, without assenting to these repudiations, have instituted this suit on the 5th September 1912, claiming Rs. 3, 50,000 as damages on account of the alleged depreciation of the trade-marks, and Rs. 10,000 in cash, and the execution of three several drafts for the aggregate sum of Rs. 13,500 for and by way of royalty for the jute season 1912-13, or in the alternative Rs. 23,500 as damages.

All the defendants have resisted the claim, and the suit has been heard by Imam, J., who disallowed the claim for damages for depreciation; but passed a decree for Rs. 23,500 in respect of the claim for royalty.

Against this judgment three separate appeals have been filed, one by Haworth & Co,.

a second by Cresswell and Smyth and a third by Watson.

The plaintiffs have on their side taken cross-objections. These several appeals and cross-objections have been heard together and will be determined in one judgment.

All the appellants advance one common ground of appeal, that the plaintiffs had no title to the alleged trade-marks, that they passed no interest to the defendants and that there is no legal consideration for the obligation attributed to them. Watson makes the further point that, having regard to the date of his becoming a partner in Moran & Co.—April 1912,—he came under no liability. This plea, however, was expressly limited by Counsel before us to the claim for damages, and was not put forward as an answer to the claim for royalty.

We will first trace the title to the alleged trade-marks asserted by the plaintiffs.

It is said that these marks were originated by Surjoo Coomar Chatterjee, who carried on business, presumably in Calcutta, as a jute-baler until his death in 1893, under the two names of S. C. Chatterjee and M. N. Chatterjee. Apart from subsidiary dealings by way of mortgage and so forth, it is sought to establish the devolution of these marks to the plaintiffs as follows.

On the 24th September 1904 Surjoo Coomar Chatterjee's widow purported to assign to Landale and Morgan, a firm of jute-brokers and agents, seven marks, including the four in suit, and also the good-will of the business of jute-balers formerly carried on by Surjoo Coomar Chatterjee, the consideration being Rs. 75,000.

On the 26th September 1904 Landale and Morgan in consideration of Rs. 85,000 assigned to Dooli Chand, a baler and dealer in jute trading under the style or firm of Hursook Das Dooli Chand, these seven marks and the good-will of the firm of Landale and Morgan "of, into, upon or concerning the said business of jute-balers formerly carried on by the said S. C. Chatterjee, deceased, and thereafter by the firm in succession thereto, and the sole and exclusive right to use the said trade-marks or brands mentioned and described in the schedule hereunder written and the name of the said S. C. Chatterjee in connection with the said business and to bale jute-cuttings, jute-rejections and all other kinds of jute with and under such marks and brands and name and all the estate, right, title and interest of the firm therein."

On the 8th of May 1907 Dooli Chand purported to assign the trade-marks and the business of Surjoo Coomar Chatterjee to Gocul Chand Khettan for Rs. 3,50,000 and on the 3rd of April 1908 Gocul Chand Khettan purported to make a similar assignment to the plaintiffs for Rs. 1,90,000.

On the 8th July 1911 the plaintiffs in their turn executed an exclusive license, for the period between the date of the instrument and the 30th June 1914 in favour of Moran & Co., of these four trade-marks, and it was thereby agreed that the licensees should and might at all times during the term peaceably and quietly use, or employ or permit or authorise others to use or employ, exclusively, the trade-marks, and to hold the good-will of the business of Surjoo Coomar Chatterjee, the original baler, and the marks as far as any of the marks were concerned, without any lawful interruption or interference by the proprietors. On the 1st of March 1912, the licensees' rights were assigned to Haworth & Co.

In India the law of trade-marks is not governed by Statute: there is no statutory system of registration, and the rights and liabilities in connection with trade-marks are determined by reference to the principles of the Common Law of England: *British American Tobacco Co., Ld.* v. *Mahboob Buksh* (1).

It is thus established that a trade-mark cannot be assigned or descend in gross; and this rests on no arbitrary rule, but is a necessary consequence of the inherent nature of a trade-mark; for it is a mode of representing the origin of the goods to which it is attached, or their trade association, and the truth of the representation is essential.

In its strictest meaning the representation of a trade-mark may perhaps only be true of its originator, but usage has sanctioned a more liberal treatment based on the principle of identification by succession.

And so successors in business have been allowed to use their predecessors' trade-marks where the representation still continues to be substantially true.

(1) 7 Ind. Cas. 279. 15 C. W. N. 280; 38 C. 110.

Can it, then, be said within the permitted limits of deviation from strict accuracy that the plaintiffs are entitled to the trade-marks in suit?

It must, we think, be taken that Surjoo Coomar Chatterjee was entitled to those trade-marks, and it is no obstacle in the way of that view that the subject of the marks was a natural product and he was merely their selector, who certified to their good quality: *Major Brothers* v. *Franklin & Son* (2). Nor do we think that it has been shown that the marks were so personal to the originator as to be inalienable.

Surjoo Coomar Chatterjee carried on the business of a baler. He died in September 1893, and the books of the Calcutta Baled Jute Association indicate that his marks continued to be used from the time of his death. This doubtless was with the authority of his successors, but whether there was such a disposition of the good-will of the business as would be necessary to support this authority, does not appear till 1904.

In that year we have the assignment by the widow in favour of Landale and Morgan to which we have already referred.

This and each succeeding assignment is expressed to be a transfer not only of the trade-marks, but also of the business of jute-balers formerly carried on by Surjoo Coomar Chatterjee. In form, therefore, there has been compliance with the rules that a trade-mark can only be assigned together with the good-will of the business to which it relates.

But is this merely a formal compliance without any reality, a mere device which ought not to be recognised as satisfying the conditions on which a successor is entitled to use a trade-mark he did not originate? For the appellants it is contended that it is, and in support of this much persistent reliance has been placed on an argumentative but unhappily-worded paragraph in the plaint (paragraph 4).

Any one who attempts to express his meaning in a single sentence 27 lines in length runs the risk of being misunderstood, and the author of this paragraph has not escaped the common fate. It is possible that the paragraph was an attempt to escape from the result of the decision in *British American Tobacco Co., Ld.* v. *Mahboob Bukhsh* (2) (1908) 1 K. B. 712; 77 L. J. K. B. 601; 981 L. T. 926, (1), and was composed more in reference to that decision than to the actual terms of the several assignments. But whether that be so or not, there is no force in the argument that the actual terms of those assignments are affected by the argumentative statement in the plaint.

They in fact purport to transfer the good-will of Surjoo Coomar Chatterjee & Co. "Good-will", Lord Macnaghten has said, "is the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old, established business from a new business at its first start": *Inland Revenue Commissioners* v. *Muller and Co.'s Margarine Ld.* (3). Manifestly that which goes to form the good-will would vary with the nature and conditions of the business. Certainly a transferee would be entitled to use the name in which the business was carried on and to represent himself as carrying on that business. This right passed under the several assignments; for, under their terms, each assignee became legally entitled to exercise these rights, and each assignor lost these advantages.

But then it is said that there is no evidence that any use was made of these rights, or that any assignee carried on the business in the name of Surjoo Coomar Chatterjee and in particular, that it is not shown that Dooli Chand, who had a baling business of his own, kept this assigned business separate.

In dealing with these objections the character of this suit has to be borne in mind and the relations of the parties; it is not brought by one who claims to be the owner of a mark against a stranger for infringement; it is brought against two firms who are at any rate expressed to be licensees and purported to take in that capacity. And a licensee shall not be permitted to deny that his licenser had, at the time when the license commenced, authority to grant such license (Indian Evidence Act, section 117).

The authority of the plaintiffs to grant the license under consideration depends upon whether they acquired a title to the trade-marks, and this they could not acquire

(3) (1901) A. C. 217; 70 L. J. K. B. 677; 49 W. R. 603; 84 L. T. 729; 17 T. L. R. 53.

in the circumstances of this case without an effective assignment of the business of Surjoo Coomar Chatterjee & Co.

This would seem to preclude the defendants from questioning the conditions on which the plaintiffs' authority rested, that is to say, the acquisition by them of the business of S. C. Chatterjee & Co. and the trade-marks. The section is positive in its terms, and we are bound to give full effect to it. Had the plaintiffs based their case on the licenses and resisted any attempt to invalidate their title by a reference to its history, they would have been within their rights; and we cannot think that their case has been prejudiced by the mode in which it has been presented.

At any rate section 117 would cast on the defendants the burden of proving that the good-will of the business had lost its separate existence by merger or otherwise, or had not passed to the plaintiffs, to support and justify the transfer of the trade-marks, and that the plaintiffs had not the authority they professed to exercise. This the defendants had not done.

On the contrary it has been urged for what it was worth that the association of the names M. N. Chatterjee & Co. and S. C. Chatterjee & Co. with the trade-marks itself involved carrying on business in the old name.

Had the defendants proved their allegation of misrepresentation on the plaintiffs' part, that would have seriously affected the value of the estoppel on which the plaintiffs rely.

But no such proof has been given, and not one of the defendants has gone into the witness-box.

Then it has been contended that the license was in gross and, therefore, was for an illegal consideration, or at any rate for no consideration, but the agreement purports to vest in the licensees a contractual right to the business. The illegality of the consideration has not been made out, nor can it be said that there was no consideration within the meaning of the Indian Contract Act. From the amounts paid or agreed to be paid at different times, it is obvious that the marks were regarded as possessing considerable commercial value. Nor must it be forgotten that for the first year of its term the license was used and paid for and that as a result of the year's working this commercial value of the marks has been seriously depreciated. Though the leasing or assigning of trade-marks without a real transfer of an existing business is a nullity from a legal point of view and in fact deprives them of the characteristics to secure which they are recognised by law, yet we cannot in the circumstances of this case hold that as against the licensees the plaintiffs have not a good claim to royalty, and we agree with the conclusion at which Imam, J., arrived. We only desire to add that no objection has been urged before us to the form in which the decree in respect of royalty has been passed, and we, therefore, refrain from discussing it.

While Imam, J., decreed the payment of royalties, he dismissed the claim for damages, and to this the plaintiffs have taken a cross-objection. They rely on clauses 4 and 7 of the agreement of the 8th July 1911, and allege that the defendants Moran & Co. permitted jute to be packed under the marks which was inferior to the quality of the standard fixed by the London Jute Association for those marks or for the corresponding marks of the same group, or otherwise committed breaches of the rules and regulations of the London Jute Association by reason whereof the marks have been removed from the respective groups (plaint, para. 10).

This claim is now made against Moran & Co. alone, and not against Haworth, whose predicament in the litigation one cannot but feel to be unfortunate.

It is conceded by Moran & Co. that the marks were included in the London Jute Association's groups for 1911, and not in those for 1912; but this, it is argued, is a matter with which these clauses 4 and 7 have no concern. The argument requires an explanation.

In the jute trade, marks have been and are largely employed as an assurance of quality. This has led to the establishment of several groups, and among them the 6-marks group was of especial importance. As the title suggests, there were 6 marks in this group, and each mark was regarded as an assurance that the jute bearing it was up to the standard of a grade called "Firsts" in the trade. Later an eight-marks group was establish-

ed, and this comprised these same 6 marks and two others that had acquired a reputation of merit. It would seem, however, that this 8-marks group, though largely identical with the 6-marks group, was in fact an independent group; and so contracts were made on the basis of one or other of these two groups, or of other groups of marks; for there were many other groups, but with them we have no concern at present.

This then is how matters stood at the commencement of the jute season 1911-12, or in other words, on the 1st July 1911.

At this time the London Jute Association had determined to establish its own groups of marks, and without attempting to explore the several reasons by which they had been influenced to this, it may be reasonably surmised that the vicious practice of leasing marks and the results of that practice had in some measure caused the mischief that this new departure was intended to counteract.

It was an easy mode of controlling the marks in use, if only the trade as a whole lent its support. At first apparently this support was somewhat feeble, and contracts on the basis of the Association groups were few; but now they are an important, if not the principal, basis of jute dealings.

This policy evidently had long been under consideration, but it did not take definite and announced shape until the 1st July 1911, when a circular was issued in the terms appearing in Exhibit No. 1 in this case.

When the London Jute Association thus established groups of their own, they adopted the marks then in use in the trade, and (among others) those of the 6 and 8-marks groups.

There were rules regulating the inclusion or non-inclusion of marks in the Association groups, and some undoubtedly were more stringent than the trade conscience, which had previously regulated, so far as it can be said that there was any regulation, the recognition by the trade or the Association of the marks in use. I may illustrate this by the new rule that three penalties might involve the exclusion of a mark, a rule of the Draconian order, for it operates without reference to the volume of jute that might be baled under the mark and disregards the average standard of quality over the whole range of dealings. Three failures in an otherwise excellent course of dealing might involve consequences from which a consistent course of inferior dealing would be exempt.

We point to this in no spirit of criticism; it is not our business or desire to criticise, but to emphasise the altered character of Morans' responsibility if the plaintiffs' reading of the clauses be accepted.

On the 24th September 1910, when the Association marks had not been established, the plaintiffs and Morans had entered into an agreement substantially the same as that now under consideration and containing provisions identical with the dark clauses, 4 and 7, of the agreement of the 8th July 1911. This shows that at that time there was an apprehension of the risk of non-recognition against which the clauses were directed. But *ex hypothesi* the risk was not of exclusion from the Association's groups, for they did not then exist. The risk must have been the non-recognition by the Association of the marks then in use by the trade—a risk which manifestly was not so urgent as that created by the new rules.

It was against this old risk, Morans contend, and not the new risk created in 1911, that the 4th and 7th clauses were aimed.

The plaintiffs see in this line of reasoning an attempt to construe a later by an earlier document; but this is hardly a complete statement of the position. It is rather an endeavour to place the Court in possession of the facts which, it may reasonably be said, were within the contemplation of the parties when the agreement of the 8th July was executed, and to show that there were conditions, apart from those created in 1911, to which in the minds of the contracting parties clauses 4 and 7 of that agreement could aptly be applied. This seems legitimate, and it becomes of considerable force when it appears that there is strong reason to believe that these new conditions could not have been known to the contracting parties or have been within their contemplation.

The circular of 1st July 1911 could not have reached Calcutta by the 8th in the

ordinary course of mail, nor does it clerely appear that it was otherwise communicated to the parties prior to that date. This is important in considering what were the circumstances, that is, the know circumstances, at the time the agreement was made.

The phraseology of the two clauses too seems to us to aid the view that the risk contemplated and accepted did not extend to exclusion from the Association groups. The two clauses evidently refer to the same topic, and they speak of the group of trade-marks which is recognised by the Association, but while the 6-marks group may be said to have been recognised at the date of the agreement, the Association groups were not recognised, but created and established. Mr. H. D. Bose, who has argued the whole case admirably on behalf of the plaintiffs, points to certain passages in Mr. Macleod's evidence as supporting his contention that the Association has ceased to recognise the 6-marks group, and at one point there would seem to be some verbal justification for the argument. But it seems to turn on the precise force Mr. Macleod placed on the word "recognise," when under enticement of cross-examination he gave an affirmative answer to a question implying that recognition had ceased. The Association then had their own groups, and it would probably be correct to say that they did not recognise any other group as occupying the position it had in relation to them prior to the establishment of the Association group. But Mr. Macleod, we believe, is not so much a grammarian as a man of affairs, and passing from the abstract to the concrete, he declares that the 6-marks group can still be the subject of a contract under the prescribed London forms and further, that contracts on the basis of the 6-marks group enjoy the same facilities for arbitration, etc., as are enjoyed by contracts made under the official group. We attach more importance to the position thus disclosed by Mr. Macleod than to the terms of his reply to the question put to him in cross-examination.

Mr. Bose, however, has suggested that the advantage of a more favourable scale of allowances has now been lost, and that the three 8 marks are now no better than substitutes. That may be so where the contract is on the basis of the official group; but it had to be admitted that there was nothing to show this was the case where the contract is on the basis of the 6-marks group, as it still may be if the parties so desire.

It may be that the exclusion of the 38 marks from the Association groups has depreciated the value of those marks in their own group, but as we read the clauses 4 and 7, this casts no responsibility on Morans to indemnify the plaintiffs.

Morans' contention, therefore, is, we think, well founded, and we hold that neither clause refers to exclusion from the Association groups of marks, but only from the group of trade-marks recognised by the Association, as for example the 6-marks group. But apart from the Association groups, it is not alleged, and certainly is not proved, that there has been any omission or demission of the marks in suit, or any removal of them from the 6-marks group; in fact there is every reason to think that they still retain their place. So far we have dealt exclusively with the 6-marks group; but what we have said as to that, applies equally to the other groups for the case and the arguments have proceeded on the basis that what is true of the 6-marks groups is, in the circumstances of this case, true of all groups in question other than the Association's groups.

And so we agree with the conclusion shortly and clearly stated by Imam, J., as to the plaintiffs' inability to recover damages; and in this view it is unnecessary to deal with Watson's separate contention that section 249 of the Indian Contract Act protects him from any liability in connection with this claim for damages.

The result is that each of the several appeals and also the cross-objections must be dismissed.

By consent we make the order that each party do bear and pay his own costs of the several appeals and the cross-objections. We say nothing about the paperbooks. Costs may, if necessary, be taxed as between attorney and client.

Appeals and cross-objections dismissed.

SUKH DIAL v. MANI RAM.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1487 AND 1488 OF 1912.

December 22, 1914.

Present:—Mr. Justice Rattigan and Mr. Justice Scott-Smith.

SUKH DIAL AND ANOTHER—DEFENDANTS—APPELLANTS

versus

MANI RAM AND OTHERS—PLAINTIFFS—RESPONDENTS.

Stamp Act (I of 1879), s. 2, sub-sec. (11)—Stamp Act (II of 1899), s. 2, sub-sec. (15)—Instrument of partition—Award—Evidence Act (I of 1872), s. 91—Secondary evidence of partition—Details of partition not allowed—Hindu Law—Partial partition proved—Onus probandi as to jointness—Mortgage-decree, form of—Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 4, 5, 6.

Under the Stamp Act of 1879 an award of arbitrators directing a partition was not included in the definition of "instrumentof partition" and, therefore, if such an award was executed before the present Stamp Act came into force, and the Court is satisfied that it was not put in the form of an award merely for the purpose of avoiding stamp duty, it will be received in evidence if it bears a stamp of Rs. 5 only.

The mere fact that the parties have signed an award does not necessarily constitute it a deed of partition.

Where an award effecting partition is lost, there is nothing in section 91 of the Indian Evidence Act to prevent one of the parties from proving *aliunde* that a partition did take place, but no secondary evidence of the details of such partition can be given.

Where a Hindu family consisted of a father and a son, and the whole of its property was originally joint, but subsequently the father dealt with various properties as if he were their sole owner, the fact of his so dealing would not amount to proof of his right to do so as against his son. But when we find him actually selling certain properties to the son himself, the inference is obvious and conclusive that some sort of partition of the property must previously have taken place. Under these circumstances, the burden of proof as to jointness is shifted and the party alleging jointness has to prove that a particular property still remained joint ancestral property.

In mortgage-decrees the provisions of Order XXXIV, rules 4, 5 and 6 should not be overlooked.

Second appeal from the decree of the Divisional Judge, Lahore Division, dated the 27th June 1912, varying that of the Additional District Judge, Lahore, dated the 29th May 1911, decreeing the claim in part.

Rai Bahadur Pandit *Sheo Narain* and Mr. *Broadway*, for the Appellants.

Mr. *Kirkpatrick* and Lala *Ganga Ram*, for the Respondents.

JUDGMENT.—This appeal is closely connected with Civil Appeal No. 1488 of 1912 and this judgment will dispose of both. Plaintiffs as mortgagees brought two suits against the representatives of the mortgagor. In the first suit they rely upon a mortgage of a house effected in their favour on the 18th December 1905 by Shib Dial (father of defendant No. 1 and grandfather of defendant No. 2), and their prayer is that the said house may be sold and out of the sale-proceeds the sums of Rs. 4,000, principal, and Rs. 757, interest, be awarded to them. In the second suit the plaintiffs base their claim upon a further charge effected upon the said house on the 23rd December 1908, and in this suit they claim to recover Rs. 1,000, principal, and Rs. 189-4, interest, by sale of the said property. The Additional District Judge in both suits held that the property was ancestral and that in the first suit only the sum of Rs. 2,600 and in the second suit only the sum of Rs. 500 were binding charges upon the property in suit. He accordingly gave judgment in plaintiffs' favour (1) in the first suit for Rs. 2,600 with interest after the 23rd December 1908, (plaintiffs having received interest up to that date in the second mortgage); and (2) in the second suit, for Rs. 500 with interest. The decrees of the first Court provided that the mortgaged property should be sold and plaintiffs be paid from the sale proceeds, the decree in the second suit further providing that if there was any deficiency in making good plaintiffs' claim, the other property of Shib Dial was to be held liable therefor.

Plaintiffs appealed in both cases to the Divisional Judge, and their appeals were accepted, "a decree being passed in each suit as prayed for in each plaint, by sale of the mortgaged property." The learned Judge based his conclusions upon his findings that there had been a partition of the joint ancestral property in 1890 between the mortgagor and his son, defendant No. 1; that thereafter the property which fell to the mortgagor's share became his acquired property, and that the mortgagor was entitled to deal with it as he pleased. At the same time, he expressed the opinion that if the property had not been the acquired

property of the mortgagor, there was "no very good proof that the sums of Rs. 1,400 and Rs. 500 (which had been disallowed by the Court of first instance) were required for family necessities" and as such binding upon the property in the hands of defendants.

Defendants have appealed to this Court from the decrees of the Divisional Judge and pray that the decrees passed by the Additional District Judge may be restored.

Mr. Sheo Narain on appellants' behalf gives up ground 2 in Appeal No. 1487 of 1912 and ground 3 in Appeal No. 1488 of 1912, and contends (1) that there is no legal proof that the property of the family, which was admittedly once joint in the strict sense of Hindu Law, was ever partitioned between Shib Dial and his son, Sukh Dial, or that the house in suit fell to the share of the former; (2) that the Additional District Judge's decree did not award future interest and that as plaintiffs did not specifically appeal from that part of his decree, it was not competent to the Divisional Judge to grant future interest after date of decree as prayed for in the plaint; (3) that the lower Appellate Court should not have made the decretal amount a charge upon property other than that mortgaged; and (4) that the Divisional Judge has not considered the finding of the Court of first instance that the sum of Rs. 150 was not actually received by the mortgagor in respect of the second mortgage charge.

As regards the first contention, plaintiffs' allegations are that in August 1890 Shib Dial and his son, Sukh Dial (defendant No. 1), who originally were members of a joint Hindu family, had the ancestral property partitioned by arbitrators and that the latter, after due inquiry, effected a partition by an award, dated 30th August 1890. This award was signed by the parties and duly registered. The original in not forthcoming and defendant No. 1 has stated in Court that it is not in his possession. Presumably, therefore, it is lost, as we cannot assume that Shib Dial made it over to plaintiffs when he effected the mortgage in their favour. It was a document which related not merely to the house in suit, but to various other properties which are said to have fallen to the share of Shib Dial, and there is no reason to suppose that the latter parted with it. On the other hand, it is obvious that plaintiffs, if they had had the original in their possession, would have preferred to produce it rather than the copy which they have obtained from the Registry Office. Other objections apart, therefore, there is no ground for refusing to accept the copy as admissible secondary evidence.

Mr. Sheo Narain's main argument, however, is that the award is inadmissible in evidence, as it was stamped merely as an award and not (as it should have been) as a deed of partition. As the original is not forthcoming, the learned Advocate argues, it is not open to plaintiffs to tender the copy and ask for its reception in evidence upon payment of the penalty due under the Stamp Act where an original instrument is under-stamped [see *Raja of Bobbili* v. *Inuganti China Sitaramasami Garu* (1)].

The Courts below are agreed in holding that the copy tendered by plaintiffs is inadmissible in evidence, but we are not satisfied that their conclusions are correct. No doubt, under section 2 (15) of the present Stamp Act, a deed of partition includes "an award by an arbitrator directing a partition", but in 1890 when the present award was made, the definition of "instrument of partition" in Act I of 1879 was not so wide and made no mention of such an award. The very fact that the definition had to be expressly extended in order to include such awards, suggests that under the former Act an award of arbitrators directing a partition was not included in that definition, and it is a well-known canon of construction that fiscal enactments which impose burdens upon the subject are to be construed strictly. If, therefore, the award in the present case was really such, and if we are satisfied that it was not put in the form of an award merely for the purpose of avoiding stamp duty, there is nothing in the definition of "instrument of partition" in Act I of 1879 to preclude us from receiving it as evidence simply because it bore a stamp of Rs. 5 instead of an *ad valorem* stamp.

Mr. Sheo Narain contends that the very fact that the parties signed the award constitutes it a deed of partition and in support

(1) 23 M. 49 (P. C); 26 I. A, 262, 4 C. W. N. 117.

of his argument, refers to a single Bench ruling of this Court [*Rattan Chand* v. *Ghasitamal* (2)] and *Amarsi* v. *Dayal* (3). We cannot accept this very general proposition. In our opinion, every case must be decided upon its own facts, and the real question is whether the document in question is a true award of arbitrators, or merely a deed of partition by the parties themselves disguised in the form of an award in order to escape payment of stampduty [*Jesa Lal* v. *Musammat Ganga Devi* (4), *Wasir Ali* v. *Mahbub Ali* (5)]. In the case before us there appears to be no reason to suspect the ostensible character of the document, and it would be a very natural proceeding on the part of the parties concerned to sign the arbitrator's award in token of their acceptance of it. But while we can find no good ground for rejecting the award (and in its absence, the copy of it tendered by plaintiffs), we do not consider it essential for the purposes of the case before us.

Under section 9 of the Indian Evidence Act, the only evidence that can be tendered of the terms of that document would be the document itself, but there is nothing in that section to prevent plaintiffs from proving *aliunde* that a partition took place between Shib Dial and defendant No. 1, though, of course, plaintiffs would not be entitled to give secondary evidence of the details of such partition. Here plaintiffs have adduced evidence to show that a partition of ancestral property must have taken place prior to the mortgage effected by Shib Dial in 1905, and in our opinion this evidence was admissible and not excluded by the provisions of section 91 of the Evidence Act.

The further question remains, whether the house in suit remained ancestral property or fell to the share of Shib Dial when the partition (if any) took place. Admittedly, the family and the whole of its property were originally joint, but after 1890 we find Shib Dial dealing with various properties as if he were their sole owner (see the sale-deeds of 11th June 1894, 18th December 1905, and 10th January 1903). No doubt the fact that in these sale-deeds Shib Dial gave himself out as the exclusive owner of the properties sold, would not amount to proof of his right to do so as against defendant No. 1, but when we find him actually selling certain property to defendant No. 1 (see the sale-deed of 1st July 1905), the inference is obvious and conclusive that some sort of partition of the property must previously have taken place, as otherwise it would not have been possible for him to sell it to his co-parcener as if it belonged to him exclusively.

We hold, then, that evidence to prove that some sort of partition actually took place between the father and son is admissible, and that the evidence in support of this allegation does, in fact, prove at least a partial partition of the ancestral property. Upon these findings, we must hold that the *onus probandi* was shifted and that it was for defendants to prove that the house in suit still remained joint ancestral property, despite such partition and the fact that Shib Dial disposed of it as if it belonged to him exclusively [see *Narayan Babaji* v. *Nana Manohar* (6), *Amichand* v. *Ghasita Mal* (7), *Sain Das* v. *Musammat Sahib Devi* (8), *Musammat Nihal Devi* v. *Kishore Chand* (9)]. Defendants have entirely failed to adduce such proof, and we accordingly hold that the house was the acquired property of Shib Dial and could be alienated by him at his pleasure. The only further point in this connection is whether the mortgagor received full consideration. As regards the first mortgage, both Courts are agreed that Shib Dial received the full amount of Rs. 4,000 and nothing further need be said as to it. As regards the second mortgage, the Additional District Judge finds that the sum of Rs. 150 was not really paid to the mortgagor, as that amount was taken back by the mortgagee after the deed had been registered. The Divisional Judge has omitted any reference to this matter in his judgment and he must, therefore, give a decision upon it. It is true that the sum in question was re-paid to the mortgagee immediately after the parties had left the registration

(2) P. L. R. 1900 p. 459.
(3) 9 B. 50.
(4) 20 Ind. Cas. 868; 210 P. W. R. 1913; 81 P. R. 1913; 321 P. L. R. 1913.
(5) 22 Ind. Cas. 412; 134 P. L. R. 1914; 101 P. W. R. 1914.
(6) 7 B. H. C. R. 153 at p. 177.
(7) 148 P. R. 1882.
(8) 140 P. R. 1892.
(9) 8 Ind Cas. 999; 97 P. R. 1910; 142 P. W. R. 1910, 11 P. L. R. 1911.

office, but we find that the mortgagee gave the mortgagor a pro-note, payable on demand, for the amount. The mortgagor apparently kept the pro-note and made no use of it but we cannot on that account hold that the mortgagee (who was liable upon the note at any moment within the period of limitation) did not give consideration *pro tanto* for the mortgage.

There remains the question of future interest. It is urged that the Additional District Judge did not award interest after decree to the plaintiffs and that as plaintiffs did not in their grounds of appeal expressly take objection to that part of the first Court's decree, the Divisional Judge was not competent to grant them such interest. We find some difficulty in understanding the decree of the Additional District Judge upon this point and are not at all sure that he did not intend to award interest after decree. But whether he did or did not, it is clear from the claim as made by plaintiffs in their memorandum of appeal to the Divisional Judge that what they prayed for from him was a decree in the terms of their plaint. It is wrong, therefore, to say that the learned Judge gave them more than they asked for. So far then as the merits are concerned, these appeals must fail. We note, however, that the Courts below have overlooked the provisions of Order XXXIV, rules 4, 5 and 6, Civil Procedure Code, and we must, therefore, so far accept the appeals as to vary the decrees by directing as follows:—

(*a*) that the amounts due to the plaintiffs are (1) Rs. 4,757 and (2) Rs. 1,189-4-0, together with interest thereon at the rate specified in the plaints in the two suits and the costs incurred in both suits by them up to date; and

(*b*) that if the defendants fail to pay into Court within six months of this date the said sums with interest thereon and costs as above specified, the mortgaged property shall be sold and the proceeds of the sale (after defraying the expenses of the sale) shall be paid into Court and applied in payment of what is declared due to the plaintiffs as aforesaid, and that the balance (if any) shall be paid to defendants;

(*c*) that if the net proceeds of any such sale are found to be insufficient to pay the amount due to the plaintiffs, the balance shall be recoverable from any other property of the late Shib Dial which may be in the possession of the defendants or either of them, or if any such other property shall have been alienated by them, from the proceeds of such alienation that may have come into their or his hands respectively. Defendants will pay plaintiffs' costs in both suits and in all Courts.

Appeals accepted; Decrees modified.

CALCUTTA HIGH COURT.

CIVIL RULE No. 1206 OF 1913.

January 13, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

CHARU CHANDRA GHOSH—PETITIONER

versus

CHANDI CHARAN ROY CHOWDHURY —OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. IX, r. 9, O. XXI, r. 90, O. XLIII, r. 1 (c)—Application to restore application for reversal of sale, dismissal of—Appeal, whether allowed—Sufficient cause—Party deliberately absenting, whether can claim restoration.

Under Order XLIII, rule 1 (*c*), of the Civil Procedure Code, 1908, no appeal lies against an order rejecting an application under rule 9 of Order IX for revival of an application for reversal of a sale, which had been dismissed for non-appearance of the judgment-debtor.

A party who was present in Court but left the Court of his own accord to attend to other business and without even instructing his Pleader, must take the consequence of his own conduct and is not entitled to have his case restored.

Civil rule against an order of the District Judge, 24-Parganas, dated the 30th June 1913, confirming that of the Munsif, Alipur, dated the 29th April 1913.

Babu *Satish Chandra Mukherjee*, for the Petitioner.

Babu *Biraj Mohan Majumdar*, for the Opposite Party.

JUDGMENT.—We are invited in this Rule either to set aside an order by which the Court of first instance refused to restore an application for reversal of an execution sale, or to direct the lower Appellate Court to entertain an appeal against that order. The petitioner had applied to the Court of first instance under rule 90 of Order XXI of the Code of Civil Procedure of 1908 for reversal of an execution sale. The case had been set down for disposal on the 23rd

November 1912. On that day, he was present in Court and found the Judge engaged in the trial of another suit. He left the Court and went on another business. He returned after an hour and found that his case had been meanwhile called on and had been dismissed for non-prosecution, as his Pleader had informed the Court that he had received no instructions. He, therefore, applied to have this order of dismissal set aside. The Court held on the 29th April 1913 that no sufficient cause for non-appearance within the meaning of rule 2 of Order IX of the Code had been established and refused to restore the application. The petitioner then appealed to the District Judge. When the appeal was taken up for disposal, a preliminary objection was taken that the appeal was incompetent. The District Judge gave effect to this contention and rejected the appeal. We are now invited either to set aside the order of the Court of first instance or to direct the lower Appellate Court to entertain the appeal.

The first question for consideration is, whether the appeal preferred to the District Judge was competent. It has been argued that the order of dismissal was made under rule 8 of Order IX of the Code, that the application for restoration was made under rule 9 of Order IX and that consequently under Order XLIII, rule 1, clause (*c*), an appeal lay to the District Judge. In our opinion there is no foundation for the contention. Clause (*c*) of rule 1 of Order XLIII provides that an appeal shall lie from an order under rule 9 of Order IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit. Here the petitioner did not prefer an appeal against an order refusing to set aside the dismissal of a suit. What had been dismissed was his application under rule 90 of Order XXI for reversal of a sale. The language of clause (*c*) of rule 1, Order XLIIIi is identical with that of clause 8 of section 588 of the Code of 1882. Under that Code, it had been held by this Court in the cases of *Sujauddin* v. *Beasuddin* (1) and *Jung Bahadur* v. *Mohadeo Prosad* (2) that no appeal lay aginst an order rejecting an application under section 102 for revival of an application under section 311, which had been dismissed for non-appearance of the judgment-debtor. The same view had been previously taken in the cases of *Ningappa* v. *Gangava* (3) and *Raja* v. *Srinivasa* (4) and has subsequently been adopted by the Allahabad High Court in the case of *Ghanti Bibi* v. *Abdul Samad* (5). We are of opinion that the new Code has not, in this respect, effected any alteration in the law. It has been argued, however, in support of the contrary view that a substantial alteration has been effected in section 647 of the Code of 1882, which has been replaced by section 141 of the Code of 1908. There is clearly no foundation for this contention. Section 647 provided that the procedure therein prescribed should be followed, as far as it could be made applicable, in all proceedings in any Court of civil jurisdiction other than suits and appeals. To this section was added an explanation in 1892, to the effect that the section does not apply to applications for execution of decrees, which are proceedings in suits. In section 141 of the Code of 1908, section 647 is reproduced in the following form:—"The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction." The two alterations effected are, *first*, that the words "other than suits and appeals" are omitted, *secondly*, the explanation is omitted. This, however, has not effected any alteration in the law, as is clear from the history of the legislation on the subject, as indicated by the decisions in the cases of *Thakur Prasad* v. *Fakirulla* (6), *Asim Mandal* v. *Raj Mohan Das* (7) and *Hari Charan* v. *Manmatha Nath* (8). In our opinion, it is clear that the appeal preferred to the District Judge was not competent and was rightly rejected.

We have next to deal with the contention that the order of the Court of first instance was erroneous on the merits and should be set aside by this Court in the exercise of its revisional jurisdiction. The Court of first instance accepted the principle laid down in

(1) 27 C. 414.
(2) 31 C. 207; 8 C. W. N. 160.
(3) 10 B. 433.
(4) 11 M. 319.
(5) 29 A. 596; A. W. N. (1907) 186.
(6) 22 I. A. 44; 17 A. 106; 5 M. L. J. 3; 6 Sar. P. C. J. 526.
(7) 11 Ind. Cas. 385, 13 C. L. J. 532.
(8) 19 Ind. Cas. 683; 41 C. 1; 18 C. W. N. 343.

the case of *Manilal Dhunji* v. *Gulam Husein* (9), which was subsequently followed in the case of *Esmail Ebrahim* v. *Jan Mahomed* (10). In this case it was laid down that where a party has not been taken unawares and where he was under no compulsion to leave the Court, nor could assign any weighty cause for his absence, he took the risk of the case being called on in his absence and could not be said to have established sufficient cause for his absence within the meaning of the Code. Reliance, however, has been placed upon the cases of *Somayya* v. *Subbama* (11) and *Lalta Prasad* v. *Ram Karan* (12), in which an attempt was made to draw a distinction between "sufficient cause" and "valid reason" for non-appearance. We are not impressed by the distinction suggested. In any event, upon the facts of the case before us, it is manifest that the petitioner is not entitled to any consideration from the Court. He was present in Court. He left the Court of his own accord to attend to other business, and he assumed that his own case would not be taken up during his absence. He did not even take the precaution to instruct his Pleader. The result was that when the case was called on during his absence, the Pleader intimated to the Court that he had no instruction to proceed with the matter. A party who deliberately chooses to act in this way must take the consequence of his own conduct.

The result is that the rule is discharged with costs. We assess the hearing fee at three gold *mohurs*.

Rule discharged.

(9) 13 B. 12.
(10) 10 Bom. L. R. 904.
(11) 26 M. 599.
(12) 14 Ind. Cas 187; 34 A. 426; 9 A. L. J. 666.

BOMBAY HIGH COURT.

CROSS APPEALS NOS. 200 AND 201 OF 1914.

October 7, 1914.

Present:—Sir Basil Scott, KT., Chief Justice, and MR. Justice Hayward.

BLANCHE SOMERSET TAYLOR —PETITIONER—APPELLANT AND RESPONDENT

versus

CHARLES GEORGE BLEACH—RESPONDENT—RESPONDENT AND APPELLANT.

Divorce Act (IV of 1869), s. 37—Maintenance—Power to award lump sum—Interpretation of Statutes—Punctuation when taken into consideration.

Under section 37 of the Divorce Act, the Court has power to make an order for payment of a lump sum for permanent maintenance.

The words 'for any time not exceeding her own life' in the section qualify 'annual sum' and do not qualify 'gross sum.'

The word 'secure' would ordinarily include 'pay.'

There can be no reason for refusing the assistance of the punctuation, where the sense might otherwise be doubtful, in Acts of the regularly constituted Legislatures of India.

The Maharani of Burdwan v. *Krishna Kamini Dasi*, 14 C 365(P. C.); 14 I. A. 30; 11 Ind. Jur. 275, 4 Sar. P. C. J. 772, distinguished.

Cross-appeals from the decision of the District Judge of Poona, in Suit No. 116 of 1914.

Mr. *Binning*, (with him Messrs. *T. R. Desai* and *P. Bunter*), for the Petitioner.

Mr. *G. S. Rao*, for the Respondent.

JUDGMENT.

SCOTT, C. J.—These are cross-appeals from an order of the District Judge of Poona awarding a lump sum of Rs. 5,000 to be paid to the petitioner for permanent maintenance under section 37 of the Indian Divorce Act, IV of 1869. The petitioner appeals on the ground that the sum awarded is not sufficient and that the Court should have secured to her a sum the interest of which would secure her at least Rs. 150 per mensem. The respondent appeals on the ground that the Court has no power to award payment of a lump sum and that if it had the power, the sum awarded is excessive.

First, as to the power of the Court to award payment of a lump sum.

The materal clause of section 37 of the Divorce Act is the third. It gives the Court power to "order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as having regard" etc.

As the sentence is punctuated in the State publications of the Act, it seems to me to be clear that the words "for any term not exceeding her own life" qualify "annual sum" and do not qualify "gross sum." If so assuming a gross sum to be available, how can it be better secured to the wife than by paying it over to her?

The argument against this view was based upon the judgments in *Medley* v. *Medley* (1)

(1) (1882) 7 P D. 122 at p 124; 51 L. J. P. 74; 30 W. R. 937.

TAYLOR, B. S. *v.* BLEACH, C. G.

and *Twentyman* v. *Twentyman* (2).

I can see no reason why the punctuation of the editions of the Act issued by the Government of India should be disregarded, for so far as I am aware there is not in India any unpunctuated original Statute Book. The position is not the same as in England, where in *Stephenson* v. *Taylor* (3) Cockburn, C. J., said: "On the parliament roll there is no punctuation, and we therefore are not bound by that in the printed copies." In *Barrow* v. *Wadkin* (4), Sir John Romilly, M. R., said: "I supposed I should not learn much on the subject from the inspection of the Roll of Parliament; but, as it was in my custody, I have examined it ... It seems that in the Rolls of Parliament the words are never punctuated, and accordingly very little is to be learnt from this document."

The punctuation of the Queen's Printers' Edition of 20 & 21 Vic. C. 85, section 32, published in 1857, is the same as the Indian punctuation and it appears that in three reported cases covering a period from 1870 to 1902 [*viz.* *Morris* v. *Morris* (5), *Stanley* v. *Stanley*(6), *Kirk* v. *Kirk*(7)], the Divorce Court in England has taken the words now under consideration as authorising it to award payment of a lump sum to the petitioner's wife.

In *Medley* v. *Medley* (1) the Appeal Court in England expressed a contrary opinion, being influenced partly by the recital in the Amending Act 29 & 30 Vic. C. 32, and in *Twentyman* v. *Twentyman* (2), Jeune, J., held that the Court had no power to order a lump sum to be paid over to the petitioner by way of permanent maintenance. That conclusion was possible, though by no means inevitable, on an unpunctuated Act, but I do not think it would be a reasonable conclusion on the clause of the Divorce Act of 1869, punctuated as it is in the Government of India Edition.

In India we have no Amending Act with an explanatory recital such as was before the Court in *Medley* v. *Medley* (1). Section 37 incorporates without comment the operative parts of the two English Acts and cannot be construed with reference to a recital which has been omitted.

In my opinion, therefore, the District Judge had power to make the order for payment of a lump sum.

On the second question whether the sum awarded was adequate or excessive, it appears to me that on the evidence it was a reasonable award and I do not think this Court would be justified in interfering with it.

I would dismiss both appeals without costs.

HAYWARD, J.—I quite agree that we should not be justified on the scanty materials before us in interfering with the amount, namely, Rs. 5,000 awarded for permanent maintenance by the District Judge.

But the question whether that amount should be paid absolutely or should be secured for a limited term by an appropriate instrument, would appear to me a more difficult matter. We have been referred to a number of conflicting decisions of the English Courts upon the corresponding provisions of the English Statutes, namely, section 32 of 20 & 21 Vic. C. 85 (1857) and section 1 of 29 and 30 Vic. C. 32 (1866) which have been combined into section 37 of the Indian Divorce Act, 1869. The Judge Ordinary, Sir C. Cresswell, ordered the absolute payment of a gross sum in the case of *Morris* v. *Morris* (5) and Gorell Barnes, J., followed this order in the subsequent cases of *Stanley* v. *Stanley* (6) and *Kirk* v. *Kirk* (7). But in the meanwhile Jessel, M. R., had held in the case of *Medley* v. *Medley* (1) that the absolute payment of a gross sum could not be ordered, because payment from time to time was contemplated by the word 'secure' used in the Statute of 1857. It was again more recently held by Jeune, J., in the case of *Twentyman* v. *Twentyman* (2) that the word 'secure' was governed by the phrase occurring later on, 'for any term not exceeding life.' Lindley, L.J., concurred with the Master of the Rolls in the former case, but observed that the word 'secure' would ordinarily include 'pay.' The learned Judges appear to have been moved to their decision by the consideration that the word 'secure,' coupled with the provision for the execution of a proper instrument in the Statute of 1857, applied only to cases where there might be

(2) (1903) P. 82; 72 L. J. P. 36; 51 W. R. 575, 88 L. T. 571.

(3) (1861) 1 B. and S. 95; 30 L. J. M. C. 145; 7 Jur (N. S.) 602; 4 L. T. 243; 9 W. R. 600; 121 E. R. 652; 124 R. R. 474.

(4) (1857) 24 Beav. 327; 116 R. R. 148; 53 E. R. 384.

(5) (1861) 31 L. J. P. and M. 33.

(6) (1898) P. 227; 68 L. J. P. 227; 47 W. R. 272; 79 L. T. 104.

(7) (1902) P. 145; 71 L. J. P. 78; 87 L. T. 148.

property which could properly be secured by such instrument as recited in the preamble of the subsequent Statute making provision for cases where there might be no such property, namely, the Statute of 1866. We should no doubt feel ourselves bound to follow that decision had the provisions of the English Statutes been incorporated in their entirety in the Indian Divorce Act, 1869. But the distinction between cases of property and cases of no property has, intentionally or unintentionally, not been retained owing to the omission of the preamble of the Statute of 1866. So that the opening words, 'In every such case,' which would otherwise have referred to cases of no property, cannot grammatically be so read in section 37 of the Indian Divorce Act, 1869.

We ought, therefore, in my opinion to approach the matter as *res integra* from the starting point of Lindley, L. J., that the word 'secure' would ordinarily include 'pay' and consider whether that ordinary meaning should be modified by reason of the other words used in the section. The material words are that the Court may order the husband to 'secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as...it thinks reasonable...and for that purpose may cause a proper instrument to be executed.' The plain meaning of those words would appear to me to be that the gross sum of money should be paid absolutely to the wife and that the annual sum of money only should be limited for the period of her life. It was the use of the word 'annual' which required the limitation 'for the period of her life.' The words would have been 'such gross or annual sum of money for any term not exceeding her own life,' if it had been intended to limit the use of the gross sum as well as the annual sums for the period of her life. It was, moreover, apparently foreseen that the gross sum might be paid down at once, in which case there would be no necessity for the execution of any document and hence among other reasons no doubt, it was provided that the parties 'may' and not 'shall' be ordered to execute a proper document. The succeeding clause opening with the words 'In every such case' must, as already indicated, be construed as adding power to order the payment of monthly or weekly sums in all cases, and not merely in cases of no property, owing to the special form of drafting of section 37 of the Indian Divorce Act, 1869.

These conclusions have been reached without reference to the punctuation, but if regard may be had to punctuation, then they are confirmed by the punctuation of the section as appearing in the publication of the Act at page 375 of the Gazette of India, dated 6th March 1869. The generally accepted rule was that punctuation could not be regarded in interpreting Acts of Parliament and this rule was founded on reason, as no punctuation appeared in the Acts on the Rolls of Parliament. But since 1849 punctation has been inserted. Nevertheless the old rule would appear to survive in England (Maxwell's Interpretation of Statutes, 5th Edition, Chapter I, section 5, pages 67 and 68). Lord Esher, M. R., observed that there were no such things as stops and brackets in an Act of Parliament and Lord Fry refused where the sense was strong to 'pause at those miserable brackets,' though refraining from expressing an opinion whether brackets could be looked at in an Act of Parliament in the case of *Duke of Devonshire* v. *O'Connor* (8). It should be no matter of surprise, therefore, that the old rule should be applied to the old Regulations promulgated in this country, and it will be found that the Privy Council remarked upon a consideration of an old Bengal Regulation of 1819 that it was an error to rely on punctuation in construing the Act of the Legislature in the case of *Maharani of Burdwan* v. *Krishna Kamini Dasi* (9). But whatever may have been the practice under the old Regulations, the practice would appear, since the constitution of regular Legislatures in India, to have been to insert stops in Bills before the Legislatures and to retain them in the authentic copies of the Acts signed by the Governor-General and published in the Gazette of India, and Maclean, C. J., ventured to look at the stops in such an Act in the case of the *Secretary of State for India in Council* v. *Rajlucki Debi* (10) and so did Parsons, Acting C. J., in the case of *A.* (*Wife*) v. *B.* (*Husband*) (11),

(8) (1890) 24 Q. B. D. 468; 59 L. J. Q. B. 206; 62 L. T. 917; 38 W. R. 420; 54 J. P. 740.

(9) 14 C. 365 (P. C.); 14 I. A. 30; 11 Ind. Jur. 275; 4 Sar. P. C. J. 772.

(10) 25 C. 239 (11) 23 B. 460.

though the action of the latter was reprehended by the Full Bench of the Allahabad High Court in the case of *Edward Caston* v. *L. H. Caston* (12), relying on the remarks of the Privy Council. With due deference to that Bench there would, however, appear to me no sufficient ground, in view of the fact that it was an old Regulation under the consideration of the Privy Council and in view of the deliberate insertion of stops by the regular Legislatures, for refusing the assistance of the punctuation, where the sense might otherwise be doubtful, in Acts of the regularly constituted Legislatures of India.

Appeals dismissed.

(12) 22 A. 270; A. W. N. (1899) 59.

BOMBAY HIGH COURT.

CIVIL APPLICATION No. 121 OF 1914.

November 23, 1914.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

DAYABHAI NARANDAS—PLAINTIFF—APPLICANT

versus

PESTONJI JAMSHEDJI - DEFENDANT—OPPONENT.

Bombay District Municipal Act (Bom Act III of 1901), ss. 3 (17), 14, 59—Trollies pushed on rails in a public street, whether subject to wheel-tax—Vehicle carrying rubbish, meaning of.

Trollies running on rails in the streets of a Municipal town, pushed or pulled by hand and used by contractors for the purpose of carrying material to fill up a tank, are 'vehicles' and subject to the wheel-tax under the District Municipal Act.

Civil application from the decree passed by the first Class Subordinate Judge of Broach, in Small Cause Suit No. 590 of 1913.

Mr. *T. R. Desai*, for the Applicant.

Mr. *G. N. Thakore*, for the Opponent.

JUDGMENT.

HEATON, J.—I think the Judge below is wrong in his decision so far as it has gone. We are dealing with some trollies, which run on rails in the Broach streets, pushed or pulled by hand and used by

contractors for the purpose of carrying material to fill up a tank. The question is, whether these trollies are vehicles subject to the wheel-tax of the Broach Municipality, the collection of which is in the hands of the plaintiff who is the farmer of that tax. The Judge below, as I understand him, held that these trollies do not come within the definition of "vehicles" of the District Municipal Act. I think they do. It seems to me to be idle to say that these vehicles are not used or capable of being used on a public street when everybody connected with the case knows that in fact they are used on a public street. I see no good reason for supposing that they do not come within the plain words of the definition; nor do I think that they come within the exemption or exception which is provided for in the contract between the plaintiff and the Municipality. They are not the conveyances of the Municipality or of Municipal servants and they are not used for watering roads or for carrying rubbish by which, I understand, is meant the conservancy purpose of removing the town refuse. At least it is not shown that they are used for this purpose. That being so, it is not shown that they come within this exemption or exception. The truth is that the real dispute between the parties is one which has not yet been adjudicated on by the Judge.

We set aside his decree and remand this suit to be disposed of according to law. Costs of this application to be costs in the suit.

SHAH, J.—I concur.

Decree set aside; Case remanded.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 82 OF 1914.

November 26, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

DAYA SHANKAR DEFENDANT—APPELLANT

versus

HUB LAL AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Hindu Law—Manager of joint family—Family

arrangement—Minor—Mutation proceedings—Registration, whether necessary.

Under ordinary circumstances and in the absence of fraud or collusion, the managing member of a joint Hindu family is entitled to transact the business of the joint family and represent the members of it.

A family settlement come to in a mutation proceeding and creating rights in immoveable property does not require registration.

Kokla v. *Peary Lal*, 21 Ind. Cas. 29; 11 A. L. J. 765; 35 A. 502, followed.

Second appeal from the decision of the District Judge of Aligarh, modifying that of the Assistant Judge.

Mr. *Gulzari Lal*, for the Appellant.

Mr. *Girdharilal Agarwala*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit in which the plaintiffs sought a declaration that they were the owners and possessors of certain property and possession.

It appears that the parties who are disputing about the estate of one Bhajan Lal were all members of the same family. In mutation proceedings a family settlement was come to, in consequence of which the plaintiffs were recorded as owners in respect of the property now in suit. It is alleged by the plaintiffs that this arrangement was come to as the result of fraud. The Court of first instance found that there was no fraud when the family settlement was entered into, and accordingly the plaintiffs were not entitled to a decree.

The lower Appellate Court agreed in all the findings of fact of the Court of first instance, but finding that one of the plaintiffs was a minor, it decreed the claim to the extent of the interest to which he would have been entitled had there been no family arrangement. The defendant comes here in second appeal contending that inasmuch as the father of the minor Raj Narain consented to the arrangement, it is binding upon his son, who is a member of the joint Hindu family. In our opinion under ordinary circumstances and in the absence of fraud or collusion, the managing member of a joint Hindu family is entitled to transact the business of the joint Hindu family and respresent the members of it.

In the present case no fraud or misconduct of any kind on the part of the father is proved, and it is not shown that the arrangement taken as a whole was not for the benefit of the family. On this point, therefore, we think that the lower Appellate Court was wrong.

The respondent, however, seeks to uphold the decree of the Court below, on the ground that rights in immoveable property were created by the compromise entered into between the parties, and that this could only be done by a document duly registered. We think that under the circumstances of the present case it was not necessary that there could have been any registered writing. The case is very similar to the case of *Kokla* v. *Peary Lal* (1). This case was followed in the case of *Jagrani Misrani* v. *Bisheshar Dube* (2), to which one of us was a party.

We accordingly allow the appeal, set aside the decree of the lower Appellate Court, and restore the decree of the Court of first instance with costs.

Appeal allowed.

(1) 21 Ind Cas. 29, 11 A. L. J. 765; 35 A. 502.
(2) 26 Ind. Cas 791; 12 A. L. J. 1316.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 360 OF 1912.

July 4, 1913.

Present:—Mr. Mittra, Offg. A. J. C.

RAM GULAM AND OTHERS—DEFENDANTS—APPELLANTS

versus

BALA PRASAD—PLAINTIFF—RESPONDENT.

Mortgage—Malikana rights—Agreement not to reclaim property till satisfaction, effect of—Hypothecation—Mortgagee, right of, to a decree for sale

Where a superior proprietor mortgages with possession his *malikana* rights of a village in lieu of a money-debt, and covenants not to claim the mortgaged property till satisfaction of the debt, the agreement amounts to a hypothecation of the property and the mortgagee is entitled to a decree for sale of his proprietary rights.

Appeal against the decree of the Divisional Judge, Nerbudda Division, dated the 19th April 1912, confirming that of the District Judge, Narsinghpur, dated the 15th September 1911.

Mr. *S. Ramdas*, for the Appellants.

Dr. *H. S. Gour*, for the Respondent.

RAM GULAM v. BAGA PRASAD.

JUDGMENT.—The plaintiff-respondent filed a suit, on the 21st July 1910, in the Court of the District Judge, Narsinghpur, on the basis of a mortgage-deed, dated the 23rd April 1883. The relief asked for was a decree for sale of the mortgaged property, that is, the superior proprietary rights in the village of Rehli. The appellants are subsequent mortgagees of the same property. Various pleas were taken in the lower Courts, which need not be noticed. On the 4th September 1911—the day fixed for argument after the case had been closed—the appellants put in a petition for leave to add a supplementary ground of defence, resting solely on the construction of the mortgage-deed. The District Judge refused to grant leave at that stage of the case. The points raised have, however, been fully considered by the learned Divisional Judge on appeal, and the memorandum of second appeal is confined to those points.

At the hearing before me, the appellant's learned Counsel asked permission to raise a new point not covered by the petition of appeal and not raised in either of the Courts below. The respondent's learned Counsel objecting, I had to disallow additional grounds of appeal of which no notice had been given to the other side.

The points for consideration are (1) whether upon a right construction of the mortgage-deed in suit, the plaintiff is entitled to sue for sale of the mortgaged property at all, and (2) if so, whether the right to such relief is limited to the recovery of the principal amount only.

The parties agree that the answer to the first question depends on whether the mortgage is a pure usufructuary mortgage, or one partly in the nature of a usufructuary mortgage and partly in the nature of a simple mortgage. Both parties rely on the dictum of this Court in *Fida Ali* v. *Ismailji* (1). The learned Divisional Judge has applied this ruling and has held that there is a personal convenant to pay combined with words of hypothecation.

The official translation made for this Court has not been challenged, and it agrees substantially with that given by the learned Divisional Judge in paragraph 10 of his judgment.

(1) 5 Ind. Cas. 701; 6 N. L. R. 20.

The mortgage runs thus: "I have now borrowed from you Rs. 500 (in words five hundred) I will to pay interest on it at Rs. 1-4-0 per cent (*sic*). I agree to re-pay the amount in six years from *Samvat* 1940 to the end of *Samvat* 1945. In lieu of this I mortgage with possession *malikana* rights of the whole of *Mouza* Rehli. . . . . You will, therefore, take Rs. 127 year by year, the amount of my *munafa*, from the inferior *thekadar* on account of yearly interest, and if there be any surplus amount, credit it towards the principal. No one will claim the mortgaged property till satisfaction of the amount."

The appellants' Counsel argues that there is no personal covenant to pay, or at any rate the covenant does not extend to anything beyond the principal amount of rupees five hundred. I am unable to agree with this contention. The property mortgaged yielded a fixed sum of money payable by the inferior proprietor. This sum could not be raised till the next settlement of the village, and the parties knew that no new settlement could come into operation during the term of six years. The amount might be irrecoverable in years of famine, but even if the whole amount was regularly paid, the mortgage debt could not be satisfied by the usufruct. I think the contention that the mortgage debt was to be repaid out of the usufruct only and not personally at the end of six years, fails. Here I may as well dispose of the second point raised above. It is argued that the personal convenant cannot extend to the interest. I think the plain meaning of the parties is that the "amount" payable includes interest, for the clause agreeing to pay interest immediately precedes the clause containing the personal covenant. The mortgage, moreover, is not a mortgage in which the usufruct was to go only in lieu of interest.

I have held that there was a personal covenant to pay the mortgage-money. But the dictum of this Court which has been accepted by both parties requires something more than a mere personal covenant.

I think there are words of hypothecation in the mortgage-deed. The property mortgaged was merely a right to recover a

certain sum of money from the inferior proprietor, the money being charged on the village in the latter's possession. No suit would lie for the possession of such rights. The mortgagees' remedy will lie in a suit for money or in a suit for sale of the superior proprietary rights. There is no means of ejecting the inferior proprietor for non-payment of the *malikana*. In my opinion the mortgagor merely charged an annuity charged upon land. If then this is the true nature of the transaction, the agreement not to claim the mortgaged property till satisfaction of the debt amounts to a hypothecation of the property within the meaning of the ruling above cited.

For the above reasons I hold that the plaintiff was entitled to the usual sale decree, and his suit was within time under section 31 of Act IX of 1908.

The appeal fails and is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 3321 OF 1912.

December 4, 1914.

Present:—Mr. Justice Richardson and Mr. Justice Mullick

KALURAM SRIMAL AND ANOTHER—DEFENDANTS APPELLANTS

versus

PURAN CHAND NAHAR—PLAINTIFF—RESPONDENT.

Landlord and tenant—Tenancy, permanent or not—Burden of proof—Question of fact—Tenancy of homestead land, created before Transfer of Property Act 1882, transferability of.

In the absence of a written instrument containing the terms and conditions of a tenancy, the burden of proving that a tenancy is a permanent one is on the person who alleges it.

Such a question is primarily one of fact. The incident of non-transferability is common to tenancies from year to year of homestead lands created before the passing of the Transfer of Property Act, 1882, in the absence of a custom to the contrary.

Madhu Sudan Sen v. *Kamini Kanta Sen*, 32 C 1023; 9 C. W. N. 895, referred to.

Second civil appeal from the decree of the District Judge, Murshidabad, dated the 10th July 1912, affirming that of the Munsif, Lalbagh, dated the 5th September 1911.

Babu *Ram Chandra Mozumdar*, for the Appellants.

Babu *Brojalal Chakravarti*, for the Respondent.

JUDGMENT.

RICHARDSON, J.—This is a second appeal from the decree of the learned District Judge of Murshidabad dismissing an appeal in a suit tried by the Munsif of Lalbagh. Two contentions have been urged before us. In the first, place it is said that the finding of the learned District Judge that the tenancy in question in this suit is not a permanent tenancy is open to objection in point of law. Speaking for myself I am perfectly content with the mode in which this question has been dealt with in the judgment appealed from. It has been dealt with briefly, no doubt, but in my opinion sufficiently. It is said that two of the tests which the District Judge has applied for the purpose of determining the nature of the tenancy are not absolute or essential tests. He says that there is nothing to show that the land was ever transferred by sale or otherwise or that permanent buildings were ever erected on it. By these words, as it seems to me, he did not mean to imply that these were essential tests or the only tests that could be applied. In the absence of a written instrument containing the terms and conditions of the tenancy, the burden of proving that the tenancy was a permanent one was on the defendants in this suit, who alleged such permanancy. Such a question is primarily one of fact, because the answer to it must depend in each case in which it arises upon the particular facts and circumstances which are found to exist. The Judge had before him here the fact that the land had been held at the same rental for a period of 40 years, and no evidence was brought on either side to show how the tenancy originated. He referred to the tests above mentioned not as being absolute tests, but as *indicia* the presence or absence of which might affect the result. Upon the whole of the materials before him he came to the conclusion as a question of fact that the permanancy of the tenancy had not been proved. I am unable to say that in coming to that finding he committed any error of law.

The next point taken is that the learned District Judge is wrong in holding that the

tenancy, whether it was permanent or not, was not transferable and that, therefore, the defendants who claimed as recent transferees were mere trespassers and were not entitled to a notice to quit.

The tenancy, it appears, is not an agricultural tenancy. The land is in the Municipality of Azimganj and the relationship of landlord and tenant was created before the Transfer of Property Act was passed. In holding that such a tenancy was not transferable, the Courts below appear to have relied on the case of *Madhu Sudan Sen* v. *Kamini Kanta Sen* (1). The learned Pleader for the appellants has told us that the opinion expressed by the learned Judges by whom that case was heard is not borne out by or goes further than the previous decision which they purported to follow and was not necessary for the purpose of their own decision. The Judges mention, however, that they had decided previous cases on the same basis, that the incident of non-transferability is common to tenancies from year to year of homestead lands created before the passing of the Transfer of Property Act, in the absence of a custom to the contrary. This view, moreover, was adopted in the subsequent case of *Ram Charan Naskar* v. *Hari Charan Guha* (2). In my opinion we are concluded by authority; and that being so, it is not possible for us to say that the Judge has come to a wrong finding. There is nothing to show that any change was subsequently effected by the conduct of the parties or otherwise in the incidents of this tenancy, as they must be taken to have been at the time of its creation. Both the contentions urged before us failing, the appeal must be dismissed with costs.

MULLICK, J.—I agree.

Appeal dismissed.

(1) 32 C. 1023; 9 C. W. N. 896.
(2) 7 C. L. J. 107.

ALLAHABAD HIGH COURT.
FULL BENCH.

STAMP REFERENCE MADE BY THE BOARD OF REVENUE.

November 26, 1914.

Present:—Justice Sir George Knox, KT., Mr. Justice Chamier and Mr. Justice Piggott.

In re STAMP REFERENCE.

Stamp Act (II of 1899), ss. 56, 57—Document not in existence—High Court, power of, to give opinion—Jurisdiction.

Under section 56 of the Stamp Act, the High Court can deal only with those instruments which are already in existence and which have been made the subject of action by the Collector, and not with such instruments as are not in existence.

Stamp Reference made by the Hon'ble Board of Revenue.

ORDER OF REFERENCE.

Under section 17 of the Bundelkhand Alienation of Land Act (II of 1903) when a Civil Court passes a decree against a member of an agricultural tribe on a mortgage made before the Act came into force, the decree is sent to the Collector who shall offer the decree-holder a mortgage in form (*a*) or (*b*) in full satisfaction of the decree. The question for the ruling of the High Court is whether such a mortgage requires to be registered and stamped or not. The Board think that neither registration nor stamping is required because (*a*) if the mortgage is executed on behalf of Government it is exempt from stamp duty under section 3 (1) of the Stamp Act, (*b*) if this view is incorrect the transaction is not a new one between the parties and it would be highly inequitable to demand double stamp duty on it. The Board think that it is a substituted transaction effected by the Court's order. It is probable that the Collector when acting under section 17 is a Court and that the mortgage is really the order of a Court, which does not require registration or stamping. This seems to be probably the reason why a mortgage under section 17 is not mentioned in item 20 of Appendix C to the Stamp Manual.

Mr. *A. E. Ryves*, for the Crown.

JUDGMENT.—In reply to our order dated the 8th of July 1914, the Secretary to the Board of Revenue sends us a sample form of mortgage under section 6A of the Bundelkhand Alienation of Land Act and adds that there are no sample forms under

section 6B. We understand from this reply that the reference made to us does not refer to a particular deed in existence but to some deed which may or may not hereafter come into existence Section 56 of the Stamp Act confers upon this Court power to deal with instruments which are already in existence and which have been made the subject of action by the Collector acting under sections 31, 40 and 41 of Act II of 1899. The Board have sent on the reference under section 57 of the above-named Act. Comparing the language of section 56 with that of section 57, we are of opinion that section 57 contemplates a decision being given under circumstances and upon documents of the same nature as those referred to in section 56 of the Act. The present case falls under neither of these sections. We have no jurisdiction to give any opinion upon documents other than those already mentioned. We, therefore, direct that this our judgment be returned to the Board of Revenue for their information.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 583 OF 1913.

September 29, 1913.

Present —Mr. Batten, A. J. C.

SIR GANGADHAR RAO CHITNAVIS—DEFENDANT—APPELLANT

versus

RAJANNA AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Custom—Chanda District—Cultivation of sugarcane —Lambardar, right of, to take land out of possession of any tenant.

In Chanda District there is an old established village custom as regards the taking of land by a *lambardar* out of the possession of any tenant for cultivation of sugarcane and the deduction to be made therefor

Appeal against the decree of the District Judge, Chanda, dated 30th June 1913, confirming that of the Munsif, Chanda, dated 14th March 1913.

Mr. *M. B. Kinkhede*, for the Appellant.

Mr. *M. R. Bobde*, for the Respondents.

JUDGMENT.—The facts of the case are fully given in the judgments of the lower Courts. As often happens in civil suits, each side claimed too much. The plaintiff, the tenant, claimed that the *malguzar* could never use a tenant's field for sugarcane cultivation without the tenant's consent, and that the tenant had the right to withhold or give consent entirely at his own pleasure. On behalf of the landlord, defendant, it was contended that the landlord could seize any field whatever for sugarcane cultivation totally irrespective of the tenant's wishes and, apparently without taking into consideration the question whether or not it was not the turn of the field to be selected in rotation for sugarcane cultivation. The issues actually framed on this point were:

(1) Whether the defendant *lambardar* has the right to take the plaintiff's tenancy land in suit without the latter's assent, for growing sugarcane as alleged by the former?

(*a*) Whether the right is supported by a long standing and well-recognised custom having the force of law?

(*b*) Whether the right is recognised by the village *Wajib-ul-arz*?

(2) Whether defendant in this case obtained plaintiff's land for raising sugarcane with the plaintiff's express or implied consent?

The second issue was found in the negative and this finding cannot be, and is not, attacked in second appeal.

On the first issue the first Court held that no valid custom existed to deprive a tenant of his land entirely without his consent, and this decision was upheld by the District Judge on appeal. This may be a correct decision on the issue as it is framed, but it is not a satisfactory decision of the dispute between the parties since their respective rights are not defined, and it is bound to lead to considerable future and futile litigation. The case is a test case and required very careful trial. There can be no doubt from the village *Wajib-ul-arz* and from the Chanda District Gazetteer, pages 172, 173 that there is a village custom as regards the cultivation of sugarcane, the taking of land out of the possession of any one and the deduction to be made

therefor. (I may note that the *Wajib-ul-arz* in evidence is that of the Settlement of 1866, that of the last Settlement is not on record). Paragraphs Nos. 58 to 63 of the Chanda Settlement Report of the last Settlement deal with the subject. An issue should have been framed so as to ascertain exactly what the custom is and exactly what form the compensation to the tenant should take apart from the exaggerated pleas of the parties. Apart from the books above referred to, it is plain from the evidence on the record that there is an old standing custom in the village, and it is impossible for a single tenant in the village entirely to ignore the custom. Either it was or was not the case that the field in suit was one whose turn it was in rotation to be used for sugarcane cultivation. This can hardly be ascertained without a map showing the field in reference to the other fields cultivated with sugarcane that year. It should be definitely ascertained whether or not under the village custom it was the turn of this field to come under sugarcane. If it was, could he reasonably refuse to allow such cultivation? He apparently would not have consented even if he had been asked, but the pleas on this point are deficient and we do not know his reason for his presumed refusal. His refusal might be reasonable or the reverse. If an unconditional refusal was unreasonable, what condition was he entitled to demand? Was he entitled to refuse without being given a share in the sugarcane cultivation, and why was such an opportunity not offered him? If plaintiff's refusal would have been unreasonable and he did not want a share in the sugarcane cultivation, would he be entitled by custom to any thing more than a remission of rent? I may note here that the District Judge has not recorded a distinct finding as to whether rent was actually remitted or not. Such are the kinds of questions that really arise in this case; upon the answer to them the proper decision of the case really depends. I remand the appeal for re-trial, after the taking of fresh pleadings and the framing of the necessary further issues. It would be highly desirable if the defendant-appellant, the Hon.urable Sir Gangadhar Madheo Chitnavis, would interest himself personally in the suit. It has been managed on his behalf hitherto by agents, whose conduct of the case has not been of an entirely satisfactory nature. The District Judge should himself take the further pleadings and frame the issues. He may use his discretion as to the further procedure to be adopted. The decree in favour of the plaintiff is set aside and the appeal is remanded for retrial in reference to the above remarks. Costs will be costs in the suit.

Decree set aside; Case remanded.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1527 OF 1913.

November 21, 1914.

Present:—Mr. Justice Tudball.

KUER SEN AND OTHERS—DEFENDANTS—APPELLANTS

versus

SUKHKHO—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), s. 23—Partition—Vendor and purchaser—Condition not to partition property, whether against public policy—Breach of contract—Compensation—Damages, measure of.

A condition imposed in a sale-deed that the vendees would not partition the share purchased without the consent of the vendor, is not opposed to public policy, as no right is absolutely given up, and the vendor is entitled to compensation for the breach of such condition.

Where the parties have themselves fixed the value of their right, that amount is a proper measure of the damages sustained by a party.

Second appeal from the decree of the Subordinate Judge of Barielly.

Mr. *Brijnath Vyas*, for the Appellants.

Mr. *Sital Prasad Ghosh*, for the Respondent.

JUDGMENT.—The case for the plaintiff-respondent in this appeal was as follows. She stated that on the 12th of July 1907 she sold to Mihi Lal and Thakur Das certain immoveable property for the sum of Rs. 900, that the vendees agreed in the sale-deed that they would not partition the share purchased without the consent of the plaintiff and that they also would not interfere with her retention of the post of *lambardar*, that the two vendees represented to her that the value of the concession they had made in regard to partition and *lambardari* was at least Rs. 250

and asked her to forego that sum in their favour out of the purchase-money. She agreed to this and remitted Rs. 250, though at the time of the registration she admitted receipt of the full Rs. 900, that Thakur Das and Mihi Lal subsequently applied for partition of the share, that she objected and after appeals to the Collector and the Commissioner the application for partition was dropped, that after the death of Thakur Das, who died childless, Mihi Lal had now applied for partition and the Revenue Court, having acquiesced, it was being carried out. She, therefore, sued, primarily, for an injunction against Mihi Lal to restrain him from proceeding with the partition and in the alternative she claimed the sum of Rs. 250, stating it to be unpaid purchase-money. The Courts below have found the facts in favour of the plaintiff and they have granted her a decree for Rs. 250 *plus* interest from the date of the sale, recoverable as unpaid purchase-money, by sale of the property in question. The defendants have come here in second appeal. They plead that the sum of Rs. 250 was in no way unpaid purchase-money, that the plaintiff was not entitled to recover the money as such, that that portion of the contract relating to the right of partition was contrary to public policy and as such void and, therefore, not enforceable and the plaintiff is not entitled to recover anything at all. Stress is laid on sections 23 and 28 of the Contract Act. Section 28, in my opinion, hardly applies. Section 23 possibly may apply. It is quite clear to me that the claim for Rs. 250 can in no way be a claim for unpaid purchase-money. On the plaintiff's own showing the purchase-money was Rs. 900, but owing to the persuasion of the vendees she actually remitted Rs. 250 out of the consideration for the property, in view of the fact that the vendees had agreed to the two conditions mentioned. This is equally clear from the fact that the plaintiff has stated that her cause of action arose not on the date of the sale, but on the date on which Mihi Lal applied to the Revenue Court for partition and the Revenue Court passed an order in his favour. There cannot be the slightest doubt that if Mihi Lal had not applied for partition, this suit would never have been brought. I note here that the prayer for injunction was dismissed by the Court below and it is not pressed in this Court. On the facts found it is clear that if the contract be not void, then the plaintiff is merely entitled to recover damages for the breach of the contract.

In regard to the contract itself, so far as it relates to the partition, it is pleaded that such a contract is contrary to public policy, as it is a limitation of the right of ownership which passed under the sale-deed. Looking at the matter from all points of view, it seems to me that the meaning of the parties was only this much that in the life-time of the plaintiff the vendees would not apply for partition except with her consent. No right was absolutely given up, and I am not prepared to hold that such a contract is against public policy and, therefore, void. It is a condition which would not be binding on the heirs of the vendee but as against Mihi Lal, I think the condition is binding. The suit was instituted as against him and the plaintiff, in my opinion, was clearly entitled to a decree for compensation.

The question remains as to the proper measure of that compensation. On the facts found by the Court below it, is clear that the parties themselves had fixed the value of the right at Rs. 250 and that sum, in my opinion, will be a proper measure of the damages sustained. The plaintiff, therefore, is entitled to a decree for that sum, but she is not entitled to a decree for sale nor is she entitled to interest for any period prior to the breach of contract. I, therefore, allow the appeal to this extent that I modify the decree of the Court below and give the plaintiff a simple money-decree for that sum of Rs. 250 plus interest at 6 per cent. per annum from June 25th, 1912, upto the date of payment. In so far as the Courts below are concerned the plaintiff will have her costs in both those Courts. In so far as this Court is concerned the parties will pay their own costs.

Decree modified.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION.

August 25, 1914.

Present:- Mr. Justice Macleod.

HIRJI KHETSEY—APPLICANT

versus

THE INDIAN SPECIE BANK, LTD.—OPPONENTS.

Company—Liquidation—Share-holder, whether entitled to have his name struck off the list of contributories Share-holder buying shares on faith of false prospectus, right of.

In proceedings to wind up the affairs of a Company, a share-holder is not entitled to have his name struck off the list of contributories, on the ground that he was induced to purchase the shares by the false reports and balance-sheets issued by the Company.

If a share-holder, who has applied for shares on the faith of a prospectus which eventually is found to contain false representation, wishes to have his name struck off the register, he must take steps before the commencement of winding-up, otherwise he would be too late.

Mr. *B. J. Desai*, for the Applicant.

JUDGMENT.- The applicant contends that he was induced to buy shares of the above Company owing to the half yearly reports and balance-sheets published by the Company, and applies that the list of contributories should be rectified by striking off his name, on the ground that he has now discovered that these reports and balance-sheets were false and contained information regarding the dealings of the Company contrary to the real facts of the case. As a matter of fact, the Company, instead of having made a profit since 1909, had incurred heavy losses and had speculated heavily in silver, although the balance-sheets showed large profits and the Directors reported, at the general meeting, that there had been no such speculation. It is not disputed that if a share-holder, who has applied for shares on the faith of a prospectus which eventually is found to contain false representation, wishes to have his name struck off the register, he must take steps before the commencement of winding-up otherwise he would be too late. Whether a person who has bought shares in the open market on the faith of reports and balance-sheets can succeed in getting his name struck off the register while the Company is a going concern, does not appear to have been decided.

It seems beyond doubt that he cannot succeed when a winding-up order is made before he takes action or a state of affairs has arisen which would enable a creditor to present a petition for winding-up. That was laid down by the House of Lords in *Tennent* v. *City of Glasgow Bank* (1), a very similar case to this, except that the plaintiff filed his suit for reduction of the transfers and entries in the Bank books and stock certificates in his favour a day before an extraordinary resolution was passed to wind up the Company permanently. Earl Cairns, L. C., in giving his decision stated, at pages 621 and 622: "The case of *Oakes* v. *Turquand* (2) in this House has established that it is too late, after winding-up has commenced, to rescind a contract for shares on the ground of fraud.. But if the Company has become insolvent, and has stopped payment, then, even irrespective of winding-up, a wholly different state of things appears to me to arise. The assumption of new liabilities under such circumstances, is an affair not of the Company but of its creditors. The repudiation of shares which, while the Company was solvent, would not or need not have inflicted any injury upon creditors must now of necessity inflict a serious injury on creditors. I should, therefore, be disposed in any case to hesitate before admitting that, after a Company has become insolvent and stopped payment, whether a winding-up has commenced or not, a rescission of a contract to take shares could be permitted as against creditors."

His Lordship then points out that the Company had stopped payment on the 2nd of October and never resumed business, stoppage having been caused by its insolvency. On the 5th of October the Directors convened an extraordinary general meeting of the share-holders by advertisement for the 22nd, for the purpose of considering, and, if thought fit, passing extraordinary resolutions under the Companies Act, for the purpose of winding-up the Bank voluntarily. These were steps taken by the Directors as agents of the share-holders, and there was imposed upon the share-holders whatever responsibility might fairly be inferred from the steps so taken.

(1) (1879) 4 App. Cas. 615.

(2) (1867) 36 L. J. Ch. 949; 2 H. L. 325; 16 L. T. 606; 16 W. R. 1201.

I find, therefore, the applicant is not entitled to have his name struck off. Strictly, speaking the applicant should have taken out a summons against the Liquidator, but this omission does not affect the merits of the case and, if necessary, a summons could be issued *pro forma* to remedy the irregularity.

Application rejected.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 176 OF 1913.

February 12, 1914.

Present:—Mr. Stanyon, A. J. C.

SAMBHASHEO—DEFENDANT—APPELLANT

versus

MAHADEO—PLAINTIFF—RESPONDENT.

Specific Relief Act (I of 1877), s. 9, scope of—Illegal dispossession—Evidence Act (I of 1872), s. 110—Nature of possession—Presumption.

Section 9 of the Specific Relief Act in no way controls the operation of section 110 of the Evidence Act. It has no concern whatever with title, but is merely a law for restoring a possession which has been disturbed otherwise than in due course of law, and may properly be used to eject even a true owner who has disturbed a peaceful possession.

The possession which attracts the presumption of ownership is a juridical possession obtained *nec vi, nec clam, nec precario, ab adversario*, and stands valid against all the world except the person legally entitled.

Appeal against the decree of the District Judge, Chanda, dated the 27th November 1912, confirming that of the Munsif, Chanda, dated the 29th February 1912.

Mr. *Atmaram Bhagwant*, for the Appellant.

JUDGMENT.—The parties own and occupy premises which adjoin one another in the town of Chanda. Their dwelling houses are separated by a piece of open land, bounded on one side by the public road. In 1910 the defendant completely closed entrance on to this land from the road by putting up a wire fence along the roadside for the whole distance between his own house and that of the plaintiff. The defendant further entered upon exclusive use of the land by stacking his wood thereon. The plaintiff sued to have the wire fence removed and the defendant ejected from a portion of the land—a strip 5½ feet wide—claiming that the same belonged to him and afforded ingress and egress to his latrine attendant. The Courts below have found that previous to 1910, when the defendant forcibly entered thereon, the plaintiff had "for a long time" been in possession and enjoyment of the land in dispute, though his original title to the same, or his acquisition of a title or easement by prescription, had not been proved. On this finding the Courts have given the plaintiff a decree ordering the defendant to remove his wire fencing and his wood, and to leave the land free to the plaintiff as before 1910. Both Courts surmise that the disputed plot may be, but do not actually find that it is, *nasul* land. Against the above decree the defendant has made the present appeal.

The Courts below have not considered the bearing of section 110 of the Indian Evidence Act, 1872, on the facts found by them. The plaintiff has not proved any title to the land apart from any presumption arising from his possession. But he has proved that he was in peaceful possession when he was forcibly ousted by the defendant in 1910. The plaintiff did not avail himself of the summary remedy provided by section 9 of Act I of 1877 for restoration of his disturbed possession. He has brought this regular suit for the purpose. The question that arises is, whether he must prove title to re-enter otherwise than by a presumption under section 110 of the Evidence Act. There is a conflict of authority on this question.

Before the Specific Relief Act, 1877, was enacted, the Calcutta High Court held to be the ordinary rule that force does not interrupt possession, and that he whose possession was interrupted by an act of violence, without any form of law or justice,

was nevertheless to be considered as a possessor for the purposes of section 110 aforesaid: *Jadubnath* v. *Ram Soondur* (1), *Khaja Enaetoollah* v. *Kishen Soondur* (2), *Radha Ballub* v. *Kishen Gobind* (3), *Gour Paroy* v. *Wooma Soondaree* (4), *Mahomed Bux* v. *Abdool Kureem* (5), and *Daitari Mohanti* v. *Jugo Bundhoo* (6). In *Kawa Manji* v. *Khowas Nussio* (7), the same tribunal held that the Civil Courts are competent, section 15, Act XIV of 1859, notwithstanding, to give a decree for immoveable property on the bare ground of illegal dispossession in a suit brought after six months from the date of such dispossession, in which suit the defendant has failed to prove his own title to the land. But, thereafter, the Calcutta Court adopted the view that proof of prior possession, and of illegal dispossession, are in themselves no evidence of title, except in a possessory suit under Act I of 1877; and that section 110 of the Evidence Act applies only to actual and present possession, and does not declare generally that possession shall always be *prima facie* evidence of title: *Mohabeer Pershad* v. *Mohabeer Singh* (8), *Brojo Sunder* v. *Koilash Chunder* (9), *Purmeshur Chowdhry* v. *Brijolall Chowdhry* (10), *Nisa Chand Gaita* v. *Kanchiram Bagani* (11). These decisions are based, in some cases, upon deductions from the *dicta* of their Lordships of the Privy Council in *Wise* v. *Ameerunnissa Khatoon* (12), and in *Ismail Ariff* v. *Mahomed Ghouse* (13). But some disturbance of the view is indicated by the Full Bench decision in *Tamiruddin* v. *Ashrub Ali* (14).

The Bombay High Court, after some decisions the other way, have settled down to a contrary opinion, and do not accept the Calcutta interpretation of the above Privy Council ruling: *Pemraj* v. *Narayan* (15), *Krishnarav* v. *Vasudev* (16), *Krishnacharya* v. *Lingawa* (17), *Hanmantrao* v. *Secretary of State* (18), *Bharmawa* v. *Sangappa* (19), *Bai Fatan* v. *Emad Asla* (20); and *Rajaram* v. *Nanchand* (21). In the Madras High Court a somewhat uncertain note was sounded in *Mustapha Saheb* v. *Santha Pillai* (22), but the Bombay view is clearly followed in *Narayana Row* v. *Darmachar* (23). To the same effect is the dictum in *Lacho* v. *Har Sahai* (24), followed in *Wali Ahmad Khan* v. *Aindhia Kandu* (25) and approved, as to principle, in *Sri Gopal* v. *Aisha Begum* (26). The same view was taken by Ismay, J. C. in *Nand Ram* v. *Narbad* (27).

I am of opinion that the correct view is that propounded by the majority of the Chartered High Courts and by this Court, and that section 9 of the Specific Relief Act in no way controls the operation of section 110 of the Indian Evidence Act. That section provides that peaceful possession shall be *prima facie* proof of title: while section 9, Act I of 1877, has no concern whatever with title, but is merely a law for restoring a possession which has been disturbed otherwise than in due course of law. The former will not avail a possessor against the true owner: the latter can properly be used to eject even a true owner who has disturbed a peaceful possession; because, in a summary case, the Court will not look at title, but only consider the question whether there has been an unlawful—using that word to mean "otherwise than in due course of law"—disturbance of possession. In one of the Calcutta cases it was suggested that if section 110 of the Evidence Act were to be applied to a possession which had been disturbed, anomalies would arise. For

(1) 7 W. R. 174.
(2) 8 W. R. 396 at p. 389.
(3) 9 W. R. 71.
(4) 12 W. R. 472.
(5) 20 W. R. 458.
(6) 23 W. R. 293.
(7) 5 C. L. R. 278.
(8) 7 C. 591; 9 C. L. R. 164.
(9) 11 C. L. R. 133.
(10) 17 C. 256.
(11) 26 C. 579, 3 C. W. N. 568.
(12) 7 I. A. 78.
(13) 20 I. A. 99, 20 C. 884.
(14) 31 C. 647; 8 C. W. N. 446.
(15) 6 B. 215.
(16) 8 B. 371.
(17) 20 B. 270.
(18) 25 B. 287; 2 Bom. L. R. 1112.
(19) 2 Bom. L. R. 628.
(20) 3 Bom. L. R. 246.
(21) 5 Bom. L. R. 225.
(22) 23 M. 179.
(23) 26 M. 514, 13 M. L. J. 146.
(24) 12 A. 46, A. W. N. (1888) 48.
(25) 13 A. 537, A. W. N. (1891) 196
(26) 3 A. L. J. 775; A. W. N. (1906) 264, 29 A. 52,
(27) 12 C. P. L. R. 59.

example, suppose *A* having held peaceful possession for eight years is then forcibly ejected by *B*, but does not sue *B* for seven years after the ejectment. Could the presumption under section 110 be properly used in favour of *A*? Or, suppose the converse case, where *A*, having held for seven years, is unlawfully ejected by *B*, who holds for eight years before any suit is brought. Such cases seemed to the Calcutta Judges to create difficulties in applying the section to any but actual physical occupation at the date of suit. They would not apply it to any wider form of juridical possession. With due respect, I venture to question this reasoning. It is not safe to interpret a provision of law by the result of applying it to an extreme case. The best rule that the ingenuity of man ever devised can be reduced to an absurdity in that way. It is easy to put forward an extreme case against the Calcutta interpretation. Suppose *A*, in peaceful possession of the house in which he dwells, leaves it physically unoccupied for a few hours, while he visits a friend. During his absence, *B* takes up his abode in the house, and, claiming it as his own, forcibly and successfully prevents the re-entry of *A*. Thereupon *A* at once files a regular suit for possession. The Calcutta interpretation of section 110 of the Evidence Act would not only refuse the presumption thereunder to *A*, but would grant it to *B*. The correct rule seems to be that law must be reasonably interpreted and discreetly applied. The interpretation must be accurate, constant, and consistent; and we must look to a proper exercise of judicial discretion for the elasticity necessary for the due application of that interpretation to the varying circumstances of each case as it comes up for treatment.

In the supposed anomaly illustrated by the Calcutta High Court, under a proper construction of section 110 aforesaid, *B*'s unlawful dispossession of *A* would not prevent a presumption in *A*'s favour under the section. But a discreet Judge would at once hold that presumption rebutted by *A*'s conduct in allowing *B* to remain in undisputed possession for the seven or eight years, as the case might be, provided *A*'s ejectment was forcible or otherwise within his knowledge. But suppose, in the case used as an illustration, *B*'s trespass was a clandestine encroachment only discovered by *A* after it had existed for seven or eight years, and immediately attacked by a suit. Surely, in such circumstances, proof that *A* was in juridical possession before *B* encroached, would rightly give rise to a presumption in favour of *A*'s title and against that of *B*. A man cannot be allowed to take advantage of his own wrong, as where he has obtained possession by illegal means, such as force or fraud, in order to shift the burden of proof on to his opponent. The possession which attracts the presumption of ownership is juridical possession, obtained *nec vi, nec clam, nec precario, ab adversario*: and it stands valid against all the world except the person legally entitled. It cannot, in the eye of the law, for the purpose of applying section 110 of the Evidence Act, be interrupted by force or fraud. But where a possession, in whatever way it was originally obtained, has stood undisputed for such time as, in the circumstances of the case, is sufficient to satisfy a reasonable mind that it must have some legal right or sanction behind it, the Court will treat it as a juridical possession to which the above section is applicable.

In the present case, the plaintiff had such a juridical possession. The date and nature of its origin are unknown. But the Courts below were satisfied that, when forcibly disturbed by the defendant, it had continued undisputed for a sufficient time to justify the assumption that it was a legal and valid possession. That finding made it a possession for the purpose of applying section 110 of the Evidence Act: and the defendant, having failed to prove his own title, cannot fall back on a *jus tertii*. The decrees of the Courts below are thus correct, and I, therefore, dismiss the present appeal without notice to the other side.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1540 OF 1913.

November 23, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

BALDEO SAHAI—PLAINTIFF—APPELLANT

versus

BEHARI LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Promissory note—Suit by assignee of promissory note—Right of assignee to sue, how far executant can question.

In a suit by the assignee of a promissory-note to recover the money due under the note, all that the executant is entitled to have ascertained is that the plaintiff is the legal holder of the note, and able to give him a good discharge; he cannot question whether consideration was paid or not paid by the assignee.

Second appeal against the decision of the Subordinate Judge of Meerut, reversing that of the Munsif, Meerut.

Dr. *S. C. Banerji*, for the Appellant.

Mr. *Sital Prasad Ghose*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit in which the plaintiff sought to recover the amount due under a promissory note. A number of pleas were taken, and amongst others a denial of consideration. The Court of first instance granted the plaintiff a decree. The lower Appellate Court reversed the decision of the Court of first instance and dismissed the plaintiff's suit. Both Courts have found that there was good consideration for the note. But the lower Appellate Court has held that the plaintiff, who is the holder of the note under an assignment, dated the 17th of June 1912, did not give any consideration for the assignment of the note. It seems to us that this finding was immaterial. Even if we assume the finding to be correct, the defendants, Behari Lal and Nathu Singh, have no concern with the question whether consideration was paid or not paid by the assignee of the note. If they are liable under the note, all that they are entitled to have ascertained is that the plaintiff is the legal holder of the note and able to give them a gooddischarge. It is quite clear that the plaintiff is entitled to give a discharge to the defendants. The case cited has no application to the present case. In that case the transferor was a party to the suit and he repudiated the transfer in favour of the plaintiff, contending that he had retained all his

original rights. We must allow the appeal and setting aside the decree of the Court below, restore the decree of the Court of first instance. The appellant will have his costs in this Court and in the Court below.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 275 OF 1913.

December 2, 1914.

Present:—Mr. Lindsay, J. C.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—PLAINTIFF—APPELLANT

versus

Shrimati Maharani JAGDAMBA DEBI AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Regulation XI of 1825, ss. 4, 5—Alluvion and diluvion—Government as owner of river-bed and proprietor of land abutting on river, dispute between—Encroachment.

Section 4 of the Bengal Regulation XI of 1825 is intended to apply not merely to cases of alluvion and dereliction arising between the owners of properties situated on opposite banks of a river, but also to cases in which the dispute is between the Government as the owner of the bed of the river and a proprietor whose land abuts on the river. Section 5 does not apply to cases of accretions made owing to recession of rivers.

Felix Lopes v. Muddun Mohun Thakoor, 5 B. L. R. 521; 11 W. R. (P. C.) 11; 13 M. I. A. 467; 2 Suth. P. C. J. 336; 2 Sar. P. C. J. 594, 20 Eng. Rep. 625, referred to.

Appeal against an order of the District Judge, Fyzabad, dated 3rd April 1913, upholding that of the Subordinate Judge, Fyzabad, dated 8th July 1912.

Babu *Nagendra Nath Ghoshal* (Government Pleader), for the Appellant.

Babu *Ram Chandra*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the Secretary of State for India against the respondent, the Rani of Ajudhia, for recovery of possession of a small piece of alluvial land situated on the banks of the river Gogra at Ajudhia. The whole of the land in Ajudhia (which is also known as *Mauza* Avadh Khas, Pargana Haweli Avadh) belongs to Government, except such portions of it as have been granted away or have been decreed to claimants in suits brought by them against Government. It is admitted that a portion of the land of this *mauza* was granted to the Ajudhia Estate by Government, and that this land was afterwards used for the erection of a

temple on the banks of the river. Since the time of the grant the river has receded towards the north and the land in dispute has been thrown up and is adjacent to the site which was granted to the Ajudhia Estate by Government as above mentioned. The case for the defendant was that the land gradually emerged from water owing to the recession of the river. The defendant, therefore, claimed that by reason of this gradual accretion it had become a part of the land originally granted to the estate and could not therefore be claimed by Government. Both the Courts below have dismissed the suit. It has been found, as a matter of fact, that the land in question has been gained by gradual accession from the recess of the river Gogra, and acting under the first clause of section 4 of Bengal Regulation XI of 1825, the Courts have held that the property in this land is with the defendant. The principal contention which has been raised here in second appeal, is that the Courts below were wrong in applying section 4 of the Regulation to the case. In my opinion this contention cannot be maintained. The argument appears to be that because the bed of the river Gogra is the property of Government, no claim to any portion of the river-bed which has been exposed by the retrogression of the river can be made by the owner of any land adjacent to the land so exposed. But the first clause of section 4 of the Regulation does not contain any reservation in favour of the right of Government in the beds of rivers. It was also suggested in argument that the section was properly applicable to disputes between the owners of land on opposite sides of a river which divided them. This argument, however, cannot hold good having regard to the language of the preceding sections. Accordingly to section 2 of the Regulation, where any clear and definite usage of *shikast paiwast* has been immemorially established for determining the rights of the proprietors of two or more contiguous estates divided by a river, the usage so established is to govern the decision of all claims and disputes relative to alluvial land between the parties whose estates may be liable to such usage. Section 3 goes on to say that where no local usage of the nature referred to in section 2 is established, the general rules declared in section 4 shall be applied to the determination of all claims and disputes relative to lands gained by alluvion or by dereliction of a river. The language of this section is important and makes it quite clear, in the first place, that the rules contained in section 4 are to be applied to the determination of all claims and disputes, not merely claims and disputes, arising between two riparian owners, and in the second place, that the rules are to be applied with regard to land which has been exposed by the dereliction of any river. There is nothing in the language of section 3 to suggest that the rules contained in section 4 are not to be applied in cases where the ownership of the river-bed is claimed by the Government. The rule does not clearly relate to all classes of rivers whatsoever. It seems to me, therefore, that section 4 was intended to apply not merely to cases of alluvion and dereliction arising between the owners of properties situated on opposite banks of a river, but also to a case like the present in which the dispute is between Government on one side as the owner of the bed of the river and a proprietor whose land abuts on the river. This interpretation of the Regulation is the correct one and seems to me to be established from the judgment of their Lordships of the Privy Council in the well-known case of *Felix Lopez* v. *Muddun Mohun Thakoor* (1). In that case the bed of the river Ganges was regarded by the Privy Council as "public domain or public territory." Their Lordships in the course of their judgment remark that "when the words of the whole Regulation are looked at, it is quite obvious what the then Legislative authority was dealing with was the gain which an individual proprietor might make in this way from that which was part of the public territory, the public domain, not usable in the ordinary sense, that is to say, the sea belonging to the State, a public river belonging to the State. This was a gift to an individual whose estate lay upon the river or lay upon the sea, a gift to him of that which, by accretion, became valuable and usable, out of that which was in a state of nature neither valuable nor usable." It was suggested further in the course of arguments

(1) 13 M. I. A. 467; 5 B. L. R. 521; 11 W. R. (P.C.) 11; 2 Suth. P. C. J. 636; 2 Sar. P. C. J. 594; 20 Eng. Rep. 625.

on behalf of the appellant that the proper section applicable to the facts of this case was section 5, which lays down that nothing in this Regulation shall be construed to justify any encroachment by individuals on the beds or channels of navigable rivers, but in truth there is no question of encroachment in this case. It was not pleaded that the defendant had in any way encroached upon the bed of the river, and again, it never was the case of the plaintiff in the Courts below that the river was a navigable river. Section 5, in my opinion, can have no application to the case whatever. Another point which was raised was that the land in dispute was really not an accretion to the land which had been originally granted to the Ajudhia Estate, but was an addition to another portion of land which had previously been thrown up by the recess of the river and which intervened between the original site granted to the Ajudhia Estate and the site of the land in dispute. This, however, is raising a new case which was not put forward in either of the Courts below and I cannot allow it to be raised now. I have no doubt whatever that the law was properly applied in this case by both the Courts below. The appeal fails and is dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 32 OF 1914.

November 21, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

SURAJ MAL—PLAINTIFF—APPELLANT *versus* HIRA KUNWAR—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 199—Suit for ejectment—Defendant set up lease—Direction of Revenue Court to file suit for declaration of title in Civil Court within three months—Suit filed after expiration of three months—Limitation.

In a suit for ejectment in the Revenue Court the defendant pleaded that he was holding the land under a lease the term of which had not yet expired. The Revenue Court directed the defendant to institute a suit in the Civil Court within three months to establish his rights under the lease. The suit was instituted after the expiration of three months

Held, that as a cloud was cast on the plaintiff's title under his lease he was entitled to institute the present suit notwithstanding that the period prescribed in the order of the Revenue Court had expired.

Second appeal from the decision of the District Judge of Aligarh, affirming that of the Munsif of Havali.

Mr. *Gulzari Lal*, for the Appellant.

Dr. *S. C. Banerjee*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit in which the plaintiff sought a declaration that he was entitled to remain in possession of certain property under an alleged *sar-i-peshgi* lease, dated the 9th September 1904. It appears that the document in question is executed by one Lala Behari Lal, the father of the plaintiff, in favour of his son. *Musammat* Hira Kunwar, the defendant, was one of the co-sharers. Partition proceedings were brought in the Revenue Court and the portion of property alleged to have been leased fell to the lot of *Musammat* Hira Kunwar. Thereupon she instituted a suit in the Revenue Court for possession of the plots that had so fallen to her lot and for ejectment of the plaintiff. The plaintiff set up the document of the 9th of September 1904. The Revenue Court, thinking that it was a case to which section 199 of the Agra Tenancy Act applied, directed Suraj Mal to institute a suit in the Civil Court within three months to establish his rights under the lease. Suraj Mal did not institute a suit within the three months prescribed. Both Courts have dismissed the suit on the ground of limitation, holding that the suit ought to have been instituted within the three months mentioned in the order of the Revenue Court. Hence the present appeal.

It seems to us open to some doubt whether *Musammat* Hira Kunwar was entitled to institute her suit in the Revenue Court for ejectment. Her case appears to be that the lease of the 9th of September 1904 was a fraudulent lease made by the *lambardar* in favour of his own son. If this be her case and if it be found to be correct, then Suraj Mal would be a trespasser. It seems to us also that the decision of the Courts below was not correct. It is quite clear that no question of "proprietary" title was raised in the Revenue Court. The plaintiff in that Court sued for possession of certain plots and Suraj Mal set up the plea that she was not entitled to possession, because a lease had

been made in his favour by the *lambardar*. If the suit was properly instituted in the Revenue Court, then the Revenue Court might have decided the question of the validity or the invalidity of the lease itself. But it seems to us that a cloud having been cast on Suraj Mal's title under his lease, he was entitled to institute the present suit notwithstanding that the period prescribed in the order of the Revenue Court had expired. We particularly wish to state that we are not expressing any opinion on the question of the validity or invalidity of the lease. This is a matter which must be tried. We accordingly allow the appeal, set aside the decrees of both the Courts below and remand the case to the Court of first instance, through the lower Appellate Court, with directions to re-admit the case under its original number in the file and proceed to hear and determine the same according to law. We direct that the Court below take up the case as soon as possible. Costs here and heretofore will be costs in the cause.

Appeal allowed: Case remanded.

BOMBAY HIGH COURT.
CIVIL SUIT No. 263 OF 1883.
December 2, 1886.
Present:—Mr. Justice Farran.
PARMANANDDAS JIVANDAS—PLAINTIFF—APPELLANT
versus
ARDESHIR FRAMJI—DEFENDANT—RESPONDENT.

Landlord and tenant—Lease, land once held under—Presumption—Fazendari tenure, meaning of.

There is a strong presumption that land once shown to be held under a written instrument of lease continues to be held under it as long as it is occupied by the same tenant, unless the contrary is shown by evidence of a cogent nature.

The word "*Fazendari*" is used with reference to tenants holding under a private landholder to indicate, sometimes, an indefeasible right to hold in perpetuity on payment of a small quit or ground-rent, and sometimes any kind of tenure agreed upon between the parties.

JUDGMENT.—The plaintiff in this suit claims to eject the defendant from, and to recover possession of, a piece of land at Bhundarwara Hill in the Island of Bombay admeasuring 675 square yards. He also claims damages from the defendant on account of his wrongful occupation of the land.

The defendant as to about 575 square yards of the land claimed by the plaintiff denies the right of the plaintiff to eject him therefrom and claims to hold the same from the plaintiff upon a Fazendari tenure, which gives him the right to remain in possession of the land upon payment of a fixed annual rental of annas two per square yard so long as the plaintiff's title to the Bhundarwara Hill continues. As to the residue of the 675 square yards, the defendant lays no claim thereto and says that he is not in actual occupation thereof.

It is not denied that the plaintiff is the holder under Government of the Bhundarwara Hill of which the pieces of land, the subject-matter of this suit, form part. By indenture of lease bearing date the 1st October, A. D. 1794, the East India Company demised the Bhundarwara Hill to one W. H. Blachford for ninety-nine years from the date of the lease at an annual rental of Rs. 324-4-0 and a premium or fine of one *phara* of *bhat* at the expiration of every twenty-one years of the turn. The lease also contained a covenant by the East India Company that they would, upon the expiration of the term and upon the application of the heirs, executors, administrators of the lessee re-grant and renew the said lease on the same terms and conditions upon their paying to the lessor an additional fine or premium of Rs. 90 for such renewal, and it was further provided that if the said leases should not be renewed, the lessors would pay to the representatives of the lessee half the real value of the buildings and plantations which should then be on the land demised. The lease, therefore, unless renewed by the plaintiff, will expire upon the 1st of October 1893.

The plaintiff is now the assignee of this lease. By various mesne assignments, which have not been put in evidence, it passed to Canjee Chattoor, the grandfather of the plaintiff. Canjee Chattoor died in 1859 having devised his property, including the Bhundarwara Hill, to his sons Runchordas Canjee and Jiwandas Canjee. Jiwandas Canjee died intestate on the 2nd

March 1859 leaving the plaintiff, then a minor, his only son. Runchordas Canjee died without issue in the year 1859, leaving a Will bearing date the 12th May 1859 by which, subject to certain bequests, he purported to devise and bequeath the whole of the property left by Canjee Chattoor to the plaintiff. This Will was proved on the 30th June 1859 by Lakhmidas Damji, Bhanabhai Dwarkadas and Jivraj Champsi, three of the executors named in it. On the 4th May 1870 the executors made over the property comprised in the Will of their testator to the plaintiff, he having then attained the age of eighteen years. The above is the nature of the tenure upon which the Bhundarwara Hill property is held by the plaintiff and of the plaintiff's title to it.

I proceed to consider how the defendant became a tenant upon the property. The nature and incidents of that tenancy are the questions to be determined in this suit. D. and M. Pestonji were the assignees of the lease of the Hill in 1850. The earliest document connected with the defendant's title is a certificate, dated the 24th January 1850, by which D and M. Pestonji certify "that one Manekbai had their permission to build her house upon their ground, part of Bhundarwara Hill—Collector's No. 19 of ground rent for which she pays to us ground rent." No further description of the land is given in the certificate. In the first document in the bundle Exhibit G, which was produced by the defendant and put in by the plaintiff, Manekbai was the sister of the defendant's father.

The next document in order of date is Exhibit D. The plaintiff says that he received it from the executors of Runchordas Canjee in 1870. It bears date the 20th March 1850. It purports to be an indenture of lease between D. and M. Pestonji of the one part and Manekbai of the other part, whereby the lessors demise to Manekbai all that piece or parcel of land on Bhundarwara Hill, more particularly described in the plan annexed, whereon it is coloured red and which contains 189 square yards or thereabouts, to have and to hold the same unto Manekbai, her executors, etc., from the 1st January 1850 as a monthly tenant yielding and paying therefor on the first day of every month the rent or sum of Rs. 1-15-6, and whereby Manekbai covenants with the lessors to pay the said monthly rent and that she will, at any time within one month, next after any notice in writing given to her, quit and deliver up the demised premises to the lessors, and that she will not assign or part with her interest in the said demised premises or in any part thereof without the consent in writing of the lessors first had. And it is provided that in case of the rent being in arrears for ten days after demand, or if the lessee attempt to assign or shall not deliver up possession to the lessors after notice, the lessors may re-enter, and that the lessee shall be liable to pay Rs. 5 per diem for every day she shall remain on the premises after the expiration of the notice to quit.

This document purports to be signed and sealed by Manekbai. No corresponding document executed by the lessors is produced by the defendant, and he says that he never saw or heard of such a document.

There is no ground for doubting the genuineness of Exhibit B. It is more than thirty years old and came from the proper custody. From the first rent receipt produced by the defendant it appears that Manekbai paid Rs. 23-10 as a year's ground rent for 189 square yards at Bhundarwara to the trustees of D. and M. Pestonji for the year ending 31st December 1850: see Exhibit G2. In that year at all events Exhibit B may be presumed to have been acted on and to have contained the terms upon which Manekbai held the 189 square yards of land demised by it.

In the next year, 1851, Canjee Chattoor became the assignee of the lease of Bhundarwara Hill. He adopted the printed form of lease used by his predecessors-in-title, changing only the names of the lessors to his own, and the plaintiff produces a document in such printed form bearing date the 8th December 1851 containing terms the same as those in Exhibit B. By it Canjee Chattoor purports to lease to Manekbai 208 square yards of land at Bhundarwara Hill as a monthly tenant at the rental Rs. 2-2-8 per month from the 1st January 1851. This also purports to be executed by Manekbai: see Exhibit C. Under this lease Manekbai paid rent for 1851, for the defendant produces a receipt in her favour signed by Canjee Chattoor for a year's ground rent from 1st

January 1851 to 31st December of that year of a spot at Bhundarwara Hill containing 208 square yards: see Exhibit G3. No receipt is produced for the rent payable for this year under Exhibit B.

The defendant produces a receipt signed by Canjee Chattoor in favour of Manekbai for the rent of 344 square yards of vacant ground situated at Bhundarwara Hill No. 28 for one year from 1st January to 31st December 1852, Rs. 43. Deduct as allowed Rs. 9=Rupees 34. See Exhibit G4. No. 28 is the number borne by the lease Exhibit C.

The aggregate of the land leased by Exhibit B and Exhibit C is 397 square yards (189 *plus* 208) and does not correspond with the amount of land mentioned in this receipt, Exhibit G4. The rental renewed by Exhibit B amounts to Rs. 23-10 per annum and that by Exhibit C to Rs. 26=Total Rs. 49-10.

The receipt produced by the defendant for 1853 is for yearly rent of the vacant ground situated at Bhundarwara occupied by Manekbai from 1st January to 31st December 1853 measuring 344 square yards, rent Rs. 43: see Exhibit G5.

The receipt produced by the defendant for 1854 is for the annual rent of the vacant ground situated at Bhundarwara occupied by "you" from 1st January to 30th January 1854, Rs. 19-8. From 1st July to 31st December measuring 247 square yards, Rs. 15-7=Total Rs. 34-15: Exhibit G6.

The next receipt is important. I transcribe it:

"To amount of Fazendari rent of 247 square yards of ground situated at Bhundarwara Hill, Mazagaon, for one year from 1st January to 31st December 1855, Rs. 30-14, Bombay 1st January 1856. E. E. and contents received. (Signed Canjee Chuttoor)" Exhibit G7. The only oral evidence adduced down to the period of term is that of the defendant, who says that he first knew the land in 1855 ; that there was then a masonry building upon it which was at that time about five years old. This, I consider, must have been on the land referred to in the receipt Exhibit G7.

From the foregoing I am asked by the plaintiff to draw the conclusions :—

(1) That the 247 square yards of land referred to in the receipt Exhibit G7 are the same land as the land leased by Exhibit B and Exhibit C together or form part of the same land which amounted to 397 square yards.

(2) That the land referred to in the receipt Exhibit G7 continued to be held upon the terms of Exhibit B and Exhibit C at the date of Exhibit G7 and after that date.

There is no description of the land leased by Exhibit B other than that contained in the plan annexed to it, which shows that it lay to the West of Lawrence De Lima Street. There is no description of the land demised by Exhibit C other than that it was in Bhundarwara Hill, but as Manekbai built a house before 1855 on the land comprised in receipt Exhibit G7 and as it lies to the West of Lawrence De Lima Street and as it is not alleged that she held any land at Bhundarwara Hill other than the lands in respect of which the defendant produces the rent-receipts and as the number in G7 corresponds with the number in Exhibit C and as no suggestion has been made to the contrary, I consider that I am justified in assuming that the 247 square yards of land referred to in Exhibit G7 formed portion of the 397 square yards leased by Exhibit B and Exhibit C taken together.

There is of course a strong presumption that land once shown to be held under a written instrument of lease continues to be held under it as long as it is occupied by the same tenant, and unless the contrary is shown by evidence of a cogent nature a jury would be directed to draw an affirmative inference to that effect.

The following circumstances may be urged in this case as rebutting that presumption :—

(*a*) That the land held by Manekbai in 1855 was less by 150 square yards than the land leased to her by Exhibit B and Exhibit C.

(*b*) The general improbability of any prudent person building upon land held under the stringent conditions contained in the leases, Exhibit B and Exhibit C, and on the precarious tenure created by these leases.

(*c*) That in 1855 the form of the rent bill sent to Manekbai was altered by the introduction of the word "Fazendari" before the word "rent."

The reduction in the quantity of land held by Manekbai is not a matter of weight.

The land was held upon a monthly tenure. Part of the extra quantity taken up in 1851 was probably necessary for her when engaged in building her house, which she would naturally give up when her house was completed. She apparently gave it up at the end of the year 1851. That of itself would not alter the tenure of the residue or raise any presumption tending in that direction.

The apparent imprudence of Manekbai building upon land held upon such a frail tenure is not of great importance, inasmuch as the building certificate of 1850 and her having built or commenced to build in that year show that she must have considered the terms of Exhibit B such as to justify her in laying out her money upon the land held under it. Land was less valuable then than it is now, and she probably relied upon the honour of D. and M. Pestonji and Canjee Chattoor, forgetting that their successors-in-title might not possess or inherit the same feelings.

There remains the introduction of the word "Fazendari" into the rent bills.

The circumstances existing at the time this was done do not favour the contention that the tenure was then altered.

The rent was continued at the same rate, annas 2 per square yard per annum. It is unlikely the lessor would have abandoned the advantages he possessed under the leases B and C without obtaining some corresponding advantage in the shape of an increased rental. Manekbai's house had been then long completed. There was no change in ownership, why then a change of tenure? The time when Manekbai commenced to build would presumably be the time when she would have taken steps to strengthen her tenure, and not when her house had been completed and she had no means of compelling her landlord to accede to her wishes.

At this time Canjee Chattoor was granting leases in the same form as Exhibit B and apparently for building purposes. See Exhibits H and I put in as specimens. One of these is a monthly and the other is a yearly tenancy. He has not shown to have leased any land upon a more permanent tenure.

If such a very important change was effected in 1855 in Manekbai's tenure it must have been of design on Manekbai's part, and at her request. Would she not have obtained some writing evidencing the change, and not rested content with a mere change of wording in her rent bills?

The whole theory of a change of tenure rests therefore upon the introduction of the word 'Fazendari' into the rent bills, and this leads to a consideration of what is the generally accepted meaning of that word. No evidence has been given upon this point. My experience is that it is used with reference to tenants holding under a private landholder, to indicate sometimes an indefeasible right to hold in perpetuity on payment of a small quit or ground rent and sometimes any kind of tenure agreed upon between the parties.

Perry, C. J., in *Doe d. Dorabji* v. *Bishop of Bombay* (1) thus says that the true meaning of "Fazendari land" is land not belonging to Government: "A Fazendar occupying and tilling land himself, and paying a fixed rent to Government; or one making contracts with tenants to occupy the Fazendary land on terms to be agreed between them; or one merely receiving a certain fixed sum by virtue of ancient usage, are all Fazendars in the eye of Government, and in the popular language of the Bazar. But in these three persons we perceive three different characters, with wholly different legal relations attachable to them, and for the most part equivalent to our English notions of a tenant in fee simple holding of a superior lord by rent service, a landlord demising at rack rent, and a party seized of an ancient rent issuing out of the land. But as this ambiguity is contained in the word 'Fazendar' we must be cautious how we apply general propositions to the terms." Yardley, J., at page 508 of the report attaches similar meanings to the term "Fazendar" in Fazendari tenure.

The word being thus ambiguous, it would be dangerous to assign to its introduction into a rent bill an indication that the parties thereby intended that a monthly tenancy should be converted into a perpetual one.

(1) (1848) Perry O. C. 498 at p. 506; 4 Ind. Dec. (o. s.) 456 at pp. 462, 468.

In this case the framers of the rentbills produced by the defendant have varied the language in describing the rent paid by the holder of the land in question from time to time. The description is generally inaccurate. In my judgment the introduction of the word "Fazendari" into the rent bills may indicate a change in the person of the English writer who drew them out for Canjee Chattoor or a desire on the part of that gentleman to have the title of Fazendar attached to his name just as much as a change in the tenure under which the land was held. The title of Fazendar as it was used to describe the plaintiff in the case of *Doe d. Dorabji* v. *Bishop of Bombay* (1) was quite inapplicable to Canjee Chattoor who held under the leases from Government, of which he was assignee.

For these reasons I am unable to hold that there is any proof that Manekbai's tenure of the land she held was of a permanent character, such as is described as a Fazendari tenure in the more limited sense.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 14 OF 1912.

April 1, 1914.

Present:—Mr. Lindsay, J. C., and Mr. Stuart, A. J. C.

Raja HANWANT RAM—DEFENDANT—APPELLANT

versus

THE HONOURABLE *Maharaja* SIR BHAGWATI PRASAD SINGH, K. C. I. E.,—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 27 (1) (a)—Documents rejected by lower Court, admissibility of, in Appellate Court—Evidence, fresh—Documentary evidence, admissibility of, at late stage—Court, discretion of.

The plaintiff undertook at the trial to prove a fact definitely and put in documentary evidence in support of it. At the instance of the defendant interrogatories were issued to be answered by the plaintiff himself with a view to obtain his admission as to non-existence of the fact, but the answers not being given by the plaintiff, but by his general agent, and being of an unsatisfactory character, although admitting non-existence of the fact to a certain extent, the defendant asked leave to file certain documents in proof of the non-existence of the the fact. The lower Court refused to receive those documents but they were asked to be filed before the Appellate Court.

Held, that under the above circumstances the lower Court ought to have received the documents in order to dispose completely of the matter in dispute, and that they were admissible in the Appellate Court under Order XLI, rule 27 (1) (*a*), Civil Procedure Code.

Appeal from the decree of the Subordinate Judge, Gonda, dated 30th November 1911.

The Hon'ble Rai *Sri Ram* Bahadur and Babu *Ramapat Ram*, for the Appellant.

Babu *Baidev Lal*, for the Respondent.

JUDGMENT.—The learned Counsel for the appellant in this case has asked us to admit into evidence during the hearing of this appeal certain documents which were rejected by the Court below. This application was embodied in a memorandum of additional grounds of appeal filed on the 13th of August 1912. The facts appear to be as follows: The suit was brought by the respondent, the Maharaja of Balrampur, against Raja Hanwant Ram for the recovery of a large sum of money alleged to be due upon a registered agreement executed by Hanwant Ram's deceased brother, Raja Achal Ram. The suit was brought against Hanwant Ram on the allegation that he was heir to his brother and had succeeded to his brother's property. In the plaint there was no specification of the property which was alleged to have come to the hands of the defendant. One of the pleas taken in defence was that Raja Hanwant Ram, although he was the brother of Achal Ram and his heir by relationship, had nevertheless not succeeded to any property left by Achal Ram. In the course of the trial attempts were made to prove that Hanwant Ram had come into possession of various items of property belonging to his deceased brother. One of these items consisted of the equity of redemption of 89 villages mortgaged to the plaintiff himself. At the instance of the defendant interrogatories were issued to be answered by the plaintiff himself. They were sent to the plaintiff, but the answers were not given by the Maharaja but by a general agent of his, one Raghunandan Prasad. The answers to the interrogatories were recorded on the 13th November 1911. The object of these interrogatories was to obtain from the plaintiff an admission that the equity

of redemption of these villages had been sold long before the suit was brought. The answers given by the plaintiff's general agent were of an unsatisfactory character, but he admitted at any rate that he was aware that a portion of the equity of redemption had been sold in execution of decrees and that some of the purchasers had given notice to the Maharaja of their intention to bring a suit for redemption. Hanwant Ram was interested to show that the entire equity of redemption relating to these 89 villages had been sold from time to time in execution of decrees obtained against his deceased brother, Achal Ram, and when this point was not admitted in the answers given in the interrogatories, the defendant asked leave to file certain documents—certified copies of proceedings taken in execution of decrees,—to show that the entire equity of redemption had passed from the hands of Hanwant Ram long ago. The Subordinate Judge refused to receive the evidence or to call for the record of the execution cases in which these sales had taken place. In these circumstances it has been argued that the Subordinate Judge ought to have received this evidence so as to enable him to dispose of the matter in dispute. The Subordinate Judge seems to have been rather doubtful as to the way in which he should deal with the case before him. In one passage of his judgment he states that it was not necessary for the plaintiff to prove that any particular items of property belonging to Achal Ram had come into possession of Hanwant Ram, and he cited an authority for this proposition. That may be, but at any rate there is no doubt that whether it was necessary for the plaintiff to do this or not, he did lead evidence to show that Hanwant Ram had come into possession of considerable property belonging to Achal Ram and one of the items regarding which such evidence was led was this equity of redemption. Documentary evidence was put in to show that after the death of Achal Ram, Hanwant Ram applied for and got mutation in respect of the 89 villages to the extent that he was recorded in the revenue papers as the owner of the equity of redemption. This being so and the plaintiff having undertaken at the trial to prove that definite items of property had come to the hands of Hanwant Ram, we think the Subordinate Judge would have acted wisely in receiving this evidence so as to enable him to dispose completely of the matter. We think that having regard to the items of Order XLI, rule 27, sub-rule (1), clause (*a*), this evidence ought to be received at the present stage and we therefore direct that it be so admitted. The documents are, as we have already observed, certified copies of execution proceedings of the Civil Courts.

Application allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEALS NOS. 69 AND 118 OF 1913.

November 19, 1914.

Present:—Mr. Lindsay, J. C.

KAMTA AND OTHERS—DEFENDANTS—APPELLANTS

versus

BHAGIRATH AND OTHERS—PLAINTIFFS AND ANOTHER—DEFENDANT—RESPONDENTS.

Hindu law—Joint family—Alienation by manager—Adult co-parceners, when bound by alienation by manager—Consent, implied—Co-parcener not benefited by transaction effected by other co-parcener, not bound by transaction.

No alienation by one co-parcener, even if he is a managing member of the joint Hindu family, will bind the other adult co-parceners, unless their consent to the alienation is either expressed or may be implied from their conduct.

And, consent to an alienation would necessarily be inferred where a co-parcener with full knowledge of all the facts takes possession of and retains that which has been purchased with the proceeds of the property alienated.

A co-parcener not benefited by a transaction entered into by the manager of the joint Hindu family can plead that he is not bound by that transaction on the ground that he derived no benefit from it and that it has not been entered into for any legal necessity.

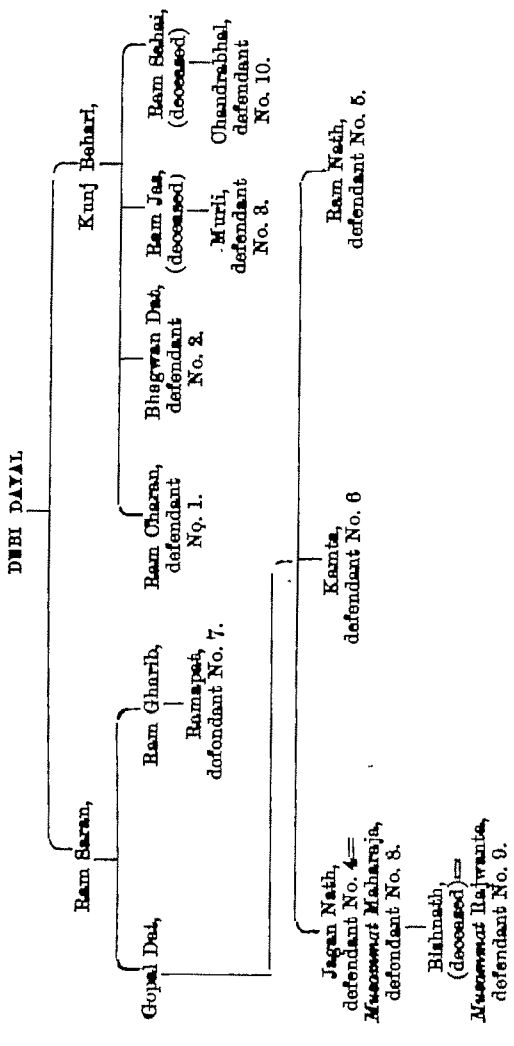
Appeals from the decree of the Subordinate Judge, Fyzabad, dated 29th March 1913.

Babu *Baslov Lal*, for the Appellants.

Pandit *Gokaran Nath Misra* and Mr. *E. Manuel*, for Respondent No. 1.

JUDGMENT.—These two appeals arise out of two suits which were tried in the Court of the Subordinate Judge of Fyzabad. The suits were consolidated and were disposed of by one judgment. First Civil Appeal No. 69 of 1913 relates to a claim for the

recovery of Rs. 6,000 on the basis of a mortgage executed on the 9th of June 1900, by which an area of 111 *bighas* made up of certain plots situated in the village Patna Mubarakpur was mortgaged to the plaintiff. Appeal No. 118 of 1913 has sprung out of a suit on another mortgage bearing the same date, by which a 6-pies share in the village just mentioned was hypothecated by way of security. The amount of the claim in this second suit was Rs. 1,100. In order to understand the matters in dispute between the parties, it is necessary in the first place to set out the following pedigree:—



The first transaction to be noticed in connection with these suits is one of the 19th of February 1900, a transaction by way of sale in which an 8-annas share of Patna Mubarakpur was purchased from one Bhola Singh by five persons Kashi, Sital, Ram Charan, Ramapat and Gopal Dat. We are not concerned in these cases with Kashi or Sital, who belong to a different family. Ram Charan, whose name has just been mentioned, is defendant No. 1 in the suit brought for the recovery of Rs. 6,000. Ramapat, another of the purchasers, is defendant No. 7 in the same suit and Gopal Dat the remaining purchaser is now represented by the defendants Jagan Nath, defendant No. 4, Ram Nath, defendant No. 5, Kamta, defendant No. 6. It will be noticed from the pedigree just given that Ram Charan belongs to one branch of the family, namely, the branch descended through Kunj Behari, while Ramapat and Gopal Dat belong to the other branch of the family being descended through Ram Saran. Both Ram Saran and Kunj Behari were, as the pedigree shows, the sons of Debi Dayal, who is the common ancestor of the defendants. The price agreed upon for the property purchased from Bhola Singh was Rs. 7,200, Rs. 1,200 in cash was paid to the vendor, the rest was left with the purchasers to pay off prior mortgages on the property. It is further to be noticed that according to the terms of the sale-deed the purchasers purchased in separate shares. Out of the 8 annas, 1 anna 8 pies is recorded as having been purchased by Ram Charan, while Gopal Dat and Ramapat each became purchasers of a 10-pies share. We come now to the two mortgages upon which the two suits now under consideration were brought. The first of these, dated 9th of June 1900, was executed in favour of Bhagirath to secure a loan of Rs. 2,000. The executants of this deed were Ram Charan, defendant No. 1, Bhagwan Dat, defendant No. 2, Ram Jas, the father of Murli, defendant No. 3, Jagan Nath, defendant No. 4, and Ram Nath, defendant No. 5. The second deed of mortgage executed on the same date and in favour of the same mortgagee was for Rs. 500. The executants of this deed were Jagan Nath, defendant No. 4, and Ram Nath, defendant No. 5. It is not disputed now in appeal that these two deeds were actually executed

as alleged by the plaintiff. The plaintiff's case was that these two sums of money aggregating Rs. 2,500 had been borrowed in order to pay off a portion of the mortgage-money, which the purchasers under the deed of the 19th of February 1900 had to pay to the prior incumbrancers. The total amount owing to these previous incumbrances on the whole 8 annas share which was purchased from Bhola Singh came to Rs. 5,883/15/-. The 3-annas 4-pies share which was bought by Ram Charan, Gopal Dat and Ramapat was, therefore, liable to contribute a sum of Rs. 2,451/10/-. The plaintiff's case is that the sum of Rs. 2,500 which was borrowed under these two mortgage-deeds was borrowed for the purpose of paying off the above share of the mortgage-money. The suits have, therefore, been brought against these various defendants, the allegation being that the money having been borrowed for the benefit of the joint family consisting of these defendants, they are bound by the mortgages in suit. So far as these appeals are concerned we have to deal only with the cases of three of these defendants. In appeal No. 69 the three appellants are Kamta, defendant No. 6, Ramapat, defendant No. 7, and Chandrabhal, a minor, defendant No. 10. The appellants in the other Appeal No. 118 are Ramapat and Kamta only. All these defendants denied their liability under these mortgages. They denied that they were members of a joint family with other parties arrayed as defendants and they denied that they were bound by the mortgages in suit. The lower Court has found that these appellants were liable, and has therefore given decrees on the mortgages, the result of which is to make their shares in the items of the mortgaged property liable to be sold. It will be convenient to deal first with Appeal No. 69, in which there are three appellants, Kamta, Ramapat and Chandrabhal. This suit relates to the mortgage of 111 *bighas* of Patna Mubarakpur. The plaintiff in order to establish the liability of all these defendants as members of a joint family produced both oral and documentary evidence. The principal oral evidence in the case consists of the statement of the fourth defendant, Jagan Nath, who was examined as a witness on the plaintiff's behalf. According to Jagan Nath's story at the time these mortgages were executed, the descendants of Ram Saran and Kunj Behari each constituted a joint family although both branches of the family were distinct. Jagan Nath deposed that the descendants of Ram Saran including himself separated four years after these mortgages were executed. He also deposes that Kunj Behari's descendants separated amongst themselves at the same time. Speaking of his own branch, namely, the branch of Ram Saran, he went on to say that after the separation just mentioned he and Kamta remained in union till about a year before the suit, while Ram Nath and Ramapat also remained in union. Speaking of the branch of Kunj Behari, he deposed that Ram Sahai, the father of Chandrabhal, defendant No. 10, died four years before the suit. His evidence also shows that at the time these mortgages were executed Chandrabhal's father, Ram Sahai, was alive and was at that time joint with his three brothers, Ram Charan, Bhagwan Dat and Ram Jas. He also proved that Ram Sahai must have been of adult age at the time these mortgages were executed, for he deposes that Ram Sahai who died only four years before the suit, was 34 years of age at the time of his death. Speaking with regard to the money borrowed under these two mortgages, Jagan Nath swore that all of it was applied to paying off the prior incumbrances on the 3-annas 4-pies share out of 8-annas which was purchased from Bhola Singh. He affirmed that neither Kamta nor Ramapat provided any of the money for redemption out of their own pocket. He went on to say that after redemption had been effected, Kamta got possession of his share of the property purchased from Bhola Singh. Ramapat too, he says, got his share, which he afterwards sold to one Ishuri. Kamta became the owner of this latter share by means of a suit for pre-emption. Speaking of the constitution of the family at the time these mortgages were executed, Jagan Nath swore that he and Kamta were heads of the family descended from Ram Saran, while Ram Charan was the managing member of the family descended from Kunj Behari. From what has been stated above, it will become apparent that neither Kamta nor Ramapat were parties to either of the mortgages in suit. According to Jagan Nath's deposition Kamta was absent at a marriage

at the time when the bonds were executed. He says that Kamta authorised him to execute the mortgage. This, as I have already mentioned, is the principal oral evidence adduced by the plaintiff. As for the documentary evidence, the plaintiff relied principally upon two applications which were made under section 83 of the Transfer of Property Act. Certified copies of these applications together with copies of the tenders made in connection with them and also copies of the orders passed by the Court in relation to them were placed upon the record. These tenders show that on the 13th of June 1900, that is to say, four days after the execution of these mortgages, two applications were filed in Court for deposit of mortgage-money due on the 8-annas share purchased from Bhola Singh. The persons who are concerned in these applications were Ram Charan, defendant No. 1, Ramapat, defendant No. 7, Jagan Nath, defendant No. 4, Kamta, defendant No. 6, and Ram Nath, defendant No. 5; Sital and Kashi Nath the other two persons concerned in the purchase of Bhola Singh's share, were also parties. It is proved, therefore, that although Ramapat and Kamta were neither of them parties to the mortgages executed on the 9th of June 1900, they nevertheless joined in the applications made on the 13th of June for deposit of the mortgage-money; and the plaintiff has relied upon this fact in order to render Ramapat and Kamta liable in these mortgage suits. As against this evidence, Kamta put forward his own statement and also the statements of two witnesses by way of evidence to prove that he had separated from Jagan Nath and the other members of the family long before the mortgages were made. Kamta in his own statement says that he never got any share of the mortgage-money which was borrowed from the plaintiff. He admits that he took part in the proceedings relating to the deposit of the mortgage-moneys under section 83 of the Transfer of Property Act, but his story in this connection is that the money he contributed to these deposits was paid out of his own pocket. Kamta in cross-examination was confronted with a statement which he had made in the Revenue Court in the year 1912 to the effect that at that time he and Jagan Nath were living in a state of union. He prevaricated when he was asked to explain the statement so made, and there can be no doubt that Kamta's story of separation is altogether untrue. He is convicted of falsehood by this statement of his own which was made so recently as 1912, and there can be no doubt that Jagan Nath's story to the effect that he and Kamta were joint at the time these mortgages were executed and remained so up till about a year before the suits were brought is in fact true. Kamta also tried to prove his separation by putting forward certain deeds purporting to show that he had been lending money in his own name but, as the Subordinate Judge remarks, the fact that Kamta entered into separate mortgage dealings on his own account is not necessarily inconsistent with the allegation that he was a member of a joint family. The two witnesses Nibar and Muneshar Pande whom Kamta produced to support the story of separation were discredited by the Court below, and I think rightly. Muneshar Pande deposed that at the time when Kamta separated from his brothers a written instrument of partition was drawn up. This document has not been produced in Court. Altogether the evidence of these two witnesses is of an extremely vague description. They seem to be partisans of Kamta and are ready to swear to anything in his interest. So far as Kamta is concerned, I think the true state of his relations with the other members of the family is to be found in the statement made on oath by the defendant Jagan Nath. And the matter seems to me to be conclusively established by the part which Kamta is proved to have taken in connection with the deposits of mortgage-money which were made in Court on the 13th of June 1900. It is impossible to come to any other conclusion than that the sum of Rs. 2,500 which was borrowed on the mortgages executed on the 9th of June 1900, was borrowed to pay off the share of the prior incumbrances, which was due on the portion of the property which came to Ram Charan, Gopal Dat and Ramapat. I have mentioned already that these persons' share of the moneys due under the previous incumbrances came to Rs. 2,450 odd. Jagan Nath's story, therefore, must be accepted that the whole of the money borrowed under these mortgages was devoted to the purchase of the 3-annas-4 pies share out of the 8-annas share bought from Bhola Singh. The case of Ramapat stands much on the same footing. He produced two

witnesses to prove separation between himself and the other members some eighteen years before suit. The witnesses contradicted each other. They were unable to say how the fields were divided and altogether reading their statements, it would be quite impossible to hold that they ever really witnessed any division of property between Ramapat and his co-sharers. Ramapat himself did not venture into the witness-box to explain how, if he were not interested in the mortgages which were executed on the 9th of June, he came to be a party to the deposits of the mortgage-money which were made in Court four days afterwards. So far, therefore, as the cases of Kamta and Ramapat are concerned they are perfectly clear. I have no doubt whatever that they are bound by the mortgages in suit, although they were not parties to them. It is proved that at the time the mortgages were executed, Kamta and Ramapat were members of a joint family with Jagan Nath and Ram Nath who were executants of both the deeds in suit. Jagan Nath was one of the managing members of this branch of the family, and as it is proved that Kamta took a part in depositing the money several days after the execution of the mortgages, it must be taken that as a co-sharer he consented to the alienation. The same is the case with Ramapat, and it only remains to be added that Jagan Nath has deposed that both Kamta and Ramapat obtained their shares of the property purchased from Bhola Singh. In these circumstances neither Kamta nor Ramapat can possibly be heard to say that they are not liable under the mortgages executed on the 9th of June 1900. These defendents are the only appellants in Appeal No. 118 of 1913 and for the reasons given, that appeal fails *in toto* and is dismissed with costs.

So far too as they are interested in Appeal No. 69 of 1913 their appeal must fail. There remains for consideration the case of Chandrabhal, who is one of the appellants in Appeal No. 69 of 1913. Chandrabhal was no party to the suit out of which Appeal No. 118 has arisen. The case of Chandrabhal in connection with this mortgage of 111 *bighas*, which is being considered in Appeal No. 69, stands on a different footing from that of Kamta and Ramapat. I have already set out the particulars of the mortgage relating to 111 *bighas* which was executed by Ram Charan, Bhagwan Dat, Ram Jas, Jagan Nath and Ram Nath. Out of these five executants three were brothers, namely, Ram Charan, Bhagwan Dat and Ram Jas. There was a fourth brother at the time this mortgage was executed, namely, Ram Sahai, who was the father of the minor appellant, Chandrabhal. Ram Sahai clearly was no party to the mortgage, nor has it been established as against him that he took part in making any deposit of the mortgage moneys as did Ramapat and Kamta. The only ground upon which the liability of Chandrabhal has been asserted is that Ram Charan, who was one of the executants of the mortgage, was the managing member (*aguakar*) of that branch of the family. For this statement we have the evidence of Jagan Nath, which I have accepted and which I see no reason to disbelieve. The question is whether it being found that Ram Charan was the *aguakar* of the family consisting of himself and his three brothers, Chandrabhal, who now represents the fourth brother Ram Sahai, can be held bound by the act of Ram Charan. Jagan Nath's evidence proves that at the time this mortgage was executed, Ram Sahai must have been of adult age. If we take it, therefore, that Ram Charan was the managing member of this property of the family, we have to see what his powers as manager were in the matter of alienation of co-parcenary property. Where the co-parceners, are adults the manager of the joint family may sell or mortgage the joint family property so as to bind the interest of the co-parceners provided that in the case of adult members if the sale or mortgage is made with their consent, expressed or implied, such consent may be implied from conduct at or after the time of the transaction. We have seen in the case of Kamta and Ramapat that there was abundant evidence of their consent by conduct, for they both joined in the tender of the mortgage-money, money which undoubtedly had been borrowed for the purpose under the mortgage-deeds of the 9th of June 1900. It was also proved in their case that they had benefited by the transaction, for they both came into possession of their proportionate shares of the property which was purchased from Bhola Singh. Is there any such evidence in the case of Ram Sahai? I have not been able to find any. If Ram Sahai and after him his son, the minor appel-

lant Chandrabhal, had got possession of any portion of this property purchased from Bhola Singh, I should treat that as being sufficient proof of their consent or ratification, for consent to an alienation would necessarily be inferred where one of the co-parceners with full knowledge of all the facts takes possession of and retains that which has been purchased with the proceeds of the property disposed of. There is no such evidence on the record. The learned Counsel for the respondents referred me to a Settlement *khewat*, a copy of which is Exhibit No. 9, in order to show that Ram Sahai held the property jointly with his brothers. This *khewat* was prepared about the year 1898, or 1899 and it cannot be accepted as any proof that Ram Sahai got any share of this property which only passed from Bhola Singh in the year 1900. No doubt Ram Sahai was joint with his brothers in the year 1898 and the parties had at that time a small share in this village of Patna Mubarakpur, but there is absolutely nothing to prove that Ram Sahai or after him his minor son, Chandrabhal, has ever acquired any portion of the property which was purchased from Bhola Singh. It is true that in paragraph 6 of his plaint the plaintiff asserted that Chandrabhal was in possession of a portion of this property. This, however, was not admitted in the written statement. Chandrabhal's defence was that he had never got any share of this property and that he had received no benefit whatever from the loan of Rs. 2,000, which was borrowed upon one of the mortgages executed on the 9th of June 1900. This being the case, it appears to me that the minor Chandrabhal was entitled to say to the Court that he was not bound by the mortgage in suit, from which he derived no benefit whatever and which was not executed for any legal necessity. In the concluding portion of his judgment the Subordinate Judge remarks as follows:—"This is not a case of a mortgage by a co-parcener of his undivided interest in the joint family so as to require the consent of the other members. In the present case certain members have incumbered their own shares as well as of the others. So the joint ownership of all the members is not broken up by any specification of shares. Therefore no question of consent comes in." I am unable to understand these remarks of the learned Judge. The law is as I have stated above that no alienation by one co-parcener, even if he is a managing member of the family, will bind the other adult co-parceners unless their consent to the alienation is either expressed or may be implied from conduct. I think therefore that the appellant, Chandrabhal is entitled to succeed in this Court and I hold accordingly that Chandrabhal's interest in the 111 *bighas* of Patna Mubarakpur, which was mortgaged by Ram Charan, Bhagwan Dat, Ram Jas, Jagan Nath and Ram Nath on the 9th of June, cannot be brought to sale in this suit of the plaintiff's. The result is that Appeal No. 69 of 1913 is allowed in part and the decree of the lower Court which is in question in that case is modified, it being declared that the interest of the minor Chandrabhal in the plots specified in the decree is not liable to sale. The appellant Chandrabhal will get from the plaintiff-respondent his proportionate costs both here and in the Court below. In other respects the appeal No. 69 of 1913 is dismissed with costs.

Appeal No. 69 *partly allowed*;
Appeal No. 118 *dismissed.*

CALCUTTA HIGH COURT.
APPEAL FROM ORDER No. 249 OF 1913.
August 31, 1914.
Present:—Mr. Justice Stephen and Mr. Justice Mullick.
SAHIBZADA SINGH AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS
versus
HAZARI SAHU—DECREE-HOLDER—RESPONDENT.

Interest, rate of, stipulated in mortgage-bond—Period between date fixed for payment and date of realisation—Interest, at what rate to be allowed.

A decree-holder in a mortgage suit is entitled to recover interest at the Court rate for the period between the date fixed for payment and the date of realization of the money, and not at the rate stipulated for in the mortgage-bond.

YESHWANT VISHNU NENE *v.* KESHAVRAO BHAIJI.

Sundar Koer v. *Rai Sham Krishen*, 34 C. 150 at p. 161; 9 Bom. L. R. 304; 17 M. L. J. 43; 11 C. W. N. 249; 4 A. L. J. 109; 34 I. A. 9 (P. C.); 5 C. L. J. 106; 2 M. L. T. 75 and *Maha Pershad Singh* v. *Surendra Mohan Singh*, 4 Ind. Cas. 56, 9 C. L. J. 288, followed.

Appeal against an order of the District Judge, Shahabad, dated the 1st March 1913, reversing that of the Subordinate Judge of that place, dated the 15th of June 1912.

Babu *Raghoo Nath Singh*, for the Appellants.

Moulvi *Wahid Hosain* and Babu *Harendra Nath Mookherjee*, for the Respondent.

JUDGMENT.—The point raised in this appeal is, whether a decree-holder in a mortgage suit is entitled to the rate of interest stipulated for in the mortgage-bond from the date fixed for payment to the date of realization, that is, the date when the money in question is paid, or whether he is entitled only to the Court rate of interest for that period. The lower Court relying on the decision in *Radhika Mohan Ghose* v. *Brojendra Kumar Saha* (1), where the question was treated as one of construction, has allowed the stipulated rate for that period. We agree that the matter to be decided is one of construction, and that we have no power to alter the decree. In these circumstances, having regard to the general rule laid down in *Sundar Koer* v. *Rai Sham Krishen* (2) and the view taken by this Court in *Maha Pershad Singh* v. *Surendra Mohan Singh* (3), we hold that the construction adopted by the lower Court is wrong. We, therefore, allow the appeal, set aside the order of the lower Appellate Court and restore that of the Subordinate Judge. The appellant is entitled to his costs in this Court, which are assessed at three gold *mohurs*, and the Court below.

Appeal allowed.

(1) 5 Ind. Cas. 61; 14 C. W. N. 125.
(2) 34 C. 150 at p. 161; 9 Bom. L. R. 304; 17 M. L. J. 43; 11 C. W. N. 249, 4 A.L.J. 109; 34 I. A. 9 (P. C.); 5 C. L. J. 106; 2 M. L. T. 75.
(3) 4 Ind. Cas. 56; 9 C. L. J. 288.

BOMBAY HIGH COURT.

ORIGINAL SIDE CIVIL APPEAL NO. 9 OF 1914.

August 14, 1914.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Davar.

YESHWANT VISHNU NENE—PLAINTIFF —APPELLANT

versus

KESHAVRAO BHAIJI AND OTHERS —DEFENDANTS—RESPONDENTS.

Landlord and tenant—Lease of land for purposes of building over—Ejectment—Terms of agreement—Mere non-payment of rent, effect of—Fasendari, *meaning of*

A tenant took a piece of land for building a house thereon on the condition that so long as the *wadi* of which the said piece of land formed a portion remained in the possession of the landlord, the tenant would occupy the land, but when the *wadi* ceased to be in the landlord's possession and the land was required, the tenant was to be paid the valuation of the house and to vacate:

Held, (1) that the landlord whose possession was contemplated in the agreement must include both the landlord and his assigns, and in the same way the tenant would include his assigns;

(2) that the tenant could not be ejected according to the terms of the agreement while the landlord remained in possession of the *wadi* and the land was not required by any one else;

(3) that the mere non-payment of rent by a tenant, if the tenancy is not determined, does not give him a right to the property as against his landlord.

The word "*fasendari*", even though indicating the nature of the rent, does not necessarily decide the nature of the tenure which depends upon the agreement between the parties.

Appeal from the judgment of Mr. Justice Beaman, reported as 23 Ind. Cas. 880.

Mr. *Setalvad* (with him Mr. *Desai*), for the Appellant.

Mr. *Kanga* (with him Mr. *Jardine*, Acting Advocate-General), for the Respondent.

JUDGMENT.—This is an ejectment suit in which the plaintiff represents the landlord under two agreements of 1859 and 1860, and the defendants represent the tenant under those agreements.

The question is whether the plaintiff is entitled at any time to determine the tenancy which has been subsisting since the date of those agreements.

Now, the first of them, Exhibit A, is dated the 5th of March 1859, and the tenant there agrees as follows:—

"There is your *wadi* by name Charni situate on the sea-shore. I have taken the land *Fasendari* (or on *Fasendari* or as *Fasendar*) being a portion of this *Wadi* on the Southern side

for building a Cadjan house. On this land I shall build a house at my cost within Rs. 50. The ground rent is fixed at Rs. 6 per annum which I will continue to pay from year to year. I will pay the assessment, and, if at any time you be in need of the ground appertaining to this house, I am to give the said ground to you and you are to pay me Rs. 50 being a valuation thereof agreeably to what is written above."

At that time the intention was to build a Cadjan house of the value of only Rs. 50 and the tenant agreed to give up ground whenever it was required by the landlord.

In the following year, an agreement, somewhat different in terms, was entered into. It recites that the tenant has taken on *Fasendari* land in the *wadi* for the purpose of building a Cadjan house thereon. The agreement then continues:—

"I shall build a house in the said *wadi* at my own cost. The *Fasendari* rent in respect thereof is fixed at Rs. 9 per annum which I will continue to pay to you from year to year. I will pay the assessment. I shall build house on this land and live in it peacefully. I shall live there till the *wadi* remains in your possession. If the *wadi* ceases to be in your possession and if the land be required, you are to pay me the value of the said house whatever the same may come to. Otherwise I shall pull down my house and remove it."

It is to be observed that the value of the house is not stated in that agreement, but the rent is raised fifty per cent. from Rs. 6 to 9 and the condition as to surrender is worded quite differently. The tenant is to live in the *wadi* so long as it remains in the possession of the landlord. He is to be paid the valuation of the house when the *wadi* ceases to be in the landlord's possession and the land is required. Therefore, his possession will not cease merely upon the wish of the landlord. For instance, if the landlord remains in possession and wishes him to vacate, he would not have to vacate according to the condition in the second agreement.

Now, we think that the landlord whose possession is contemplated there must include both the landlord and his assigns and in the same way the tenant would include his assigns. Here we have a suit in which the landlord sues to eject according to the terms of the agreement while he remains in possession of the *wadi* and the land is not required by any one else. It appears to us that under the terms of the agreement he has no right in such circumstances to eject the tenant. That disposes of the suit and the decree of the lower Court dismissing the suit must be affirmed.

It must not be supposed, however, that we accept the view of the lower Court with regard to the meaning of *Fasendari*, when it occurs in a written document embodying the contract between the parties. On that point, we entirely agree with the remarks of Mr. Justice Farran in *Parmanandas Jivandas* v. *Ardeshir Framji* (1).

We also do not agree with the learned Judge in holding that the plaintiff's suit is barred by limitation. In the letter of the 7th of July 1871, the tenants who were then Atmaram Bhikaji and Bhai Lakshmanji, predecessors-in-title of the present defendants, instructed their attorneys to say that they did not recognize Ramnath Dadaji, predecessor of the present plaintiff, as the *Fasendar* of the premises and could not see what right he had to interfere. Unless, therefore, Ramnath showed them that he was the *Fasendar*, they would complete purchase without regard to the threats contained in his letter. Then on the 19th of July after having been informed of the title of Ramnath Dadaji, the attorneys of Atmaram Bhikaji and Bhai Lakshmanji stated that they were ready and willing to pay rent at the rate of Rs. 9 per annum, if Ramnath removed the foundation of the wall which he had laid in front of their clients' house and allowed the use of the old privy.

There is, therefore, no denial of the title of Ramnath Dadaji as the landlord of this ground and although there is no evidence that rent was paid between 1871 and 1901, the mere non-payment of rent by a tenant, if the tenancy is not determined, does not give him a right to the property as against his landlord. Then, it appears that in 1901 the plaintiff sued the defendants for rent according to the terms of the agreement of 1860 and after evidence had been given by the plaintiff the defendants agreed to a decree for the amount of rent prayed, on

(1) *See* 27 Ind. Cas. 512; 16 Bom. L. R. 723*n*.

condition that the summons in the suit was amended by the insertion of the word "*Faxendari*" as indicating the nature of the rent. We are of opinion that that word, even though agreed upon as indicating the nature of the rent, does not decide the terms upon which the defendant held and still holds, for his tenure must depend upon the terms of the agreement of 1860 taken together. Upon the terms of that agreement, we are of opinion, for the reasons already stated, that in the circumstances which have been established in this case, the plaintiff has no right of ejectment.

We, therefore, affirm the decree of the lower Court and dismiss the appeal with costs.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 68 OF 1912-13 OF SULTANPUR DISTRICT.

July 23, 1914.

Present:—Mr. Holms, J. M.

MAHESH SHUKLA—PLAINTIFF—APPELLANT

versus

Babu RUDRA PRATAB SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Oudh Rent Act (*XXII of* 1886), *s.* 108 (10)—*"Illegally ejected", meaning of*—Res judicata, *temporary.*

The words "illegally ejected" used in section 108 (10) include an ejectment by a process of law if the ejectment was illegal.

A decision in a previous ejectment case under section 62 of the Oudh Rent Act as to under-proprietary rights operates as *res judicata* between the parties in a subsequent case for recovery of possession in the Revenue Court until there is a final adjudication of the question in the Civil Court.

Appeal from the decree of the Commissioner, Fyzabad, dated 28th April 1913, upholding that of the Assistant Collector, Sultanpur, dated 26th August 1912.

FACTS.—The defendants-landlords filed a suit against the plaintiff for ejectment under section 62 of the Oudh Rent Act. The latter pleaded that he was an under-proprietor of the land in suit. The Revenue Courts found that he had no under-proprietary right, and ejected him. After he had thus been ejected, he brought a suit for recovery of possession under section 108 (10) of the Oudh Rent Act, on the allegation that he had been illegally ejected as he was an under-proprietor. The points for decision in the case, therefore, were:—*firstly*, whether the plaintiff was entitled to sue under section 108 (10) after he had been ejected under section 62, and *secondly*, whether the decision in the previous ejectment case as to under-proprietary rights operated as *res judicata* in the subsequent suit for recovery of possession.

Mr. *P. C. Bhattacharjee*, for the Appellant.

Babu *Raj Kumar*, for the Respondents.

JUDGMENT.—The learned Commissioner has dismissed the appeal somewhat summarily, and I am not altogether able to accept his view of the law. It has been held that the words "illegally ejected" used in section 108, clause (10), include an ejectment by a process of law if the ejectment was illegal. He will find the rulings on the subject at page 248 of Mata Prasad's Oudh Rent Act, second edition.

I proceed to dispose of the appeal on the merits of the case, as it seems unnecessary to send it back for re-hearing by the Commissioner. The Assistant Collector says that defendant No. 3 was not a party to the suit under section 62. The copy of the judgment on the file shows that besides the present defendants Nos. 1 and 2 there were other parties to the suit, and respondent contends that defendant No. 3 was a party. The appellant is not very definite on the point. Appellant has, however, admitted that defendant No. 3, Mata Prasad Singh, holds his title under the other defendants. This being so, section 11 of the Code of Civil Procedure applies to him also, and the question of under-proprietary right which was in issue and decided in the section 62 suit is now *res judicata* as between the parties, until there is a final adjudication on the question in the Civil Court. There was no illegal ejectment therefore, and the suit was properly dismissed.

I dismiss the appeal with costs.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 134 OF 1914.

May 6, 1914.

Present:—Mr. Crouch, A. J. C.

J. M. LANG AND ANOTHER—PETITIONERS

versus

MESSRS. HOLLAND AND MOSS, LD., AND OTHERS—RESPONDENTS.

Arbitration—Party having notice of hearing not appearing—Ex parte award, validity of—Costs, order as to, included in award—Award, whether bad.

Where a party to an arbitration proceeding receives notice of the hearing but does not appear, the arbitrators are right in making an *ex parte* award.

Costs incurred in the process of obtaining an order from the Court are within the discretion of the Court and outside the province of the arbitrator, but an award is not bad merely because of their inclusion.

Mr. *Kimatrai Bhojraj*, for the Petitioners.

Mr. *Mulchand Thawardas*, for Respondents.

JUDGMENT.—The award is objected to on behalf of Assanmal Udernomal on three grounds:—

1. That Assanmal received no notice of the hearing.

2. That the arbitrators proceeded *ex parte*.

3. That the award is *ultra vires*, inasmuch as it awards costs and charges that may be incurred in filing this award in Court.

Mr. Noble has proved that notice of the hearing was sent by registered post and the receipt purporting to be in order is produced. He states that Assanmal systematically refused notices. All that Assanmal can say of this receipt is that he did not sign it himself; he is not prepared to say that one of his brothers did not sign it.

I hold that Assanmal received notice of the hearing and that, as he did not appear, the arbitrators rightly proceeded *ex parte*.

I have previously held in the case of *James Finlay & Co.* v. *The Firm of Asudamal Harbhagwandas*(1) that all costs incurred in the process of obtaining an order from the Court are within the discretion of the Court and outside the province of the arbitrator; but it is an almost universal practice of arbitrators in Karachi to add at the end of their award the words complained of, and the Court may fairly regard such words as nothing more than a recommendation that the costs

(1) 12 Ind. Cas. 687; 5 S. L. R. 89.

referred to be granted. As the costs are not specified, the award cannot be enforced of itself and without some order of the Court. Construing the words in this sense, I hold that the award is not bad merely because of their inclusion. So far as I am aware no award has been held bad solely because the arbitrators awarded costs of filing the award.

Let the award stand filed. All costs of these proceedings to be borne by respondents No. 2.

Award filed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 307 OF 1912.

July 23, 1914.

Present:—Mr. Justice Fletcher and Mr. Justice Richardson.

Raja JYOTI PROSAD SINGH BAHADUR—DEFENDANT—APPELLANT

versus

KUMUD NATH CHATTERJEE AND OTHERS—PLAINTIFFS—RESPONDENTS.

Chota Nagpur Encumbered Estates Act (VI of 1876), ss. 1, 2, 3, 5, 8, 11, 12, 19 (d)—Mortgage-debt created on property outside Chota Nagpur, whether affected by Act—Manager, jurisdiction of, to deal with outside debts and liabilities—Mortgagee, rights of—Proprietor, liability of

The Chota Nagpur Encumbered Estates Act does not apply to debts and liabilities which are charged upon immoveable property outside Chota Nagpur.

Therefore, a Manager of an encumbered estate appointed under the Act and the Revenue Authorities in Chota Nagpur have no jurisdiction to reduce the interest or deal in any other way with a mortgage-debt created by the proprietor of the estate on a property outside Chota Nagpur, and the proprietor of such an estate is not entitled to the rents payable under the *patni* leases which were reserved in lieu of interest on the mortgage-debt, until the principal sum secured by the mortgage is re-paid, and is liable to refund any amount realized as such.

Appeal from the decree of the Sub-Judge of Burdwan, dated 26th June 1912.

Dr. *Rash Behari Ghose*, Babus *Lalit Mohan Ghose* and *Karunamoy Ghose*, for the Appellant.

Babu *Dwarkanath Chuckerbutty*, Mr. *S. K. Sinha* and Babu *Sarat Chandra Datta*, for the Respondents.

JUDGMENT.

FLETCHER, J.—I have had the advantage of reading the judgment about to be delivered by Richardson, J. I agree herewith for the reasons there stated.

RICHARDSON, J.—The plaintiffs in this suit (Kumud Nath Chatterjee and others) are the sons and daughter-in-law of the late Mohesh Chandra Chatterjee. The defendant is the *Raja* of Pacheti in Chota Nagpur, having succeeded to that dignity on the death of his grandfather, the late Maharaja Nilmoni Sinha Deo.

The late Maharaja granted to Mohesh Chandra Chatterjee *patni* leases of four lots or parcels of land, three of which are in the District of Bankura, while one is in the District of Burdwan.

In the year 1887, the late Maharaja borrowed from Mohesh Chandra Chatterjee the sums of Rs. 22,435 upon the security of a mortgage of the lands covered by the *patni* leases. Interest was payable on the loan at the rate of Rs. 10-8-0 per cent. per annum, and the amount of annual interest being approximately equivalent to the amount of rents due under the leases, it was stipulated that the one sum should be set off against the other until the principal was re-paid. This arrangement was effected by a deed, styled a *sudbandaki* mortgage-bond, which was executed by the Maharaja at Pacheti on the 2nd February 1887. If the arrangement was not terminated by the proceedings to which I am about to refer, it is still in force as between the plaintiffs as representatives of Mohesh (who died in 1890 or 1891) on the one hand and the defendant Raja on the other.

In the year 1895, the affairs of the late Maharaja being then, as it appears, in a very embarrassed condition, the provisions of the Chota Nagpur Encumbered Estates Act (Act VI of 1876) were applied to his case and the management of his immoveable property was vested in a Manager appointed under section 2 of the Act. This vesting order was notified in the Calcutta Gazette of the 3rd July 1895, and was wide enough in its terms to extend to the immoveable property of the Maharaja in Chota Nagpur and in the districts of Burdwan and Bankura. The Manager, in due course, issued a notice under section 5 of the Act and the plaintiffs, among other creditors, brought in their claim. They submitted their mortgage-bond with a petition, dated the 26th August 1895, (Exhibit U) praying "that an order may be passed for the payment of the said amount (Rs. 22,435) from the estate or for the continuance of the practice of crediting the rents of the said lots to the satisfaction of the interest." The Manager dealt, or assumed to deal, with the debt under the Act, under section 8; the principal amount due to the plaintiffs was determined to be Rs. 22,393-2-9, instead of Rs. 22,435. The reduction was made, as I understand, because it was thought that interest had been overpaid, the annual rents being slightly in excess of the annual interest. The debt so determined was then entered in the schedule of the Maharaja's debts and liabilities and in the scheme for their settlement prepared and submitted to the Commissioner under section 11. What was done in regard to it was this. Under the rules framed under clause (*d*) of section 19, future interest was allowed at the reduced rate of 6 per cent. per annum and the difference between the interest calculated at that rate and the amount of the *patni* rents was taken in satisfaction of the principal amount determined under section 8. It may be that the Manager was at first disposed to allow interest at the bond, rate but there is no doubt that in the scheme of settlement in the form in which it was finally sanctioned by the Commissioner the debt was to be discharged in the manner I have indicated. This appears from the Deputy Commissioner's letter to the Commissioner and the statement of account dated 29th March 1898 (Exhibit H and Exhibit F), from the Commissioner's letter in reply dated 30th April 1898 (Exhibit G), and from the ledger accounts (Exhibit Q, Exhibit T). Exhibit T, the ledger of debts for the years 1906-1907, shows a balance of Rs. 5,523-12-11 due to the plaintiffs on the 31st July 1907. This amount seems to have been deposited in the treasury in August or September of the same year, presumably to the credit of the plaintiffs. The plaintiffs, however, have not withdrawn the amount and it is not shown that notice of the deposit was given to them.

The late Maharaja having died, the property which had been under management was restored on the 1st August 1907, to his heir, the defendant Raja. This was done under the first paragraph of section 12 of the Act, on the footing, that is, that the debts and liabilities entered in the schedule prepared under section 11 had been paid and discharged. Throughout the period of management, the plaintiffs must be considered to have been in possession as mortgagees. They paid no rent. On the only occasion on which any rent was collected from them, it had been demanded by an oversight and was repaid. The incident has no importance, because it is not the case for either side that any rent was actually payable by them in money during the period in question. The system adopted by the Manager was a system of book entries of which the plaintiffs may or may not have been aware. They assert that they were in possession under the terms of their mortgage-bond. The defendant says that their possession was subject to the action taken under the Act in respect of the debt due to them.

Acting upon that view, the defendant on his restoration proceeded to levy rent from the plaintiffs by putting or threatening to put in force the summary provisions for the recovery of *patni* rent enacted in Regulation VIII of 1819. He applied to the Collector for the sale of the *patni* tenures and caused notice to be issued to the plaintiffs under section 8 of the Regulation. The plaintiffs then paid certain sums aggregating Rs. 6,848-4-0, and they subsequently brought the present suit for the recovery of the money so paid. The plaint also prays for interest, a claim which was withdrawn at the trial. In regard to the principal claim the plaintiffs were successful in the Court below, and this appeal is preferred by the defendant from the judgment and decree of the learned Subordinate Judge of Burdwan, dated the 26th June 1912.

The first point urged on the appellant's behalf related to the jurisdiction of the Subordinate Judge. The greater part of the sum decreed was paid to the defendants' agent at Bankura. A small portion, however, was paid at Burdwan and it cannot, therefore, be said that no portion of the cause of action arose at Burdwan. The contention that the Subordinate Judge of Burdwan had no jurisdiction to try the suit must be rejected.

The contention, that the suit should be dismissed because the payments which it is sought to recover were voluntary payments made under a mistake of law and not under a mistake of fact, raised a more debateable question, but is also in my opinion untenable. No doubt the payments were made without express protest and without application for a summary investigation under clause second of section 14 of the Patni Regulation. The record, therefore, does not show in point of fact whether the payments were made rightly or wrongly in satisfaction of the demands for rent or whether they were made merely for the purpose of preventing the threatened sale of the tenures. It may further be conceded that the case does not come precisely within the class of cases of which *Dhuli Chand* v. *Ram Kishen Singh* (1) may be taken as an illustration, while the payment is made by a third party under compulsion of a threatened sale and for the purpose of preventing the sale. It does not follow, however, that the claim is not maintainable. The true answer to the defendants' contention is that it is wrong to treat the claim merely as a claim for money paid and received by the defendant to the use of the plaintiffs. If that were the only foundation of the claim there might be a difficulty in the plaintiff's way. No suggestion of fraud is made and there is the doubt as to the intention with which the payments were made. The ordinary rule, moreover, is that money paid under compulsion of legal process cannot be recovered back [*Marriott* v. *Hampton* (2), *Moore* v. *Fulham Vestry* (3)]. But the present case stands on higher ground. Section 14 of the Regulation recognizes some right, at any rate on the part of the *patnidar*, to resort to the ordinary Civil Courts for the purpose of contesting the demand made by the *zemindar*. If the former does not pay the amount claimed, the tenure is to be sold, but with this express reservation that "it shall be competent to

(1) 8 I. A. 93; 7 C. 648; 4 Sar P. C. J. 245; 5 Ind. Jur 498.

(2) 7 T. R. 269, 2 Esp. 846; 4 R. R. 439, 101 E. R. 969.

(3) (1895) 1 Q. B. 399; 64 L. J. Q. B. 228; 14 R. 343, 71 L. T. 862; 43 W. R. 277; 59 J. P. 596.

any party (including, that is, the *patnidar*), desirous of contesting the right of the *zemindar* to make the sale, whether on the ground of there having been no balance due, or any other ground, to sue the *zemindar* for the reversal of the same and upon establishing a sufficient plea to obtain a decree with full cost and damages." Similarly if under the second clause the *patnidar* contests the demand and applies for a summary investigation and the investigation (which is also called a "suit") is not concluded before the day appointed for sale, the sale is to be held unless the amount claimed is deposited, and if the deposit is not made the alleged defaulter is to "have no remedy but by a regular action for damages and for a reversal of the sale." A *patnidar*, therefore, can always sue to have a sale set aside and no distinction in this respect exists between cases in which the demand is, and those in which it is not, contested before sale. There is no reason why, if the amount claimed is paid (with the result that no sale is in fact held), it should not be recovered back when it is afterwards found that no rent was due. If that course is permissible to the *patnidar*, it is much more convenient to all concerned than his waiting till the sale is over and then suing to have it set aside, when various complications may arise owing to the existence of a third party auction-purchaser. It seems to me that the section necessarily implies a right on the part of the *patnidar* to recover back his money by suit in such circumstances as those of the present case. In the first place, the *patnidar* is not obliged to prefer his objection to a demand before the Collector. Clause second of section 14 merely says that he "shall be competent to apply for a summary investigation." In the second place, the section is silent on the question whether if in the course of such an investigation the amount claimed is deposited, and the Collector decides against the validity of the objection and pays the money over to the *zemindar*, the *patnidar* can sue to recover it back. But obviously he must have that right and it seems to me upon the language of the section as a whole, that its framers contemplated and intended that he should have the right to sue for the recovery of his money on the ground that no rent was due from him not only when he has made an unsuccessful objection, but in all cases whether he has or has not paid under protest or lodged an objection. In other words, an objection or a summary investigation by a Collector is not a condition precedent to the bringing of a suit. The Collector's decision is not final and in the case before us, for instance, nothing could have been gained by bringing the dispute between the parties before the Collectors of Burdwan and Midnapur. Litigation in the Civil Courts would have followed as a matter of course. Under the Regulation no complete or final determination is possible except by bringing the matter before the Civil Court. The truth seems to be that a *zemindar* initiates proceedings under Regulation VIII of 1819 at his own risk and subject, if there is no balance of rent due, to the right of the *patnidar* to recover the sum levied from him by such proceedings, or to be restored to the *status quo ante*. When there is no arrear of rent in fact due, proceedings under the Regulation are in their inception unauthorized and illegal. Possibly it is this illegality which distinguishes the original notice issued on the plaintiffs in the present case from the writ or summons in an ordinary suit and furnishes a compulsive or coercive element sufficient to bring the case within the rule applied in *Duli Chand's* case(1) and embodied in section 72 of the Contract Act [*Seth Kanhaya Lal* v. *National Bank of India Ltd.* (4)]. But if the plaintiffs have a right of suit in the nature of a suit for money had and received under the Regulation, it is not necessary to consider whether they have an independent right of suit under section 72 of the Contract Act. In my opinion it is no defence to the present suit (though it may be a good defence in other cases) to say that the payments made by the plaintiffs were voluntary payments made with a full knowledge of all the facts.

The main stress of the argument addressed to us was directed to the question whether the Chota Nagpur Incumbered Estates Act, according to its true construction, applies

(4) 18 Ind. Cas. 949; 40 I. A. 56, 40 C. 598; 17 C. W. N. 541; (1913) M. W. N. 406; 11 A. L. J. 413; 17 C. L. J. 479; 15 Bom. L. R. 472; 184 P. L. R. 1913; 25 M. L. J. 104; 13 M. L. T. 406.

to immoveable property situated outside the limits of the Chota Nagpur Division, or to debts for which such property is merely hypothecated. The learned Subordinate Judge has answered the question in the negative, and his opinion is supported by the subsequent decision of a Bench of this Court (Mukherjee and Beachcroft, JJ.) in the case of *Bhicha Ram* v. *Bishambar Nath* (5). By that decision we are bound, unless we see such reason to differ from it as would justify us in referring the question to a Full Bench for determination. The learned Vakil, who argued in the case cited in favour of the view which was adopted by the Court, has now with the skill and learning to which we are accustomed pressed the contrary view upon us. Notwithstanding I am not prepared to take the course which he urged us to take. In deference to his argument, however, we have re-examined the provisions of the Act, which is no doubt an extremely difficult one to construe. The difficulty is largely grammatical, the language being very involved owing to the loose way in which words of relation are used. I take the Act as printed in the Bengal Code, that is, as it stood before it was amended by Act III (B. C.) of 1909. The most important sections are perhaps section 2, under which the vesting order is made, and section 3 which defines the effect of the order. The rest of the Act is largely concerned with machinery and details, but nonetheless sections 2 and 3 cannot be construed as though they stood alone. The Act must be read and construed as a whole. Section 1 gives its title, "The Chota Nagpur Incumbered Estates Act." Section 2 begins. "Whenever any holder of immoveable property". Admittedly in view of the preamble and the title, that means "whenever any holder of immoveable property in Chota Nagpur" and if the words "in Chota Nagpur" must be understood here, it becomes at least possible that the expression "immoveable property" occurring elsewhere must be similarly limited to property in Chota Nagpur. Omitting two or three paragraphs, the section continues:—

"Or when any such property belonging to such holder has been attached in execution of a decree of a Civil Court, the Deputy Commissioner within whose jurisdiction such property is situate."

That must also mean property in Chota Nagpur. Then come the words:—

"Applies in writing to the Commissioner, stating that the holder of the said property is subject to, or that his said property is charged with, debts or liabilities other than debts due or liabilities incurred to Government."

There again "the said property" is property in Chota Nagpur.

The Act proceeds:—"the Commissioner may .... appoint an officer (hereinafter called the manager) and vest in him the management of the whole or any portion of the immoveable property of or to which the said holder is then possessed or entitled in his own right or which he is entitled to redeem, or which may be acquired by or devolve on him or his heir during the continuance of such management."

These are wide words and at first sight suggest that they extend to more than the immoveable property held in Chota Nagpur required as a condition precedent to an application for the benefit of the Act. But almost in the next line a difficulty suggests itself. Under clause (*a*), with which one of the clauses in section 3 is referentially connected, the application is to state the particulars of the debts and liabilities *as aforesaid* to which the said holder is subject or with which his immoveable property is charged. The difficulty lies in the relative words "as aforesaid" which refer back to the application clauses. They may, however, and probably do, mean debts and liabilities other than debts due or liabilities incurred to Government. If that be so, the words "his immoveable property" in clause (*a*) and clause (*b*) of the section are capable of a construction consistent with the extended meaning which it is suggested should be given to the language of the vesting clause.

There is nothing in section 3 which is necessarily inconsistent with that meaning. The words "such debts and liabilities" in clause *first* must refer to debts and liabilities of the kind contemplated by clause (*a*) of section 2. Clause *secondly* speaks of "the property so vested as aforesaid." In clause *thirdly*, three different expressions are used

(5) 17 Ind. Cas. 957; 16 C. L. J. 527; 17 C. W. N. 754; 18 C. L. J. 48.

"the said immoveable property," "such property" and "the same property" but, in each case the reference must be to the property so vested as aforesaid mentioned in clause *secondly*.

Even so, however, there still remains a doubt whether the words of the vesting clause do in fact include, and whether they were intended by the Legislature to include, property other than property in Chota Nagpur. The doubt is suggested in the first instance by the preamble and title of the Act. In regard to the scope and purpose of the Act or its policy, it is arguable whether the Legislature ever intended to do more than free the holders of the land in Chota Nagpur from their personal liabilities and disencumber their lands and estates in Chota Nagpur. It is quite conceivable that the Legislature did not intend to touch debts and liabilities which are merely charged upon lands outside Chota Nagpur. As Mr. Justice Mookerji has pointed out, the language used in sections 2 and 3 does in more than one place support the view that a distinction ought to be drawn between the debts and liabilities to which the holder of the land is personally subject and debts and liabilities secured upon landed property. If that distinction be borne in mind, it is quite possible to confine the words of the vesting clause, wide as they are, to immoveable property in Chota Nagpur, and that construction seems to me, as it seemed to the learned Judges in the case cited, to be more consistent with the preceding part of section 2, with such provisions as those contained in sections 10, 16 and 23 and with the Act as a whole. For instance, section 2 speaks of the Deputy Commissioner within whose jurisdiction such property is situate and section 16 of "the Deputy Commissioner within whose jurisdiction the property is situate." In section 2 the property referred to must be property in Chota Nagpur, and it is obvious that in section 16 the Legislature were also thinking of property in Chota Nagpur. Deputy Commissioners are to be found in Chota Nagpur and other non-regulation tracts, but the revenue head of the ordinary district is styled a Collector. Sections 7 and 8 are consistent with either view of the scope of the Act, the property referred to in those sections being the property the management of which is vested in the manager. It all depends on the meaning of the vesting clause as to which the conclusion arrived at is precisely that in the case cited. Something was said as to the Act having been passed by the Supreme Legislative Council and not by the Bengal Council. That may well be accounted for by the fact that the Act abridges, or may in some cases abridge, the jurisdiction of the High Court.

I may add that we have given the learned Vakil for the defendant an opportunity of addressing us on the question whether, according to the terms of the mortgage-bond of 1887, the late Maharaja was under any personal liability to repay the amount which he had borrowed, a question which was not discussed at the original hearing of the appeal. The learned Vakil has very candidly informed us that having read the instrument, he is not in a position to argue that it imposed any such liability on the Maharaja.

The result is, in my opinion, that the Act being inapplicable to immoveable property outside Chota Nagpur, the Manager and the Revenue Authorities in Chota Nagpur had no jurisdiction to deal with the plaintiff's mortgage, either by reducing the interest on the debt or in any other way. It follows that until the principal sum secured by the mortgage is re-paid, the defendant is not entitled to the rents payable under the *patni* leases and that he must refund the amount claimed in this case.

It was suggested that even if the Manager had no jurisdiction, the plaintiffs so acted as to constitute him an arbitrator for the settlement of their claim. But consent cannot confer on a Judge a jurisdiction which he does not otherwise possess, and section 15 of the Act shows that the Manager acts in some respects judicially. Even if it be assumed that the Manager might have been by agreement validly appointed an arbiter or that some valid agreement as to the mode in which the plaintiffs' claim should be satisfied might have been arrived at between the plaintiffs and the Manager, the latter acting not as a Judge but in some administrative or representative capacity for the Maharaja, I cannot find on the record materials sufficient to support a conclusion that the plaintiffs ever entered

into any agreement either of the one kind or the other. There is nothing to show that they consented to be bound by the decision of the Manager, whether he had, or had not, power under the Act to deal with their claim, or that they assented to or adopted the Manager's action in regard to that claim.

In my opinion the appeal fails and must be dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 153 OF 1913.

January 8, 1915.

Present:—Mr. Justice Tudball.

CHET RAM—PLAINTIFF—APPELLANT

versus

SAHABA AND OTHERS—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 79 (1) (b)—Suit for compensation for crops wrongfully removed by landlord—Jurisdiction of Civil or Revenue Court.

Section 79 (1) *(b)* of the Agra Tenancy Act entitles a plaintiff to recover the value of any crop which has been wrongfully removed by the defendant as one of the resultant damages of wrongful dispossession.

Therefore, a suit for compensation for the value of the crops which were wrongfully removed is a suit for compensation for illegal ejectment by a tenant against his landlord and should be brought in a Revenue Court.

Application for revision against a decree of the Small Cause Court Judge, Bulandshahr, dated the 22nd September 1913.

Mr. *Girdhari Lal Agarwala*, for the Appellant.

JUDGMENT.—The plaintiff is a person who obtained a sub-lease from the defendants, the occupancy-tenants of the land. He sowed the land. The lessors trespassed on it and cut and removed his crops. He prosecuted them in the criminal Court charging them with criminal trespass and assault. One of them, Laljit, was convicted of these two offences and was fined Rs. 10. The plaintiff now brings a suit for compensation for the value of the crops which were removed. The lower Court, that is, the Judge of the Court of Small Causes, has rejected the plaint, on the ground that the suit was one for compensation for illegal ejectment by a tenant against his landlord, and has returned it for presentation to the proper Court. The plaintiff applies in revision and contends that the suit is merely to recover the value of the property which was illegally taken by the defendants. It is clear that after the wrongful ejectment, the plaintiff was entitled to bring a suit to recover possession of the holding and also for compensation for wrongful dispossession under section 79 of the Tenancy Act. If compensation for wrongful dispossession could cover and include the value of the crops removed by the defendants, then it is clear that the suit ought to have been brought in the Revenue Court and not in the Court of Small Causes. It seems to me that clause (1) *(b)* of section 79 would entitle the plaintiff to recover the value of any crop which has been removed by the defendants as one of the resultant damages of wrongful dispossession. The suit, therefore, ought to have been brought in the Revenue Court and the order of the Court below is quite correct. This application is, therefore, rejected. I make no order as to costs, as the opposite party is unrepresented.

Petition dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 11 OF 1913-14 OF PARTABGARH DISTRICT.

November 11, 1914.

Present:—Mr. Holms, J. M.

LACHHMAN SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

MADHO PRASAD—DEFENDANT—RESPONDENT.

Under-proprietary tenure—Oudh Rent Act (XXII of 1886), Chap. VIIA—U. P. Land Revenue Act (III of 1901), s. 79.

Under-proprietary tenures paying no rent at all fall under the operation of the Resumption Chapter of the Oudh Rent Act; those paying rent must be dealt with under section 79 of the U. P. Land Revenue Act.

Ram Datt Tiwari v. Court of Wards, Adojhya Estate, 5 Select Decision 1914, referred to.

Appeal from the decree of the Commissioner, Fyzabad, dated 2nd October 1913, upholding the order of the Deputy Commissioner, Partabgarh, dated 8th March 1913, reversing that of the Assistant Collector, Partabgarh, dated 14th August 1912.

MASIH-UD-DIN *v.* IMTIAZUNNISA BIBI.

Mr. *Muhammad Wasim*, for the Appellants.

Munshi *Syed Zahoor Husain*, for the Respondent.

JUDGMENT.—*Ram Datt Tiwari* v. *Court of Wards, Ajodhya Estate* (1) is entirely against the appellant's case. It is only under-proprietary tenures which pay no rent at all that fall under the operation of the Resumption Chapter. Under-proprietary tenures which pay rent must be dealt with under section 79 of the Land Revenue Act. Indeed the appellant himself applied at the last Settlement under section 79, and only failed to get the rent enhanced because it was held that no enhancement could take place until a Settlement began.

I dismiss the appeal with costs.

Appeal dismissed

(1) 5 Select Decision 1914.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 49 OF 1913.

October 22, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

MASIH-UD-DIN—DEFENDANT—APPELLANT

versus

IMTIAZUNNISA BIBI—PLAINTIFF—RESPONDENT.

Limitation Act (*IX of* 1908), *Sch. I, Art.* 62—*Suit to recover money from person appointed to realise assets of a deceased—Money had and received—Limitation.*

The defendant was appointed to sell the stock-in-trade of a deceased, to realize debts due to him and pay debts due to others by the deceased, pending the settlement by arbitration of disputes between the relatives of the deceased as to their shares. The defendant realised the assets of the deceased and paid certain debts. The arbitration proceedings meanwhile fell through. The plaintiff, a sister of the deceased, sued to recover her share:

Held, that the plaintiff was only entitled to recover under the form of action known as a claim for "money had and received by the defendant for the use of the plaintiff" and as the suit was brought more than three years after the latest item was received, it was barred by Article 62 of the Limitation Act.

FACTS of the case fully appear from the following judgment in connected Appeal No. 104 of 1912:—

This appeal arises out of a suit brought by the plaintiff to recover her share in the estate of her brother, one Sheikh Gulzar Ali, who died on the 22nd of August 1907. It is clear that the plaintiff was entitled to her share in the estate of her deceased brother after paying his debts. It appears that the deceased carried on certain business as a timber merchant. After his death pending disputes (which it was hoped would be settled by arbitration between the relatives of the deceased), defendant No. 2, Maulvi Syed Masihuddin, was appointed to sell the stock-in-trade of the deceased, to realise debts due to him and pay debts due to others by the deceased. The arbitration proceedings seem to have come to nothing, but it is admitted that the defendant No. 2, the appellant in the present appeal, did realise the estate of the deceased to the extent of Rs. 26,628-12-0. There can be no doubt that notwithstanding that the arbitration proceedings came to nothing, the defendant No. 2 was liable to account for the estate of the deceased which had come into his hands. In the plaint it was admitted that certain debts had been paid out of the money realised. After the written statement was filed, the plaintiff gave details of the debts which she admitted to have been paid to the extent of Rs. 18,917-4-0. Amongst the details was an item of Rs. 4,540-9-9. This was stated to have been paid for miscellaneous debts of creditors whose names were not known. In the column of remarks opposite to this item, there is the following passage: "After the execution of the agreement referring the matter to arbitration. Thakur Prasad had mentioned this sum to the plaintiff's servant as the total amount due on account of miscellaneous items, including the arrear due to the *warifa*-holders and others, salary holders, and the amount of income-tax and it was entered in the plaint. The detail of the account was not known, hence it could not be correctly checked. Thakur Prasad had also mentioned that a certain sum was due to Hakim Saiyed Husain but he did not give a detail of it."

The contention in this Court by the appellant has been that the plaintiff having admitted that the sum of Rs. 18,917-4-0 having been paid to the creditors, and not having admitted that any sum was due to Hakim Saiyed Husain, the appellant is entitled to credit for any sum which the Court below found to be due to Hakim Saiyed Husain, and furthermore that inasmuch as the

Court below found that the plaintiff had failed to prove that there was any money save Rs. 2 left by the deceased in cash, not only is the money found due to Hakim Saiyed Husain to be added to the Rs. 18,917-4-0, but also the sum of Rs. 1,155 admitted by the plaintiff to have been paid for funeral and other expenses. It appears to us from a perusal of the judgment of the Court below, and after hearing the learned Advocate on behalf of the appellant that the parties in the Court below went into evidence upon all disputed items, which included many items, which went to make up the Rs. 18,917-4-0. The Court below heard the parties and came to a conclusion upon every disputed item. In our opinion it was quite open to the Court below to do this, and it seems to have done it without any protest on behalf of either party. In the end although the Court found that the defendant had failed to prove the entire Rs. 18,91-4-0, it nevertheless held the plaintiff bound by her admission that debts, etc., had been paid to this extent. The view that we have taken as to the way that the matter was dealt with by the Court below and the parties themselves is further corroborated by the grounds of appeal, which are mainly confined to the question whether the appellant here was in law liable at all. The fifth ground of appeal is the only ground upon which the matters which have been dealt with in the arguments before us could be discussed. It is noteworthy that no specific mention is made of the debt due to Hakim Saiyed Husain, nor of the item of Rs. 1,155 for funeral and other expenses. In our opinion the Court below was entitled to go into the accounts between the parties. It did so, and we see no reason to differ from its finding.

We accordingly dismiss the appeal with costs including in this Court fees on the higher scale.

The Hon'ble Pandit *Motilal Nehru*, (with him Messrs. *S. M. Sulaiman*, *S. A. Haidar*, *Durga Charan Banerji*, and *Moulvi Mohammad Ishaq*), for the Appellant.

Mr. *B. E. O'Conor*, for the Respondent.

JUDGMENT.—This appeal is connected with First Appeal No. 104 of 1912* in which we have just now delivered judgment. The facts are stated in our judgment in the connected appeal, and the only difference between the cases is that a plea of limitation has been taken in the present case. It is contended on behalf of the defendant that the suit is barred by Article 62 of the 1st Schedule to the Limitation Act, in so far as the case relates to a claim against him for money realised by him. In our opinion under the circumstances of the present case, the plaintiff was only entitled to recover under the form of action known as a claim for "money had and received by the defendant for the use of the plaintiff." The last item realized by the defendant was realised as far back as the year 1908. The present suit was not instituted until February 1912, that is to say, more than three years after the latest item was received. In our opinion the suit is barred under Article 62. We accordingly allow the appeal, set aside the decree of the Court below and dismiss the suit as against the appellant with costs.

Appeal allowed.

[*The judgment in this appeal is printed above—*Ed.*]

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 4 OF 1913-14 OF PARTABGARH DISTRICT.

April 24, 1914.

Present:—Sir Duncan Colvin Baillie, S. M., and Mr. Tweedy, J. M.

MUHAMMAD ASHRAF AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

GAYA PRASAD AND ANOTHER—DEFENDANTS—RESPONDENTS.

Ex-proprietary rights, claim for—Sale of proprietary rights—Relinquishment of ex-proprietary rights, deed of, executed at same time as sale-deed—Possession retained by vendor, effect of

A deed of relinquishment of ex-proprietary rights executed on the same date as the deed of sale of proprietary rights, is void and inoperative; and the vendor retaining possession of the land can claim ex-proprietary rights in respect of it although the deed of relinquishment relates to that very land.

Appeal from the decree of the Officiating Commissioner, Fyzabad, dated 12th August 1913, upholding the order of the Deputy

Commissioner, Partabgarh, dated 21st April 1913, modifying that of the Assistant Collector, Partabgarh, dated 23rd January 1912.

FACTS.—On the 13th of August 1908, the plaintiffs sold their proprietary rights to the defendants, and after the sale-deed was executed, the plaintiffs executed another deed on the same date in favour of the defendants under which the former agreed to relinquish their ex-proprietary rights in Nos. 464 and 552. Subsequently the plaintiffs applied for reservation of their ex-proprietary rights in those numbers and in others which were their *sir* and *khudkasht*, and for fixation of proper rent on them. The plaintiffs had, moreover, not given up their possession on any of those numbers. The point for decision was whether the plaintiffs could claim ex-proprietary rights in respect of Nos. 464 and 552.

Babu *Gopal Sahai*, for the Respondents.

JUDGMENT.

BAILLIE, S. M. (*April 18th*, 1914)—The appeal relates to Nos. 552 and 464. Appellant is found to have no ex-proprietary rights in these numbers, because on the day on which the sale-deed was executed he had also executed a document declaring that he would give up the land and not claim ex-proprietary rights. This was one of the ordinary expedients to defeat the provisions of the law as to ex-proprietary rights, and as such it was entirely void and inoperative. Appellant never gave up possession of the land and as he has retained possession he retains also the ex-proprietary rights. It is urged for respondent that the suit as to No. 552 was dismissed by the Court of first instance and that appellant had not appealed to the Deputy Commissioner about this number. The fact is that there was a clerical mistake in his cross-objection before the Deputy Commissioner in which '652' was written instead of '552', but there is no doubt that the intention was that '552' should be shown. This matter is unimportant.

I would allow this appeal with costs on respondent, declaring appellant to be ex-proprietary tenant of the two numbers in question. The lower Court must submit a report showing the rent due.

TWEEDY, J. M.—I concur

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 913 OF 1910.

October 27, 1914.

Present:—Sir Alfred Kensington, KT., Chief Judge, and Mr. Justice Rattigan.

HASSAN KHAN AND OTHERS—PLAINTIFFS —APPELLANTS

versus

Musammat BANO AND OTHERS—DEFENDANTS —RESPONDENTS.

Custom—Succession—Bhakral Rajputs *of Gujarkhan* Tahsil, *Rawalpindi District—Widow, her caste immaterial - Collaterals.*

The survivor of the two widows of a sonless *Bhakral Rajput* of Mauza Deir, Gujarkhan Tahsil, Rawalpindi District, is entitled, whatever her caste or rights as against a co-widow may be, to hold her deceased husband's property for life, and so long as she lives, no collateral can claim possession of that property.

Second appeal from the decree of the Divisional Judge, Rawalpindi Division, dated the 15th July 1910, reversing that of the Subordinate Judge, first Class, Rawalpindi, dated the 6th August 1909, decreeing the claim.

Messrs. *Fasl-i-Hussain* and *Taj-ud-Din*, for the Appellants.

The Hon'ble Mr. *Muhammad Shafi*, K. B., for the Respondents.

JUDGMENT.—The facts of this rather peculiar case are set out in the judgment of the Divisional Judge, and it is not necessary to repeat them. The parties are *Bhakral Rajputs of Mauza* Deir, Gujarkhan Tahsil, Rawalpindi District; the plaintiffs are collaterals of the last male owner of the estate (Pir Bakhsh) and related to the deceased in the 7th degree, while defendants Nos. 1—3 are the sister's sons of deceased, and defendants Nos. 4 and 5 are his widow and daughter, *Musammats* Bano and Fatima. The remaining defendants are collaterals who have not joined in the suit but are, according to plaintiffs, entitled to 19/40ths of the property.

In the answer to the plaintiffs' claim defendants Nos. 1—3 relied upon a written Will, which they alleged had been executed in their favour by Pir Bakhsh prior to his death in May 1893, and defendants Nos. 4 and 5 (the widow and daughter) pleaded that in their presence and while they were alive, plaintiffs had no right to claim possession.

The Subordinate Judge, for reasons which are not set forth in his record

ignored the pleas of the widow and daughter, and finding that the alleged written Will set up by defendants Nos. 1—3 was not proved, proceeded to give plaintiffs a decree for 21/40ths of the property in accordance with their prayer.

Defendants Nos. 1—5 thereupon preferred an appeal to the Divisional Judge and in grounds (2) and (3) of their grounds of appeal, took exception to the omission on the Subordinate Judge's part to consider the pleas in bar of plaintiffs' claim urged by the widow and daughter of Pir Bakhsh. They also urged in those grounds that the suit as framed would not lie; that the alleged Will had been established and was valid; that plaintiffs were estopped by their conduct from questioning it, and that in any event, plaintiffs could not be given the property unless and until they compensated the appellants for the money spent by the latter upon the funeral expenses of Pir Bakhsh.

The learned Divisional Judge accepted the appeal and dismissed plaintiffs' suit, and from his decree (dated 15th July 1910) plaintiffs have preferred a further appeal to this Court.

After hearing Mr. Fazl-i-Hussain for appellants, we have no hesitation in holding that plaintiffs' suit for immediate possession of the property was rightly dismissed, but not on the ground upon which the judgment of the Divisional Judge would seem to be based. In our opinion the plea urged by *Musammat* Bano was a complete and effective answer to plaintiffs' claim. She is, admittedly, the widow of Pir Bakhsh and as such presumably entitled to hold her deceased husband's property for her life, and so long as she lives, no collateral can claim possession of that property. It is true that she is a woman of comparatively low caste, and it was presumably on this ground that she did not succeed to half the property jointly with her co-widow, *Musammat* Rani, who being of the same caste as Pir Bakhsh, obtained possession of the greater part of the property, *Musammat* Bano (and subsequently *Musammat* Fatima, Pir Bakhsh's daughter by *Musammat* Bano) getting a small share of the property by way of maintenance. But on *Musammat* Rani's death, *Musammat* Bano as the sole surviving widow of Pir Bakhsh would, in the ordinary course and apart from any special custom applicable to the parties, succeed to the whole estate for life. Mr. Fazl-i-Hussain was unable to refer us to any peculiar customary rule prevailing in the parties' tribe which would debar *Musammat* Bano from claiming the usual widow's life-estate as against her late husband's collaterals. The Divisional Judge has very summarily disposed of this part of the case. He remarks that if the widow of superior caste excluded *Musammat* Bano, the collaterals of Pir Bakhsh can equally exclude, and that in any event *Musammat* Bano's claim did not appear to have been urged "with persistence" in the first Court. We are unable to agree with the learned Judge. It may well be (though we do not so decide) that when a *Bhakral Rajput* dies, leaving two widows, one a *sahu* and the other of inferior caste, the widow of superior caste has a preferential right to possession of the estate for life, the other widow being entitled, as against her, merely to claim maintenance. But even if such is the rule, it by no means follows that, as against collaterals, the latter has no stronger position. If, for example, *Musammat* Rani had died in Pir Bakhsh's life-time and *Musammat* Bano had alone survived him, plaintiffs would, as we understand the customary law of this Province, have had to prove that she was not entitled to the estate for life which, in the ordinary course and as a general rule, devolves upon a widow of a sonless proprietor (see paragraph 11 of the Digest of Customary Law). Mr. Fazl-i-Hussain admitted that there was nothing on the record or in Robertson's Customary Law of the Rawalpindi District to support such a proposition, and we must assume, therefore, that the general rule obtains among the parties' tribe. The Divisional Judge's remark that her claim was not urged "with persistence" in the first Court appears to be a mere surmise based probably on the fact that her plea was not put in issue. But *Musammat* Bano, who appears to have been the principal appellant in his Court, expressly and emphatically in her grounds of appeal took exception to the action of the Subordinate Judge in ignoring her claim and her plea

in bar of plaintiffs' suit, and it is hardly fair to her to say that she did not press her plea, when, in point of fact, she took the earliest opportunity in the Appellate Court of drawing attention to the fact that her plea had been ignored by the Court of first instance and had not been put in issue as it should have been.

In our opinion the Divisional Judge should have dismissed the suit on this preliminary objection and have held that so long as *Musammat* Bano lives, the collaterals of Pir Bakhsh have no right to demand immediate possession of his estate.

As a matter of fact the learned Judge has dismissed their suit, but for reasons which we are not able to understand. He rules out *Musammat* Bano's and *Musammat* Fatima's pleas in bar, and apparently holds that the pleas of defendants Nos. 1—3 (the sons of Pir Bakhsh's sisters) must prevail. But it is not easy to follow his reasoning. Defendants Nos. 1—3 expressly relied upon a written Will in their favour, which, however, they alleged they were unable to produce as it had been made over to one Lachhman Singh, an *ex-patwari*, who had colluded with plaintiffs and refused to produce the document. The learned Judge does not decide that such a Will was ever executed, but finds that "the balance of probability *seems* to be in favour of the fact of a Will, *verbal if not written*." In other words, he holds that there must have been some such Will, but that there is no definite proof that it was either written or oral; it must have been one or the other. He also finds "great difficulty" in rejecting the evidence of eight witnesses who depose to the existence of the alleged written Will and is reluctant to accuse them of flagrant perjury, and yet in conclusion he finds it impossible to hold definitely that there was a written Will, a conclusion which appears to us to ignore the difficulty he felt in the earlier portion of his judgment in rejecting the evidence of the eight witnesses. Having, however, arrived at the very inconclusive result that there must have been an oral, if not a written, Will, the learned Judge concludes with the remark, "*On the whole I would dismiss the suit.* The appeal is, therefore, accepted and the suit dismissed with costs throughout." Such vacillating and colourless conclusions are valueless and afford no assistance to this Court when it has to deal with the case on further appeal. We need not, however, discuss them further, as the sole ground upon which we dismiss this appeal is that plaintiffs' suit for possession is premature and cannot be entertained so long as *Musammat* Bano lives. Upon all other questions raised in the case we must decline to express any opinion, as any such expression would amount at most to *obiter dictum*. The appeal is accordingly dismissed with costs.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEAL No. 71 OF 1914.

December 23, 1914.

Present:—Mr. Stuart, A. J. C.

JIT SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAM BAKHSH SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Court deciding previous suit not competent to try subsequent suit, effect of.

The decision in a previous suit by a Court not competent to try the subsequent suit does not operate as *res judicata* in the subsequent suit.

Misir Ragho Bardial v. *Sheo Baksh Singh*, 9 C. 439; 12 C. L. R. 520, 9 I. A. 197; 7 Ind. Jur. 107; 4 Sar. P. C. J. 395; Rafique and Jackson's P. C. No. 70, referred to.

Appeal from the decree of the District Judge, Lucknow, dated 3rd April 1914, upholding that of the Assistant Collector, Unao, dated 29th December 1913.

Pandit *Gokaran Nath Misra* and Babu *Hari Kishen Dhaon*, for the Appellants.

Mr. *P. C. Bhattacharjee*, for the Respondents.

JUDGMENT.—In this case Jit Singh, Sital Singh and Sheopal Singh brought a suit in the Court of the Assistant Collector, under the provisions of section 108, clause 15, of Act XXII of 1886 against Ram Bakhsh Singh and Sheo Adhar, minor, on the allegation that each of the plaintiffs and defendants owned a one-fifth share in plots Nos. 157/1, area 1 *bigha* and 10 *biswas*, and 158/4, area 4 *bighas* and 5 *biswas*, in the village of Asehru, that Ram Bakhsh Singh and Sheo Adhar's father

and afterwards Sheo Adhar were in possession of these two plots which they cultivated themselves, and that they, the plaintiffs, were entitled each to a one-fifth share of the profits of those plots for three years. The plaintiffs had instituted a similar suit for their shares in the profits of these two plots for the previous four years in the Court of the Tahsildar. That case was carried on appeal first to the Court of the Deputy Commissioner and then to the Court of the Commissioner, and it was decided therein that the plaintiffs could not sue for the profits of these two plots because they formed a portion of a *chak* of 17 *bighas* and 15 *biswas*, and that a suit could not lie for the profits of a portion only.

The Assistant Collector and the District Judge have held that the present suit is barred under the provisions of section 11, Act V of 1908, in view of the existence of the former judgment and have dismissed it accordingly.

The present appeal is preferred. I do not consider that the Courts below are right in the view which they have taken. The suit would have been barred had the matter directly and substantially in issue been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claimed, litigating under the same title, in a Court competent to try such subsequent suit. The matter now directly and substantially in issue was directly and substantially in issue in the former suit. The plaintiffs were the same. One of the defendants is the same, and the other defendant is litigating under the same title as his father who was the defendant in the previous suit. But the Court which passed the former decision was the Court of a Tahsildar, and as such, was not competent to try the present suit which is triable only by a Court of an Assistant Collector. Thus, although the matter was finally decided in the Court of the Tahsildar, the principle of *res judicata* does not apply to the present case. If any authority be required for this proposition it will be found, in so far as it is necessary to look for it outside the wording of the section, in *Misir Bagho Bardial* v. *Sheo Baksh Singh* (1).

(1) 9 C. 439; 12 C. L. R. 520, 9 I A. 197, 7 Ind. Jur. 107; 4 Sar. P C. J. 395; Rafique and Jackson's P. C. No. 70.

As a result I allow this appeal. As the Courts below have disposed of the suit upon a preliminary point and the decree has been reversed in appeal, I remand the case under the provisions of Order XLI, rule 23, to the Court of the Assistant Collector with directions to re-admit the suit under its original number in the register of suits and proceed to determine it. Costs will follow the result.

Cause remanded.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2601 OF 1912.

August 28, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

Raja DURGA PROSAD SINGH—DEFENDANT—APPELLANT

versus

HARI RAM MAHATO AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Chota Nagpur Tenancy Act (*Beng. Act VI of* 1908), *ss.* 139 (6), 20 (3)—*Suits for recovery of possession, when barred by s.* 139 (6) *-Occupancy right; acquisition of.*

Section 139, clause (6), of the Chota Nagpur Tenancy Act, 1908, bars only a suit which relates to agricultural land and is instituted by the headman of a village in his character as headman, but does not bar a suit for recovery of possession on declaration of title.

The mere fact that a *raiyat*, who has a right of occupancy in his agricultural lands, is at the same time the rent-collector of the village and is remunerated as such, does not deprive him of his right of occupancy.

Second appeal from a decision of the District Judge of Manbhum, dated 23rd May 1912, reversing that of the Munsif, Dhanbaid, dated 16th December 1911.

Babus *Lalit Mohan Ghose* and *Karunamoy Ghose*, for the Appellant.

Babus *Dwarka Nath Chuckerbutty* and *Gopal Chandra Chuckerbutty*, for the Respondents.

JUDGMENT.—This is an appeal by the defendant in a suit for recovery of possession of land on declaration of title. The case for the plaintiffs is that the eleven parcels in dispute constitute their paternal permanent holding, and that they have been unlawfully evicted therefrom by the defendant. The Court of first instance dismissed the suit.

Upon appeal the District Judge has reversed that decision. He has found in favour of the plaintiffs that they have the right alleged by them in the plots in suit and that they were unlawfully dispossessed therefrom by the defendant on or about the 20th January 1911. This decree of the District Judge has been assailed substantially on three grounds.

It has been contended in the *first* place that the suit is barred under clause 6 of section 139 of the Chota Nagpur Tenancy Act of 1908. That section is in these terms: "All suits by or against headmen of villages or groups of villages (whether known as *mankis* or *pradhans*, *manjhis* or otherwise) for a declaration of title in, or for possession of, their office or agricultural land, whether based or not on an allegation of the existence or non-existence of the relationship of landlord and tenant, shall be cognisable by the Deputy Commissioner and shall be instituted and tried or heard under the provisions of the Act and shall not be cognizable in any other Court except as otherwise provided in the Act." The contention of the appellant is that as the plaintiffs have been found to be headmen, the suit which admittedly relates to agricultural land is not maintainable in a Civil Court. In our opinion, there is no foundation for this contention, as clause 6 of section 139 is intended to apply only to a suit brought by a headman of a village as such. There can be no room for controversy that this is the only interpretation possible in so far as a suit for declaration of title in or for possession of the office of headman is concerned. We are of opinion that when a suit relates to agricultural lands and is instituted by the headman of a village in his character as headman, clause (6) operates as a bar, but it has no application to a case of the present description. The first contention consequently fails.

It has been argued in the *second* place that the plaintiffs have no right of occupancy in the land in dispute, and, in support of this proposition, reference has been made to clause (3) of section 20 of the Chota Nagpur Tenancy Act, 1908. That clause is in these terms: "A person interested in any estate, tenure, village or land, whether solely or jointly with others, as a temporary tenure-holder, *ijaradar* or farmer of rents or as a mortgagee in possession, shall not, during the period of his lease or mortgage, acquire by purchase or otherwise a right of occupancy in any land comprised in his lease or mortgage". This clause can have no possible application in the determination of the rights of the plaintiffs, which were acquired long before section 20 of Act VI of 1908 was framed. The predecessors of the plaintiffs, it has been found, reclaimed the lands in 1867. At that time Act X of 1859 was in force and its provisions continued to be applicable till Act VI of 1908 came into operation. Under section 6 of that Act, every *raiyat* who has cultivated or held land for a period of 12 years has a right of occupancy in the land so cultivated or held by him, whether it be held under *pattah* or not, so long as he pays the rent payable on account of the same. To this there is added an exception in favour of the private lands of proprietors, to which reference is not necessary for our present purpose. In the case before us, there is no room for controversy that the plaintiffs and their predecessors occupied the land for a period of 12 years before 1908, cultivated the same and paid rent therefor as *raiyats*. Consequently, they acquired, *prima facie*, the status of occupancy *raiyats*. But it has been argued that as they were *ijaradars* of the village from 1869 onwards, they could not have acquired a right of occupancy in the eleven parcels in suit. The application of the term *ijaradar* to the plaintiffs is, however, somewhat misleading in the circumstances of this case. The plaintiffs and their predecessors were headmen of the village, but they were not *ijaradars* in the sense in which the term is used in section 20, clause 3, of the Chota Nagpur Tenancy Act. The mere fact that a *raiyat*, who has a right of occupancy in his agricultural lands, is at the same time the rent-collector of the village and is remunerated as such, does not deprive him of his right of occupancy. We are of opinion that the District Judge has correctly held that the plaintiffs have acquired the status of an occupancy-*raiyat*.

It has been argued in the *third* place that the judgment of the District Judge is based on surmises, and the case should be remanded for re-consideration; in this connection reference has been made to the case of

Durga Prasad Singh v. *Ram Doyal Chaudhury* (1). We do not express any opinion as to that decision which has plainly no application to the present case. The findings of the District Judge here are based on evidence and on the circumstances of the case, and we are unable to hold that they involve errors of law such as would justify our interference in second appeal.

The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs.

Appeal dismissed.

(1) 10 Ind. Cas. 965; 38 C. 153.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 203 OF 1913.

December 22, 1914.

Present:—Mr. Lindsay, J. C.

GAJRAJ SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

RAGHUBAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 132—Further charge, deed of, suit for recovery of money due on—Mortgagor not to redeem prior mortgages without first discharging further charge—Mortgagee to enforce at any time payment of money due on deed of further charge—Limitation, starting point of.

Where a deed of further charge provided that the mortgagor should not be at liberty to redeem the prior mortgages without first redeeming the deed of further charge and that if in the meantime the mortgagee desired to recover his money he should be at liberty to realise it whenever he wished, and more than 20 years after the execution of the deed of further charge a suit was brought for recovery of money due on it:

Held, that the money became due from the date of the execution of the deed and that the suit was time-barred under Article 132, Schedule I, of the Limitation Act.

Perumal Ayyan v. *Alagirisami Bhagavathar*, 20 M. 245, 7 M. L. J. 222; *Periasna Goundan* v. *Muthuvira Goundan*, 21 M. 139; 7 M. L. J. 315 and *Nattakaruppa Goundan* v. *Kumarasami Goundan*, 22 M. 20, 8 M. L. J. 167, referred to

Sheo Narain v *Ram Din*, 11 Ind. Cas. 526; 14 O. C. 129, distinguished from.

Appeal from the decree of the District Judge, Hardoi, dated 27th February 1913, reversing the order of the Munsif, Sandila, dated 17th June 1912.

Babu *Bishesheor Nath*, for the Appellants.

Babu *Lachhman Prasad Varma*, for the Respondents.

JUDGMENT.—The only question involved in this appeal is one of limitation. The appellants were the plaintiffs in the Court of first instance and their suit was to recover money alleged to be due in respect of a deed of further charge, which was executed on the 17th October 1891 by the father of the defendants. There had been two previous usufructuary mortgages of the same property executed by Gauna, and it was stated in this deed of further charge that the mortgagor should not be at liberty to redeem the prior deeds without first redeeming the deed now in suit. It was further stipulated that if in the meantime the mortgagee desired to recover his money, he should be at liberty to realise it whenever he wished. The suit out of which this appeal has arisen was brought on the 24th of February 1912, that is, more than twenty years after the execution of the deed in suit. The question, therefore, is whether under Article 132 of the first Schedule to the Limitation Act the suit was within time. The learned Judge of the Court below came to the conclusion that the suit was either time-barred or premature, and he dismissed it accordingly. As regards [redacted] suit being premature, I do not find that there was any reason for a conclusion of this kind. It may be that the mortgagee is entitled to recover the money due on this bond at the time when redemption is sought of the two previous usufructuary mortgages. In such a case no question of limitation would arise, because the person entitled to the money under this bond would be the defendant in a suit for redemption. The question really is whether or not the plaintiff, having put the bond in suit in order to recover his money, has done so within the time prescribed by law. Article 132 of the Limitation Act lays down that such a suit must be brought within twelve years from the date when the money sued for becomes due, and the whole of the argument here is as to the particular point of time when the money did become due. The learned Judge referred to certain cases in which the question of limitation in suits brought on instalment bonds had been discussed. One of these cases was *Sheo Narain*

v. *Ram Din* (1), in which it was said that it was impossible to hold that money was not due merely because the creditor was not bound to enforce payment.

There is a difference, however, between cases of instalment bonds and a case like the present in which admittedly no time was fixed for payment of money. The provisions of the mortgage-deed in suit as regards payment are as follows:—"It is further agreed that if the mortgagee should in the meantime (that is before the date of redemption) desire to have his money, he shall be to all times at liberty to recover it along with interest. I, the mortgagor, shall have no objection." It is at the option of the mortgagee either to realise the money due on this bond at the time of redemption or at any time between the date of this bond and the date of redemption. The question, therefore, is at what time, in accordance with the language of this instrument, can it be said that the money became due. My opinion is that the money became due from the date of the execution of the bond. Various cases have been cited in the course of argument. In the first place there was a reference to *Perumal Ayyan* v. *Alagirisami Bhagavathar* (2), in which the money was made payable on demand. It was held that where money was expressed to be payable on demand, no demand would be necessary to make the money due and time would run from the date of the bond. Their Lordships held that the words "on demand" were technical words and signified "immediately" or "forthwith." They referred to other cases in which the stipulation was that the borrower would repay the money "if so required." They were of opinion that cases like those stood on a different footing, inasmuch as a condition was to be understood, namely, that the creditor should first call for the money. In another Madras case, *Perianna Goundan* v. *Muthuvira Goundan* (3), it was laid down as being a matter beyond doubt that under the general law money lent payable on demand is due from the date of the loan and that there is a cause of action on the date of the loan. In that judgment their Lordships referred to Article 59 of the first Schedule to the Limitation Act, which lays down the limitation for money lent under an agreement that it shall be payable on demand. The limitation in such cases is three years from the date when the loan is made. Another Madras case was so referred, namely *Nettakaruppa Goundan* v. *Kumarasami Goundan* (4). In that case the covenant on the part of the debtor was that he would re-pay the money whenever the creditor should make demand. There it was held that there was a condition which made it necessary that the creditor should first ask for his money. In the present instance there are no such words as "if so required", or "when you make the demand". All that appears is what has been above stated, namely, that the mortgagee was to have the option of recovering his money at any time he chose. There appears to be no doubt that under the English Law where the time for the performance of a contract is not determined by the contract itself and where performance is due as soon as the creditor or obligee may desire it, the latter has an immediate remedy to sue. The doctrine is that in a contract like this there is an immediate duty imposed upon a promisor and that no demand on the part of the promisee is necessary in order to render performance due. The promisee does not seek to impose a conditional obligation. He merely gives notice to the promisor that he must be ready to perform the promise at any time. This doctrine seems to me to have been followed by the Indian Legislature, as is clear from a consideration of the language of Article 59 of the Limitation Act. It seems to me, therefore, that in the present instance for the purposes of determining the starting point of limitation, it must be held that the money became due immediately upon the execution of the bond. This being so, the suit was clearly beyond time. The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 11 Ind. Cas. 526, 14 O. C. 129.
(2) 20 M. 245; 7 M. L. J. 222.
(3) 21 M. 139; 7 M. L. J. 315.
(4) 22 M. 20; 8 M. L. J. 167.

AYAZ-UD-DIN *v.* MAHFUZUNNISA.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1228 OF 1912.

November 11, 1914.

Present:—Mr. Justice Chevis and Mr. Justice Shadi Lal.

AYAZ-UD-DIN—PLAINTIFF—APPELLANT

versus

Musammat MAHFUZUNNISA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Succession—Sister—Kureshi Sheikhs *of Gohana in Rohtak District—Collateral of fourth degree not excluding sister—Presumption of following personal law in case of residents in town—Punjab Laws Act (IV of 1872), s. 5.*

Where the parties belonging to a non-agricultural tribe reside in a town and do not till land with their own hands and mostly live on Government service, the presumption is that they follow their personal law in matters of inheritance, and the onus of proving any particular custom against it lies on the person asserting such custom.

The fact that among them there are instances of exclusion of daughters by sons, of sisters by brothers and of succession of widows in the absence of sons, does not raise the presumption that in all matters their personal law has been superseded

No custom among *Kureshi Sheikhs* of the town of Gohana in the District of Rohtak by which a collateral of the fourth degree excludes a sister from succeeding to her brother's estate was proved in this case.

Daya Ram v. *Sohel Singh*, 110 P. R. 1906, 59 P. W. R. 1907 (F. B.); 31 P. L. R. 1907, referred to.

Second appeal from the decree of the Divisional Judge, Hissar, dated the 19th April 1912, varying that of the Subordinate Judge, first Class, Rohtak, dated the 10th February 1912, decreeing the claim in part.

Mr. *Fazl Ilahi*, for the Appellant.

Mr. *Fazl-i-Hussain*, for the Respondents.

JUDGMENT.—The parties in this case are *Kureshi Sheikhs*, of the town of Gohana, in the Rohtak District; and the sole question for determination in the appeal is whether a custom, by which a collateral of the fourth degree excludes a sister from succeeding to her brother's estate, has been established. After hearing Counsel for the appellant we concur with the lower Appellate Court in holding that the plaintiff-appellant has failed to prove the custom set up by him.

The parties, as stated above, belong to the tribe of *Kureshi Sheikhs* which is not one of the agricultural tribes of the district, and they are residents of a town. It is also clear that they do not till land with thier own hands and mostly live on Government service. In these circumstances, there is no presumption that the general agricultural custom applies to them and the onus is on the plaintiff who puts forward the custom to prove it to the satisfaction of the Court. It is true that there are instances in this family of the exclusion of daughters by sons, of sisters by brothers and of the succession of widows in the absence of sons. It was also held by a Division Bench of this Court in *Nasib-un-Nisa* v. *Umed Ali* (1) that among *Kureshi Sheikhs* of Gohana, collaterals related in the second degree excluded daughters from succession. These instances only go to prove that in some matters the personal law of the parties has been modified by custom; but there is no warrant for the presumption that, in all matters, custom has superseded the Muhammadan Law. The Full Bench judgment of this Court [*Daya Ram* v. *Sohel Singh* (2)] contains a full exposition of the law on the subject and lays down the rule for the guidance of the Courts in such cases. It is observed in that judgment that "it lies upon the person asserting that he is ruled in regard to a particular matter by custom, to prove that he is so governed, and not by personal law, and further to prove what the particular custom is. ..If he fails to do so, clause (*b*) of section 5 of the Laws Act applies, and the rule of decision must be the personal law of the parties, subject to the other provisions of the clause. It is not sufficient to show that in regard to certain other matters the parties are governed by custom." The onus of issue (1) which relates to custom was laid by the Court of first instance upon the plaintiff and he had every opportunity to produce evidence in support of it. There is no entry in the *Riwaj-i-am* in proof of the alleged custom and Counsel for the appellant admits that there is not a single instance, judicial or otherwise, in which a collateral of the fourth degree was preferred to a sister. We must, therefore, hold that the plaintiff has failed to prove the custom on which he relied and that his suit was rightly dismissed by the Divisional Judge. We decline to remand the case for further inquiry, because it is clear that in the first place the plaintiff having got opportunity to produce all his evidence is not entitled to remand, and in the second place, no useful purpose would be served by ordering a fishing inquiry into a

(1) Civil Appeal No. 801 of 1902 decided by Mr. Justice Kensington and Mr. Justice Chitty on 2nd April 1906.

(2) 110 P. R. 1906, 59 P. W. R. 1907 (F. B.); 31 P. L. R. 1907.

matter which was thoroughly threshed out in the case which ultimately came up before this Court in *Nasib-un-Nissa* v. *Umed Ali* (1). In that case, a very exhaustive enquiry was made by the lower Courts, but not a single instance in support of the custom alleged in this case was adduced by either party.

We, therefore, affirm the decree of the learned Divisional Judge and dismiss this appeal with costs.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 281 OF 1913.

December 2, 1914.

Present:—Mr. Lindsay, J. C.

Pandit IQBAL NARAIN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Pandit SURAJ NARAIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Decree, interpretation of—Village, entire, division of—Jurisdiction of Revenue Courts—Partition of house—U. P. Land Revenue Act (III of 1901), ss. 106, 111, 118—Objection as to jurisdiction not taken, effect of.

Ordinarily a decree for the division of an entire village means that the land of the village together with all the buildings appurtenant thereto is to be divided.

Revenue Courts, however, while making a partition, have no jurisdiction to make the actual division of a house or building or the materials thereof.

Ashiq Husain v. *Muhammad Jan*, 22 A. 329, A. W. N. (1900) 116, followed.

Section 111 of the U. P. Land Revenue Act is confined to objections raising a question of title only and does not contemplate those relating to the jurisdiction of Revenue Courts.

If, as a matter of law, a Court has no jurisdiction to do something, such a jurisdiction cannot be conferred upon it by a failure on the part of the parties interested to raise an objection in bar of the jurisdiction.

Appeal from the decree of the District Judge, Hardoi, dated 2nd April 1913, upholding that of the Munsif, Hardoi, dated 27th May 1912.

Babu *Jiban Krishna Banerjee*, for the Appellants.

Babu *Ishwari Prasad*, for the Respondents.

JUDGMENT.—This second appeal has arisen out of a suit for declaration brought by the plaintiffs-appellants with respect to a certain house situated in the village of Masit in the Hardoi District. It is admitted that some years ago there was a partition suit between the parties brought in the Civil Court in which one of the items was this village of Masit. A decree was passed by which it was divided between the parties in equal shares. Formal possession was granted to them under the Civil Court decree, so as to enable them to apply to the Revenue Authorities for partition of the revenue-paying lands. The case for the plaintiffs is that after the Civil Court decree an application was made to the Revenue Court for partition of the various items of property including this village of Masit. It is alleged that the Revenue Court in carrying out partition divided a certain house belonging to the parties situated in this village, the result being that the defendants were put in actual physical possession of one-half of the house. The plaintiffs' claim was that the partition of the house which had been effected by the Revenue Authorities, was invalid and not binding upon them. A further point which was raised on behalf of the plaintiffs was that, as a matter of fact, the house in suit had not been included in the property the division of which was sought in the Civil Court some years ago in the manner above described. In the first Court the plaint was allowed to be amended, the Munsif being of opinion that a mere suit for declaration was not maintainable, inasmuch as it was admitted that by virtue of the proceedings taken by the Revenue Courts the plaintiffs have actually been dispossessed from one-half of the house in suit. It was held that it was necessary for the plaintiffs also to add a prayer for possession. Both the Courts below have dismissed the suit. They were both of opinion that the house in question did constitute a portion of the property, division of which was sought by the parties in the Civil Court. They were both also of opinion that it was competent to the Revenue Court to make a partition of this house. In second appeal here both these points are raised again on behalf of the plaintiffs-appellants. I agree with both the Courts below in thinking that the house, which is now in dispute, did form part of the property, partition of which was sought in the Civil Court. For the appellants an attempt was made to show that this

could not have been so, inasmuch as in the schedules of the property attached to the plaint in the suit which was brought in the Civil Court certain houses were mentioned specifically as being liable to partition. It was argued, therefore, that as no house in the village of Masit was included in the schedule relating to this village, it must be taken that there was no prayer for partition of any house in Masit. But it seems to me that there was special reason, as pointed out by the lower Appellate Court, for making a separate schedule of certain houses in the civil proceedings. As the learned Judge has said in his judgment, most of the houses mentioned in the schedule attached to the plaint in the civil suit are houses situated in the cities of Lucknow or Hardoi. But I agree that ordinarily a decree for the division of an entire village would mean that the land of the village together with all the buildings appurtenant thereto was to be divided. I find, therefore, against the appellants on this first point. On the second point, however, I must find in the appellants' favour. In my opinion both the Courts below were wrong in finding that a Revenue Court has any authority to make a partition of houses or buildings. The learned Judge says that it is the practice of the Revenue Courts to make such partitions, but in this I think he cannot be right. There is the clearest authority in the ruling reported in *Ashiq Husain* v. *Muhammad Jan* (1) that Revenue Courts have no jurisdiction to make a partition of buildings or the materials thereof. What the Revenue Courts have authority to do is to make a partition of the lands situated in a *mahal*. That this is the correct interpretation of law seems to me to be apparent from the provisions of Chapter VII of the Land Revenue Act (U. P. Act III of 1901). According to section 106 of that Act, partition means the division of a *mahal* or of a part of a *mahal* into two or more portions, each consisting of one or more shares. The only section in this Chapter which relates to any arrangements to be made by a Revenue Court in respect of houses or other buildings belonging to co-sharers is section 118, which lays down that if, in making a partition, it is necessary to include in the portion allotted to one co-sharer the land occupied by a dwelling house or other building in the possession of another co-sharer, the latter shall be allowed to retain it with the building thereon, on condition of his paying for it a reasonable ground rent to the co-sharer in whose portion it may be included. This section, however, does not justify the division of dwelling houses or buildings. On the contrary, the section is clearly intended to prevent the division of houses or buildings at the time of making partition. The exclusive possession of a house or building is to be secured to one co-sharer and compensation for his occupation of the land is according, to the section, to be awarded to the other co-sharer. It is quite wrong to lay down that section 118 confers any authority on the Revenue Courts to make an actual division of a building, as has been contended in the present case. The learned Judge seems to have thought that this plea could not be raised by the plaintiffs who were parties to the partition proceedings in the Revenue Court. He referred in this connection to section 111, which gives parties a right to object when an application for partition has been made. But section 111 deals only with objections which raise a question of title. The section says nothing at all about objections taken to the jurisdiction of the Revenue Court. Whether objection to jurisdiction be taken or not, the fact remains that if, as a matter of law, a Revenue Court has no jurisdiction to make a division of buildings, such a jurisdiction cannot be conferred upon it by a failure on the part of one of the parties interested to raise an objection in bar of the jurisdiction. I must hold, therefore, that the partition of the house in suit was made without jurisdiction and is not binding upon the plaintiffs. The result is that the plaintiffs' claim for the declaration is decreed, and with regard to the claim for possession it is ordered that the plaintiffs be restored to joint possession of the property along with the defendants, so as to place them in the position in which they stood before the Revenue Court made the division of the property in suit. The plaintiffs will get their costs from the defendants in all the three Courts.

Appeal allowed.

(1) 22 A. 329; A. W. N. (1900) 116.

BOMBAY HIGH COURT.

CRIMINAL REFERENCE No. 69 OF 1914.

December 3, 1914.

Present:—Mr. Justice Heaton, and Mr. Justice Shah.

APPA RAGHO BHOGLE AND OTHERS—ACCUSED—APPLICANTS

versus

EMPEROR - PROSECUTOR.

Criminal Procedure Code (Act V of 1898), ss. 155, 173—Case not disposed of by order of Magistrate—Prosecution by Police under s. 211, illegal.

The applicant gave to the Police information of a non-cognizable offence. The Police obtained the authority of a Magistrate as required by section 155 of the Criminal Procedure Code to investigate the case. The Magistrate directed that the Police should report to him. No report was ever made. Meantime, however, the Police instituted proceedings against the applicant under section 211 of the Penal Code and obtained his conviction:

Held, that the conviction was bad and must be set aside. Even if the Magistrate had not directed a report to be made, section 173 of the Criminal Procedure Code requires that it should be made. The case was one that could not be disposed of without the order of the Magistrate in some form or another.

Criminal reference made by the Sessions Judge of Ratnagiri.

Mr. *A. G. Desai*, for the Applicants.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

HEATON, J.—In this case the applicants gave information to the Police about certain alleged circumstances in relation to a woman who had just died, and this amounted to information of the commission of a non-cognizable offence. It was made to the Police, who obtained the authority of a Magistrate as required by section 155 of the Criminal Procedure Code to investigate the case. In empowering them to do this the Magistrate directed that they (the Police) should report to him. No report was ever made. Even if the Magistrate had not directed a report to be made, section 173 of the Code requires that it should be made. The case is one that could not be disposed of without the order of the Magistrate in some form or another. But no report was made to the Magistrate and no order was made by him and the case, as a matter of fact, has never been disposed of. Meantime, however, the Police instituted proceedings against the persons who had given the information and prosecuted them under section 211 of the Indian Penal Code. They obtained a conviction before the Magistrate. On application in revision to the Sessions Judge he referred the matter to us. The ground he took was that the trial which took place without the Magistrate's sanction was illegal. In substance I dare say that that is perfectly true, although technically it may be that that reason is doubtful because of the circumstance that the proceedings did not go before the Magistrate and apparently so far as the Police are concerned were not intended to go before him. I mean the proceedings of the investigation into the non-cognizable case. But however that may be, there is another objection which seems to me more fundamental and more cogent than the want of a sanction. It is that, as I have explained, the case had not come to an end, and could not come to an end without an order of the Magistrate. This being so, it is contrary to the method and the spirit, contrary indeed to the whole system of our criminal procedure, that the Police should be allowed to prosecute in the way they have done without ever having the case disposed of by a Magistrate. The point is one not of technicality, but of very great importance. One need say little to show how absolutely contrary to our system things would be if the Police were allowed, independently of the Magistrates, to take proceedings, as they have done here, in cases which had never been disposed of by a Magistrate.

For that important and fundamental defect I consider that the whole of these proceedings are bad and that the conviction must be set aside.

SHAH, J.—I concur.

Conviction set aside.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 56 OF 1912.

May 15, 1912.

Present:—Mr. Hallifax, Offg., A. J. C.

SHIOSHANKARPURI AND OTHERS—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 4 (m)

SHIOSHANKARPURI *v.* EMPEROR.

476—*Proceedings in execution, whether "judicial proceedings"—Sanction to prosecute—Guiding principle.*

The proceedings in execution are judicial proceedings within the meaning of the Criminal Procedure Code till they are finally disposed of by the Court

No Court should direct or sanction prosecution unless there is a reasonable probability of conviction. The opinion of the Court should be judicial opinion based on evidence and formed after a thorough inquiry into the matter.

Criminal revision against an order sanctioning prosecution, passed by the Subordinate Judge, Wardha, dated the 1st March 1912.

Mr. *V. R. Pandit*, R. B. and Mr. *M. B. Kinkhede*, for the Applicants.

Mr. *P. S. Kotwal* (Standing Counsel), for the Crown.

Mr. *V. T. Deshmukh*, for the Decree-holder.

JUDGMENT.—On a warrant issued by the Court of the Subordinate Judge, Wardha, in execution proceedings in Civil Suit No. 163 of 1910 of that Court, the produce of a field said to belong to the judgment-debtors was attached. The produce consisted of 30 or 32 *khandi* of partially threshed *juari*, and was left in charge of two watchmen, each of whom was given a *parwana* or written order of appointment. This was on the 23rd of December 1911. On the opening of the Courts after the Christmas vacation the two watchmen presented a written report to the Court to the following effect: "About 4 P. M. on the 27th December eighteen men of Shioshankarpuri Gosain of Nagpur came to the threshing floor. Two of them took our written orders of appointment from us on the pretext of wanting to read them, and then refused to return them. They drove us out of the field, and when we went to the village we were driven out of that also. At 10 P. M. on the following day, Thursday the 28th, they came again to the field with nine or ten carts and carried off the *juari*." This is followed by a list of nineteen names, headed "Names of the men of Shioshankarpuri," and the first name in the list is Shioshankarpuri.

The Subordinate Judge called on Shioshankarpuri alone to show cause why he should not be prosecuted, and after considering the written statement filed and the oral arguments advanced on his behalf passed an order of which the gist is as follows: "The pleas raised by Shioshankarpuri are that he resides at Nagpur, and could not possibly have been present at the scene of the alleged offence and he is not aware of the occurrence, and that his servants did remove a certain amount of *juari* from the field, but they did not know that it was under attachment or that the two men there were watchmen appointed by the Court. This is an admisson that his servants removed the crop while it was under attachment, and it is impossible that they should not have known of it. That they did know of it is further proved by the large number of them that went to the field. They could not have gone there except under orders from him, and he could not have given those orders without knowing of the attachment. The eighteen servants, therefore, appear to have committed offences punishable under sections 186, 188 and 204 of the Indian Penal Code, and Shioshankarpuri appears to have abetted the same. Their prosecution is, therefore, ordered for those offences or any others which the facts proved against them may constitute."

The main ground on which the legality of this order is challenged by Shioshankarpuri and all except two of the other persons affected by it, is the contention that execution proceedings are not judicial proceedings of the kind mentioned in section 476 of the Criminal Procedure Code. Section 4 (*m*) of that Code does not attempt to give us an exhaustive definition of a "judicial proceeding," but is content with declaring that, in addition to what are plainly and obviously judicial proceedings, that term "includes any proceeding in the course of which evidence is or may be legally taken on oath." In *Queen Empress* v. *Tulja* (1) West and Birdwood, JJ., offered a definition of a judicial proceeding as one of which the object is to determine a jural relation between two parties. That a proceeding in execution is not such a judicial proceeding as is meant by sections 4 (*m*) and 476 of the Criminal Procedure Code, is based solely on the ruling of the Calcutta High Court in *Har Charan Mookerjee* v. *Emperor* (2). This ruling was followed in *Kanto Ram Das* v. *Gobardhan Das* (3), but without any discussion or examination,

(1) 12 B. 36
(2) 32 C. 367; 9 C. W. N. 364, 1 C. L. J. 161; 2 Cr. L. J. 110.
(3) 35 C. 133.

and the learned Judges found that the result to which it led them was "to be regretted," as it was a very apparent failure of justice.

In the former case in execution proceedings a warrant for the delivery of possession was entrusted for execution to the Nazir, who went to the spot but was obstructed by the opposite party to the suit, and on his reporting the matter, the Munsif held an inquiry under section 476 of the Criminal Procedure Code and sent the accused to the Magistrate for trial under section 186 of the Penal Code. The matter was heard by Harington and Pargiter, JJ. Mr. Justice Harington said: "The definition of judicial proceeding includes any proceeding in which evidence is, or may be, legally taken on oath. Now in this case, as between the parties to the suit, evidence could not have been legally taken, because their rights had been finally determined by the Court. It is true that some third person might have claimed the land as against the execution-creditor, and that his claim might have had to be determined in a judicial proceeding in which evidence might legally be taken. But this would be a fresh judicial proceeding between fresh parties raising fresh issues, and the fact that this possibility exists does not, in my opinion, affect the question whether the judicial proceeding in which the rights of the decree-holder were decided had or had not determined before possession was delivered. In my opinion section 476 does not apply. 'Judicial' proceeding means a proceeding in which judicial functions are being exercised: when the final decision is given and the order for the execution of that decision has been made, the judicial proceeding is at an end because there is no question remaining for judicial determination. The officer of the Court who executes the order to give effect to the Court's decision does not exercise a judicial but a ministerial function. In my opinion the obstruction was committed in the course of a ministerial and not a judicial proceeding, and, therefore, the offence does not fall within section 476."

The opinion of the learned Judge clearly was that one judicial proceeding ended with the making of the order for the issue of a warrant. Another might commence with the filing of an objection by a third party, but the intermediate proceedings were ministerial and not judicial. I feel bound to say, with all deference, that I cannot follow the learned Judge in what seems to me to be an assumption that the evidence mentioned in section 4 (*m*) of the Criminal Procedure Code must be throughout between the same parties and on the same issues. Nor can I see that the fact that a judicial proceeding has reached a stage in which no more evidence is to be taken makes the rest of that proceeding non-judicial. If this were so, would not the delivery of judgment and the making of a decree in accordance therewith be non-judicial proceedings?

Mr. Justice Pargiter delivered a dissentient judgment, in which he said: "The execution case was without dispute a 'judicial proceeding,' but it is contended by the applicants that the Court had finished that case in ordering possession to be given, so that the judicial proceeding had terminated, and that the Nazir's function of carrying out that order was a separate matter and was not part of the judicial proceeding. It has not been shown to us how the execution case had terminated. It was the Court's duty in executing the decree not only to pass an order to give possession but also to see that possession was given. Its duty did not end with the mere passing of the order, nor did the execution case terminate thereat. The Nazir was the hand of the Court for the purpose of giving possession, and until possession was given the Court could not treat the case of executing the decree as completed. The resistance, therefore, to the delivery of possession, which resistance was reported by the Nazir, was an offence brought to the notice of the Court 'in the course of a judicial proceeding' within the meaning of section 476, Criminal Procedure Code."

Mr. Justice Henderson, to whom the case was referred under section 429 of the Criminal Procedure Code, apparently adopted the reasoning of Mr. Justice Harington, that the possibility of evidence being taken on an objection being raised by a third party did not bring the proceedings within the terms of section 4 (*m*) of the Criminal Procedure Code, but in his conclusion from that reasoning he went a great deal further and held that the judicial proceedings ended with the decree in the suit, after which there was no matter left for judicial

decision between the parties, and, therefore, no part of execution proceedings can be called a judicial proceeding. This seems to me open to the same criticisms, perhaps in a greater degree, as those I have ventured to suggest on the judgment of Mr. Justice Harington. But in *Bhola Nath Dey* v. *Emperor* (4), in which the facts were exactly similar to those of the case now before us, Rampini and Mookerjee, JJ., held that the Munsif had rightly acted under section 476 of the Criminal Procedure Code. The case of *Har Charan Mookerjee* v. *Emperor* (2) was cited before them, and they seem to have doubted its soundness, though without expressly dissenting from it, and they distinguished it on the ground that there "it was held that the Munsif had passed an order for possession, which finally determined the case." If the ruling in *Har Charan Mookerjee* v. *Emperor* (2) were to be accepted, the present case could also be distinguished in the same way, as the Court still had matters in connection with the sale and money matters to determine, upon which evidence could legally be taken, and, therefore, the execution case was not finally disposed of. But I am very distinctly of the opinion of Pargiter, J., that proceedings in execution are judicial proceedings within the meaning of the Criminal Procedure Code till they are finally disposed of by the Court. *Har Charan Mookerjee* v. *Emperor* (2) and *Kanto Ram Das* v. *Gobardhan Das* (3) have been overruled, and *Bhola Nath Dey* v. *Emperor* (4) has been affirmed by the Full Bench of the Calcutta High Court in *Shaik Bahadur* v. *Bradatullah Mallick* (5): the learned Judges said: "We entertain no doubt that an execution proceeding is a 'judicial proceeding'; the definition in section 4, clause (*m*), of the Code of 1898 is clearly not exhaustive."

The principles which should guide the Court in dealing with an application for revision of this kind are well and clearly laid down in *In the matter of the petition of Afamdar Husain* (6). Strachey, C. J., said: "It has been held by this Court that the High Court has power in revision to set aside an order passed by a Civil, Criminal or Revenue Court under section 476 of the Code; and I assume that this view is correct. Still, one must have regard to the nature of the revisional jurisdiction, and must not, in a case arising under section 476, any more than in any other case, allow what would virtually be an appeal from the order of the Court below. It is necessary, as in all other cases, to see whether there has been any error of law, any irregularity, any abuse of, or failure to exercise judicial discretion, such as would justify interference in revision. Now let us see whether there is any fault of that kind to be found in the Collector's proceeding. The condition of his acting under section 476 is his forming the opinion that there was ground for inquiring into any offence referred to in section 195. The test is his opinion, and not the opinion of any superior Court; and if he has formed a real opinion to the effect stated, he has power to act under the section, and he commits no error or irregularity in doing so, even though another Court may think the opinion erroneous. I say, if he forms a real opinion, because no doubt if a case arose in which the Court acted on merely fanciful grounds, on grounds so empty, so obviously wrong that it could not be said to have formed a serious judicial opinion at all, then this Court would probably hold in revision that there had been no such action as section 476 contemplates. The opinion spoken of by section 476 no doubt is a judicial opinion founded on evidence. If such an opinion has been formed, this Court ought not in revision to interfere merely on the ground that it disagrees with it: the case must go on."

This is also a very clear statement of the kind of basis there must be for the opinion, "that there is ground for inquiring into any offence," at which a Court must arrive before taking action under section 476. It may be said that there is always ground for enquiring into any offence, even if there is only a vague suspicion that it has been committed. But this is wrong. To give only two reasons out of many, the Courts have no time to waste over cases in which there is nothing more than a bare possibility of a conviction and one unsuccessful prosecution in a case where there is a

(4) 3 Cr. L. J. 142; 10 C. W. N. 55.
(5) 6 Ind. Cas. 801; 37 C. 642; 14 C. W. N. 799, 12 C. L. J. 45; 11 Cr. L. J. 407.
(6) 28 A. 249.

reasonable suspicion that the accused is really guilty does more harm than abstaining from prosecution in five such cases. This was explained by the Calcutta High Court in *Jadu Nandan Singh* v. *Emperor* (7). The learned Judges said: "The principle which should guide Courts in taking action under section 195 or 476 is now well settled. No sanction should be granted unless there is a reasonable probability of conviction. It would be an abuse of the powers vested in a Court of Justice, if sanction were given or upheld on the principle that, though the conviction of the party complained against is a mere possibility, it is desirable that the matter should be threshed out, so that it may be decided whether or not an offence has been committed. No doubt the authority which is called upon to grant a sanction under section 195, or to take action under section 476, need not, and should not, decide the question of guilt or innocence of the party against whom procedings are to be instituted; but great care and caution are required before the criminal law is set in motion, and there must be a reasonable foundation for the charge in respect of which prosecution is sanctioned or directed."

We have, therefore, to see whether the Subordinate Judge in this case ever formed an opinion that there was any reasonable prospect of a conviction, and if so, whether there is any proper basis for that opinion. Both questions must, I think, be answered in the negative. The only opinion he states is that the nineteen persons accused by the watchmen have committed the offences for which he directs that they shall be tried. There is no examination or even statement of the strength of the evidence to be produced against them. There naturally could not be anything of that sort, as no inquiry whatever was held beyond the sending of a request to the Nazir to state whether the two watchmen were given orders of appointment in writing, to which he replied simply that those two men were appointed, omitting to state whether they were given written orders or not. Even, then, if the Subordinate Judge had formed any opinion such as is required by section 476, all the materials he had for it were: (*a*) the report by the two watchmen, obviously and naturally instigated and engineered by the decree-holder, and necessarily open to suspicion, if only on account of the very large number of people they affect to have recognised, (*b*) a report from the Nazir which says nothing and has been misread as establishing a point of some importance, and (*c*) the written statement of the one out of nineteen accused who admittedly was not present when the alleged offence was committed, which also has been misread and misconstrued and has had absolutely unjustifiable inferences drawn from it. In the words of the learned Chief Justice of the Allahabad High Court quoted above, the Court, in forming whatever opinion it did form, "acted on merely fanciful grounds, on grounds so empty, so obviously wrong that it could not be said to have formed a serious judicial opinion at all."

There is yet another reason why no Court should take action under section 476 without inquiring very much more thoroughly into the matter than has been done here and being satisfied that there is what may be called a fairly good case against the accused. It is that persons complained against by a Court under section 476 are deprived of the protection given to them by section 203 of the Criminal Procedure Code against frivolous and unnecessary prosecution by other complainants. I conceive that, as section 204 empowers a Magistrate to dismiss a complaint only after oral examination of the complainant, and the presiding officer of a Court who makes a complaint under section 476 is exempt from oral examination, a dismissal of such a complaint under section 203 would be illegal. Anyhow it would certainly be improper and no Magistate probably would think of doing such a thing, because it is presumed that the Court making the complaint has already taken all the proper precautions to ensure that the accused party is not being unnecessarily or wantonly or frivolously prosecuted. For all these reasons I set aside the order directing that Shioshankarpuri and eighteen others are to be prosecuted. This will not, of course, prevent proceedings being again taken against them in a legal and proper manner, if such a course is deemed advisable.

Order set aside.

(7) 4 Ind. Cas. 710; 10 C. L. J. 564; 14 C. W. N. 330; 37 C. 250; 10 Cr. L. J. 37.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 202 OF 1913.

July 9, 1914.

Present:—Sir Alfred Kensington, KT., Chief Judge, and Mr. Justice Johnstone.

HIRA LAL AND OTHERS—PETITIONERS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 88, 386, 439—Attachment under s 386—Revision incompetent—Claim, determination of—Criminal Courts, jurisdiction of.

No revision lies against an order of attachment made under section 386 of the Criminal Procedure Code.

The principles applicable to attachments under section 88 of the Code apply equally to attachments under section 386

The Code does not contain any provision for the trial of claims which may be preferred to property distrained under section 386, and when the Magistrate has acted under it, no further proceedings in the Criminal Courts are admissible.

Queen-Empress v. *Gasper*, 22 C. 935, *Queen-Empress* v *Sita Nath Mitra*, 20 C 478, *Queen-Empress* v. *Kandappa Goundan*, 20 M. 88; 2 Weir 42, *Secretary of State* v. *Sukhdeo*, A. W. N. (1898) 173, referred to.

Petition, under section 439 of the Criminal Procedure Code, for revision of the order of the Sessions Judge, Sialkot, dated the 9th January 1913, rejecting the petitioners' application for the release from attachment of certain moveables alleged to be the property of Bir Bhan, convict.

Mr. *Bhagat Ram Puri*, for the Petitioners.

The *Government Advocate*, for the Respondent.

JUDGMENT.—The facts of this case, so far as they concern us in the present instance, are these. The Sessions Court of Sialkot convicted one Bir Bhan of a serious criminal offence and sentenced him to imprisonment and also to a fine of Rs. 5,000, of which sum Rs. 1,000 was to be paid to the Municipal Committee as compensation; and the conviction and sentence were alike duly confirmed on appeal here. The learned Sessions Judge issued a warrant of attachment of certain moveable property belonging to Bir Bhan, under section 386, Criminal Procedure Code, and certain articles were attached. The convict, it appears, is a member of a joint undivided Hindu family, and, this being so, Hira Lal and others, as the remaining members, applied to the Sessions Court for release of the said articles on the ground that, on the authorities, proceedings cannot lawfully be taken under section 386 aforesaid against the property of such a family in which the convict has merely an undivided share.

Apparently no one denies that the family is a joint undivided one under Hindu Law and that the articles attached are part of the property of that family. The Sessions Judge, after noticing *Queen-Empress* v. *Sita Nath Mitra* (1), and the particulars in Weir's Law of Offences, 11, pages 442-3, decided not to follow those authorities, ruled that a share in moveables is moveable property and refused to release the things attached; but he went on to suggest to the petitioners that they might, if so advised, effect a partition with the convict so as to separate off his share, and for this purpose he adjourned the case for three months.

Not satisfied with this solution the petitioners have filed a further revision petition here, again contending that the order of attachment under section 386, Criminal Procedure Code, was illegal and adding that the lower Court should have followed the aforesaid authorities; but we find it unnecessary to decide the point, inasmuch as we are disposed to agree with the learned Government Advocate who has raised the preliminary objection that no revision lies. We need only refer to *Queen-Empress* v. *Gasper* (2), *Queen-Empress* v. *Kandappa Goundan* (3) and Rules and Orders of the Chief Court, Volume 3, page 133 (old Edition). The principles applicable to attachments under section 88 of the Code apply equally to attachments under section 386; and the rulings just quoted, to which we may add *Secretary of State* v. *Sukhdeo* (4), though the matter is there looked at in a somewhat different way, are sufficient authority for holding that the Code does not contain any provision for the trial of claims which may be preferred to property distrained under section 386. The Chief Court rule quoted above by implication leads to the conclusion that, when the Magistrate has acted under it, no further proceedings in the Criminal Courts are admissible. In this case the learned Sessions Judge discussed the petition

(1) 20 C. 478.
(2) 22 C. 935.
(3) 20 M. 88; 2 Weir 42.
(4) A. W. N. (1898) 173.

on the merits and came to a decision adverse to the petitioners. Whether his decision be right or wrong, and whether he was called upon to undertake a discussion on the merits at all, it is clear to us that in any case the petitioners cannot further pursue any remedy on the criminal side. No doubt in the cases relied upon by the petitioners remedy on the criminal side was tacitly treated as open; but this question of jurisdiction was not raised in those cases, and, so far as we are aware, wherever it has been raised, it has been decided in the manner in which we decide it now.

For these reasons we dismiss this petition, merely adding that the learned Sessions Judge need not have gone out of his way to advise the objectors as to the course they should take. He should now proceed to deal further with the attached property according to law.

Petition dismissed

MADRAS HIGH COURT.

CRIMINAL MISCELLANEOUS PETITION No. 23 OF 1913.

February 20, 1913.

Present:—Justice Sir Ralph Benson, KT., and Mr. Justice Sundara Aiyar.

In re NATTAVA PARANKUSAM—PETITIONER.

Criminal Procedure Code (Act V of 1898), s. 195—Sanction for giving false evidence—Court, duty of—Prosecution, desirability of, in public interests.

In giving sanction to prosecute for giving false evidence, the Courts should not merely see that there is a good prospect of conviction, but should also consider whether the circumstances are such as to render a prosecution desirable in the public interests.

Petition praying the High Court to set aside the order of the Sessions Judge, Guntur Division, in Criminal Miscellaneous Petition No. 27 of 1912, confirming the sanction granted by the Taluk Second Class Magistrate of Tenali, in Criminal Miscellaneous Petition No. 1 of 1911.

Mr. *P. Narayanamurthi*, for the Petitioner.

Mr. *O. F. Napier*, Public Prosecutor, for the Crown.

ORDER.—We do not think that this is a case in which the interests of justice call for a prosecution for perjury.

The accused is a girl of 15 years, and the perjury alleged is in her having made contradictory statements about her mother having wordy quarrels with the man who was keeping the witness. The materiality of the statements is only remote, as suggesting a motive for the offence.

We often have to notice that Courts exercise little discretion in giving sanction to prosecute for giving false evidence.

They should not merely see that there is a good prospect of conviction, but should also consider whether the circumstances are such as to render a prosecution desirable in the public interests.

We do not think the prosecution in this case is desirable. We revoke the sanction.

Sanction revoked.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 738 OF 1914.

November 11, 1914.

Present:—Sir Alfred Kensington, KT., Chief Judge, and Mr. Justice Rossignol.

WADHAWA SINGH—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 302, 369—Murdered child found in well indicated by the accused who disclaimed all knowledge—Fact of stripping the child of her ornaments established—Youth of accused.

In a case of murder the facts clearly established were that the accused was last seen with the child alleged to have been murdered, and that he stripped her of most of her ornaments and sold them and that her body was next found in a well, and the accused disclaimed all knowledge of the matter, though he himself indicated the well.

Held, that the accused was guilty of a foul murder, which in spite of his youth called for the extreme penalty.

Appeal from the order of the Sessions Judge, Amritsar, dated the 29th August 1914, convicting the appellant.

Khalifa *Hakumat Rai*, for the Appellant.

JUDGMENT.—Wadhawa Singh, a *Jat* youth of 19, has been convicted of the murder of *Musammat* Kaki, a little girl of 7, and sentenced to death.

We find it established that the child had gone with her mother and two other rela-

tives to Sarhali, appellant's village, to attend a marriage. The party arrived on 12th July 1914 and on 13th July 1914 the girl was missing. A search was instituted but with no result. On 14th July Mahna *lambardar* was told by one Kaka he had seen appellant riding with the child on a mare along the canal bank, which is a short distance from the village, whereupon Bhan Singh, the girl's uncle, Harnam Singh, the appellant's brother, and others started off for Bhilowal, whither the marriage party had gone to get the bride.

Appellant was brought back on the early morning of the 16th and taken at once to the *thana*. Thence the appellant led the Police and villagers to the Sikhanwala well, ¼ths of a mile from the village beyond the canal bank; in that well the body of the child was found floating.

The child when last seen was wearing several ornaments; of these appellant had sold silver anklets, silver necklet, a silver hair ornament, silver bracelets and a gold *phul* and *chaunk* to Radhu of Patti, whom the Police traced on appellant's information; he had left on the body a *nath*, *nakaura* and *tikka*.

Before the committing Magistrate appellant admitted kidnapping the girl and taking her ornaments, but added that she broke away from him and fell into the well, where appellant left her to drown.

Before the Sessions Court he denied all knowledge of the girl.

In this Court his Counsel admits that he kidnapped the girl and stole some of her ornaments, those recovered, but he urges that the girl fell into the well when breaking away from appellant, and that this is a probable story as the well mouth is on a level with the ground and has no parapet.

We are quite unable to accept this view, which the appellant did not urge before the learned Sessions Judge. The appellant is a youth of 19 and his victim was a little girl of seven, whom he could have overpowered with ease.

Our view is that the appellant did not take the remaining three articles of jewellery from his victim, either because of their small size, or because he was overtaken with sudden fear.

The medical evidence is that the child was throttled, not drowned, and this fact too suggests that the appellant's story is quite untrue.

Much capital is made of the fact that the diver who recovered the body, alone mentioned in the first Court that the body was weighted with a clod of earth. Before the Sessions Judge witnesses Nos. 9, 12, 13 also mention the clod. The question was probably not put to them in the first Court, but in any case as the clod had been three days in the water when the body was recovered, it is more than probable that very little of it had resisted dissolution.

The facts clearly established are that appellant was last seen with the child and that he stripped her of most of her ornaments and sold them. Her body is next found in a well and appellant disclaims all knowledge of the matter, though he himself indicated the well.

The appellant is guilty of a foul murder, which in spite of his youth calls for the extreme penalty.

We dismiss the appeal and confirm the sentence of death.

Appeal dismissed.

BOMBAY HIGH COURT.

CRIMINAL REFERENCE No. 72 OF 1914.

November 18, 1914.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

EMPEROR—PROSECUTOR

versus

BHAGWAN CHHAGAN—ACCUSED.

Penal Code (Act XLV of 1860), s. 335—Nose-cutting—Act importing deliberate design—Grave and sudden provocation.

When the particular act, such as nose-cutting, of which the accused is found guilty, is one which imports deliberate design, the plea of grave and sudden provocation or the excuse it implies will not have by any means the same effect as in the case of a man who in sudden and provoked anger strikes a blow, however serious that blow may be.

Criminal reference made by the Sessions Judge of Ahmedabad.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.—Our attention has been called to a number of these nose-cutting cases, and it appears to us that certain

Magistrates in the Ahmedabad District do not seem to be alive to the extremely brutal character of these offences. In this particular case the person who inflicted the grievous hurt has been charged and convicted under section 335 of the Indian Penal Code, on the ground that there was grave and sudden provocation. This may be so, but the particular act of which the accused is found guilty is one which imports deliberate design. Therefore, the plea of grave and sudden provocation or the excuse it implies does not seem to us to have by any means the same effect as in the case of a man who in sudden and provoked anger strikes a blow, however serious that blow may be, because in that case there is not deliberate design as there is in the one we are considering—deliberate design too of a peculiarly brutal and cruel character.

The sentence imposed in this case is one of four months' imprisonment. We enhance the sentence to two years' rigorous imprisonment.

Sentence enhanced.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEALS NOS. 3, 4 AND 5 OF 1915.

February 2, 1915.

Present:—Mr. Stuart, A. J. C.

RAMADHIN AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 395—Dacoity committed in Lucknow District—Trial by jury and not by assessors—Government Notification No. 1692,-VI-545 A-9.

Under Government Notification No. 1692,-VI-545A-9, dated 10th December 1884, which is in force, no person can be tried on a charge under section 395, Indian Penal Code, by the Court of Session in Lucknow, when such person has been committed to that Court by a Magistrate exercising jurisdiction in Lucknow District with respect to an offence of dacoity alleged to have been committed in Lucknow District, except by a jury.

Appeal against an order of the Sessions Judge, Lucknow, dated 12th December 1914.

Mr. *A. Shaw*, for the Appellants.

The Government Pleader, for the Crown.

JUDGMENT.—In this case the three appellants were committed to the Court of Sessions on a charge under section 402 of the Indian Penal Code. The learned Sessions Judge altered the charge into one under section 395, upon which he convicted the appellants. The trial was conducted with the aid of assessors. Under Government Notification No. 1692, VI-545A-9, dated 10th December 1884, which is in force, no person can be tried on a charge under section 395 by the Court of Sessions in Lucknow, when such person has been committed to that Court by a Magistrate exercising jurisdiction in the Lucknow District with respect to an offence of dacoity alleged to have been committed in the Lucknow District, except by a Jury. The circumstance that the Magistrate did not convict on a charge under section 395, does not affect the question. Such a case must be tried by a Jury. Thus when the learned Sessions Judge framed a charge against the appellants under section 395, it was necessary for him to empanel a Jury and to proceed with the trial as a Jury trial. The convictions and sentences in these circumstances cannot stand and must be set aside. I direct that the appellants be re-tried by the same Court and a Jury on a charge under section 395 under the same commitment order.

Re-trial ordered.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 692 OF 1912.

CRIMINAL REVISION PETITION NO. 572 OF 1912.

March 17, 1913.

Present:—Mr. Justice Oldfield.

In re MUTHU IBRAHI AND OTHERS—PETITIONERS.

Penal Code (Act XLV of 1860), s. 363—Minority—Lawful guardian—Majority Act (IX of 1875), s. 3—Unmarried Muhammadan girl—Father not living—Mother, whether lawful guardian—Kidnapping, offence of, when completed question of, whether can be raised in revision for first time.

According to Muhammadan Law the occurrence of puberty determines minority and the mother's right to custody, but for the purposes of section 363 of the Indian Penal Code, regard must be had only to the definition of minority in section 3, Act IX of 1875.

Where the girl alleged to have been kidnapped

was unmarried, and her father was not living, there could be no question of any guardianship other than her mother's as lawful.

The question at what stage the offence of kidnapping was completed is one of fact, and cannot be raised in the High Court for the first time

Petition, under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the judgment of the Sessions Judge of Ramnad, Madura, in Criminal Appeal No. 36 of 1912, confirming the conviction and sentence of the Sub-Divisional First Class Magistrate, Ramnad Division, in Calendar Case No. 46 of 1912.

Dr. *S. Swaminadhan*, for the Petitioners.

Mr. *C. F. Napier*, Public Prosecutor, for the Crown.

ORDER.—The first and the fourth accused were convicted of an offence punishable under section 363 and the second and the third accused of one punishable under sections 363 and 114, Indian Penal Code.

Objection is taken first to the finding that the fourth prosecution witness, the girl alleged to have been kidnapped, was aged less than sixteen. There was evidence to justify the finding, which was purely one of fact, and I cannot interfere with it in revision.

It is urged that the fourth prosecution witness was not a minor and her mother, from whose keeping she was taken, was not her lawful guardian, because she had admittedly attained puberty and her minority and her mother's guardianship ceased under Muhammadan Law when she did so. The fourth prosecution witness was unmarried, and her father was not living. There is, therefore, no question of any guardiadship other than her mother's as lawful, and it is necessary to deal only with the question whether the fourth prosecution witness was still a minor. No doubt according to Muhamamdan Law the occurrence of puberty determines minority and the mother's right to custody. (Macnaughten's Principles of Muhammadan Law, page 63). But for the present purpose, regard must be had only to the definition of minority in section 3, Act IX of 1875. For no argument has been based and nothing turns in this case on the saving clause, section 2, or its references to capacity to act in the matter of marriag and to religious usage. In the cases cited, for instance *In the matter of Khatija Bibi* (1), the conflict was between the claims of the mother and husband to the custody of the minor, and section 2 was material. Here no such considerations arising, the finding in favour of the fourth prosecution witness's minority for the purpose of this case is justified by the Statute Law; and her mother's guardianship and right to custody of her person against the accused follow. This objection, therefore, fails.

It is then said that the offence punishable under section 363 is not a continuing one, and that, therefore, the accused Nos. 2 and 3, who joined the accused Nos. 1 and 4 only after the kidnapping had been completed, are not liable for abetment of it. It has not been shown that the point was taken in either of the lower Courts. The question at what stage the offence was completed is one of fact and cannot be raised here for the first time.

Though the accused's intention is not shown to have been immoral, the sentences are not excessive. The petition fails and is dismissed.

Petition dismissed.

(1) 5 B. L. R 557.

CALCUTTA HIGH COURT.

CRIMINAL APPEALS NOS. 439 AND 440 OF 1914.

August 4, 1914.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice N. Chatterjea.

IN NO. 439 OF 1914.

RAM RANJAN ROY—APPELLANT

IN NO. 440 OF 1914

MADHUB MISTRI—APPELLANT

versus

EMPEROR—OPPOSITE PARTY

Penal Code (Act XLV of 1860), ss 114, 302—Abetment must be complete apart from presence of abettor—Public Prosecutor, duty of, in murder case—All available eye-witnesses, production of witnesses not called without sufficient reason, whether raises inference adverse to prosecution

A conviction for murder under section 3 2 of the Penal Code, read with section 114, cannot stand where the only abetment charged necessarily required the presence of the accused, for to come within section 114, the abetment must be complete apart from the presence of the abettor.

It is the duty of the Public Prosecutor in a

murder case to place before the trial Court the testimony of all available eye-witnesses.

The purpose of a criminal trial is not to support at all costs a theory, but to investigate the offence and to determine the guilt or innocence of the accused, and the duty of a Public Prosecutor is to represent not the Police, but the Crown, and his duty should be discharged by him fairly and fearlessly and with a full sense of the responsibility that attaches to his position.

Where witnesses are not called without sufficient reason being shown, the Court may properly draw an inference adverse to the prosecution.

In re Dhunno Kasi, 8 C. 121 at p. 124; 10 C. L. R. 151; 6 Ind. Jur. 251, referred to.

Criminal appeals against the convictions under section 302 read with section 114, Indian Penal Code, and sentences of transportation for life passed by the Sessions Judge of Bankura, dated 28th May 1914.

IN No. 439

Messrs. *Norton* and *Bagram*, Counsel, and Babus *Manmotha Nath Mukherjee*, *Probodh Chandra Chatterjee* and *Mritunjoy Chatterjee*, for the Accused-Appellant.

IN No. 440

Mr. *Bagram*, Counsel, and Babus *Probodh Chandra Chatterjee* and *Mritunjoy Chatterjee*, for the Accused-Appellant.

Mr. *Donogh*, Counsel, and Babu *Monindra Nath Banerjee*, for the Crown in both appeals.

JUDGMENT.—Ram Ranjan Roy, a *zemindar* in the Bankura District, Umesh Chandra Mukerjee, one of his *gumastas*, and Madhub Mistri, his up-country peon, have been charged with offences which resulted in the death of Dhan Kristo Laik and his nephew Bunwari Laik, tenants of Ram Ranjan. The charges against Ram Ranjan were that he on or about the 18th of March 1914 at Dejuri committed murder of Dhan Kristo Laik by striking him with a *lathi* and thereby killing him, and also that he committed murder of Bunwari Laik by being present and abetting Madhub Mistri in striking and thereby killing him. Umesh Chandra Mookerjee was also charged with the murder of Bunwari by being present and abetting Madhub. The charge against Madhub Mistri was that he murdered Bunwari and that he caused simple hurt to Hari Laik.

Umesh has been acquitted. Ram Ranjan has been acquitted of the murder of Dhan Kristo, but convicted of the murder of Bunwari by being present and abetting Madhub Mistry. And Madhub Mistri has been convicted of both the offences with which he was charged.

The sentence in each case has been transportation for life. Ram Ranjan and Madhub have appealed, but no appeal has been preferred by the direction of the Local Government.

We, therefore, have to assume that Ram Ranjan was not guilty of the murder of Dhan Kristo or of any offence against him of a lesser degree.

I will here state the broad features of the case for the prosecution, largely borrowing for that purpose from the first information as contained in Exhibit I.

Ram Ranjan on the 6th of March came to his village of Dejuri and put up at the Durga Mela. He was anxious to secure his tenants' assent to an enhancement of their rents, and sent for some of them with a view to discussing the matter. The *zemindar's* demands were resisted, and ultimately on the 8th of March he summoned Bunwari through Madhub Mistri, to whom I will in future refer as the Nagdi.

Bunwari was taken to the Durga Mela and detained there. What followed is thus described in the first information:—As he (that is, Ram Ranjan) was having him (that is, Bunwari) assaulted by the aforesaid Nagdi for his not agreeing to pay rent at an enhanced rate, Dhan Kristo Laik went to Ram Ranjan Baboo and said 'yesterday you brought away a he-goat and have kept it tied, and to-day why are you having my nephew assaulted by the Nagdi?' On this Ram Ranjan Baboo and Umesh Mookerjee gave orders to the up-country Nagdi saying *mar salako*, whereupon Nagdi wounded Bunwari Laik by kicking him first and then striking him with a *lathi* on the head. Ram Ranjan Baboo has caused grievous hurt to my uncle, Dhan Kristo Laik, by striking him on the head with a *lathi* which was in his hand. The wounds on Bunwari Laik and Dhan Kristo Laik are serious. There is no hope of their lives."

Besides the appellants and Dhan Kristo and Bunwari, there were in the Durga Mela at this time Umesh Chandra Mookerjee, Gosto Chatterjee and Ramanath Roy, all *gomastas* of the *zemindar*.

Even on the case for the prosecution the conviction of Ram Ranjan for murder under

section 302 of the Indian Penal Code, read with section 114, cannot stand, for the simple reason that the only abetment charged necessarily required the presence of Ram Ranjan, while to come within section 114 the abetment must be complete apart from the presence of the abettor. This was recognised by Mr. Donogh who has appeared on behalf of the Crown, and he conceded that all he could ask for was a conviction of abetment of murder under section 109.

We must, therefore, see whether the evidence would justify a conviction of Ram Ranjan under that section.

At the outset, we are confronted with a serious difficulty by reason of the way in which this case was conducted before the Sessions Court. Gosto Chatterjee and Ramanath Roy were admittedly eye-witnesses of the occurrence and yet the Public Prosecutor did not call them as witnesses, notwithstanding repeated requests by Mr. Norton.

The Public Prosecutor cannot shelter himself behind the suggestion that he was able to form an opinion from evidence previously given that these men would not be truthful witnesses; for they were not even examined before the Committing Magistrate.

Mr. Donogh contended that the prosecution even in a case of murder was only bound to call witnesses "in their favour," and for this he relied on a remark attributed to Sir Arthur Wilson in the report of *In re Dhunno Kasi* (1). But this remark appeared to me so opposed to the established rule and also to the whole trend of the judgment that I examined the original record and there found that the word used by the learned Judge was not "favour" but "power," and this is how the judgment is reported in 10 C. L. R. 151. Obviously, therefore, Sir Arthur Wilson's authority cannot be invoked in favour of the prosecution's contention, and if, as we have been told, the conduct of the Public Prosecutor is in accordance with the general *mofussil* practice, the sooner that practice is stopped the better. The practice, if it exists, rests on a fundamental misconception of the purpose of a criminal trial and the duty of a Public Prosecutor.

That purpose is not to support at all costs a theory, but to investigate the offence and to determine the guilt or innocence of the accused, and the duty of a Public Prosecutor is to represent not the Police, but the Crown, and his duty should be discharged by him fairly and fearlessly and with a full sense of the responsibility that attaches to his position. The guilt or innocence of the accused is to be determined by the tribunals appointed by law and not according to the tastes of any one else.

It was, therefore, undoubtedly the duty of the Public Prosecutor in a capital case like the present to have placed before the trial Court the testimony of all available eye-witnesses. This duty is clearly illustrated by the case of *Reg.* v. *Holden* (2), where in a murder trial Counsel for the prosecution did not propose to call an eye-witness because she was brought to Court by the defence. On that the presiding Judge remarked: "She ought to be called. She was present at the transaction. Every witness who was present at a transaction of this sort ought to be called, and even if they give different accounts, it is fit that the jury should have their evidence so as to draw their own conclusion as to the real truth of the matter." This is no technical rule : it is founded on common sense and is dictated by humanity.

The omission of the Public Prosecutor has involved this case as it comes before us in what Mr. Donogh on behalf of the Crown has very justly described as mystery. Indeed he felt this mystery to be so embarrassing that he asked for a re-trial or at any rate for an examination of the witnesses that had not been called. But having regard to the time already occupied by the case and the expenditure incurred, this was opposed and reasonably opposed by the defence, and we must, therefore, dispose of the case on the record as it stands.

The sequence of events as described by the prosecution is improbable and unnatural and hardly accords with the connected actions of responsible human beings. There is obviously something kept back, something omitted, which is required to link up the narrative and to present a reasonable and connected picture of what occurred.

(1) 8 C. 121 at p. 124; 10 C. L. R. 151; 6 Ind. Jur. 251.

(2) (1838) 8 Car. & P. 605 at p. 609.

The papers before us, however, disclose the description given by Gosto and Ramanath shortly after the event, and it is a description that acquires some value from its correspondence with the story told by Ram Ranjan in his first information, and the statement made by the Nagdi to the Magistrate on the 9th. Correspondence of this class may be attributed to concoction, but in estimating the probability of this it has to be borne in mind that Gosto and Ramanath did not escape with Ram Ranjan but were kept prisoners by the villagers and that even when Ram Ranjan and Umesh were brought to Dejuri where Gosto and Ramanath were, they were throughout kept first under Police observation and then under arrest.

There was, therefore, no opportunity of concoction except in the presence and with the knowledge of the Police, and the evidence discloses no such concoction. Nor is the opportunity of concoction in the case of the Nagdi obvious if regard be had to the statements of the *goealas*, who were also kept back, and, in my opinion, wrongly kept back by the prosecution. The importance of the story thus told by the defence is that it unmistakably points to an angry irruption of the villagers into the Durga Mela.

If this be true the whole story takes a natural shape, and the improbabilities are smoothed out. Nor is there any unlikelihood in this story: on the contrary the record, with all its imperfections, discloses much that points in the direction of its truth, and supports the idea of an irruption and consequent scuffle and exchange of blows. Thus one of the prosecution witnesses says, there were villagers outside the Durga Mela before the occurrence. When the place was searched a *lathi* was found, and there is no suggestion that it belonged to the accused's party: there were indications of disturbance in the Durga Mela: there were injuries on the Nagdi which both assessors think, and in my opinion rightly, were genuine and these injuries are suggestive of an attack on him with a *lathi*.

These matters may not alone amount to proof of an irruption and scuffle, but they certainly encourage the idea that the whole story has not been placed before us and justify the application here of the view expressed by Sir Arthur Wilson in *Dhunno Kasi's* case (1) that where witnesses are not called without sufficient reason being shown, the Court may properly draw an inference adverse to the prosecution.

I certainly infer that the prosecution has not placed before us a complete picture of what occurred, but has withheld that which would have been favourable to the accused. I do not suggest that the prosecution story is wholly false: far from it.

Thus I am convinced that it was a blow delivered by the Nagdi that caused Bunwari's death, but I am far from satisfied that the prosecution have placed before us the circumstances that immediately led up to this fatal blow.

It may be that Dhan Kristo addressed the *semindar* in terms which were regarded as impertinent, and that this village magnate called out *maro salako* or some such offensive and provocative expression. But I cannot for a moment suppose that he meant thereby to instigate the murder of his tenant, nor can I believe that the Nagdi to whom it was addressed so understood it. A cuff, a blow, or a kick was all that can have been intended, and curiously enough in the first information of the villagers it is said that after the *semindar* so called out, the Nagdi kicked Bunwari first and not until after this struck him with the *lathi*. It is true that the villager who gave this information showed an anxiety to correct it when he came to give evidence. I wholly distrust this correction; it is unlikely that the head constable would write down an expression of that kind if it was not said to him, and though his statement was read to him at the time, the villager did not then perceive the error upon which he promptly fastened in the witness-box without any apparent aid.

It is possible that more astute minds than his realised that those words might help to save Ram Ranjan and Umesh from the gallows, and that they should be explained away. It is intelligible that the villagers, already exasperated by the high-handed action of the *semindar*, went to their companion's aid when they heard the *semindar's* order and saw the kick. If there was an

irruption of villagers this would be the probable sequence of events, and the treatment of the case by the Public Prosecutor has made it impossible for us to hold with the assurance requisite on a capital charge that this did not occur.

I wish to say nothing in palliation of the *zemindar's* conduct or of his exclamation, if in truth it was uttered by him, but I am unable, on the record as it stands, to hold him guilty of instigating Bunwari's murder or even the *lathi* blow which caused Bunwari's death.

Even if it be assumed that Ram Ranjan uttered the exclamation attributed to him, the only natural consequence of that was the kick described in the first information. That might have amounted to an offence, but no charge has been made in respect of it. In the circumstances, therefore, we have no option but to acquit Ram Ranjan, but it may be hoped that his experience of the 8th of March will teach him the danger of having in his train a man armed with a deadly weapon when he is dealing with his tenants: for though he is not proved to be legally responsible for the crime, I can hardly suppose him to be so callous as to contemplate without some remorse his association with the killing of two of his villagers. The Nagdi is proved to have inflicted the blow of which Bunwari died, but I do not think the case justifies a conviction under section 302. At the same time the defence has not been able to establish a plea of private defence justifying what he did. We, therefore, convict him under section 304 and pass on him a sentence of seven years' rigorous imprisonment. The appeal in respect of the offence on Hari fails, but the sentences will run concurrently.

Mr. Norton has told us of the fairness with which the Sessions Judge placed materials at his disposal for the purpose of the defence. This is as it should be, and I am further gratified with the treatment by the learned Judge of the Assessors as disclosed by the record, and his careful and conscientious use of their experience. It is much to be commended and presents a pleasing contrast with the treatment of Assessors which has sometimes come under my notice in other cases.

Appeal No. 439 accepted.
Appeal No. 440 dismissed; Conviction altered.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 122 OF 1914.

August 5, 1914.

Present.—Mr. Fawcett, J. C.

BULCHAND TAHILRAM—APPLICANT

versus

GHANDHOOMAL RAMRAKHIAMAL—OPPONENT.

Criminal Procedure Code (Act V of 1898), ss. 203, 259, 437—Dismissal of complaint for default—Second complaint on same facts, whether entertainable—Further inquiry—Discretion.

A prior order of discharge does not bar the jurisdiction of the Magistrate to entertain a second complaint upon the same facts.

The mere fact that a complaint has been dismissed under section 259, Criminal Procedure Code, is not a sufficient ground for refusing to entertain a second complaint and dismissing it under section 203.

It is purely discretionary with a Court to order further inquiry under section 437, Criminal Procedure Code.

Application against an order of the City Magistrate, Karachi.

Mr. *Hassaram Jashanmal*, for the Applicant.

Mr. *R. R. Bugtani*, for the Opponent.

Mr. *C. M. Lobo*, Assistant Public Prosecutor, for the Crown.

JUDGMENT.—The applicant has not much legitimate grievance as regards the dismissal of his complaint, for even if the Magistrate's peon did call out "Mulchand" instead of "Bulchand," he should clearly have gone up and enquired if he was not wanted. The sworn statements of the Court Sherishtedar and Naik are also, in my opinion, entitled to more weight than the affidavits filed by applicant. I see no reason, therefore, to interfere with the order of the Magistrate under section 259, Criminal Procedure Code, or his subsequent refusal to restore the complaint to the file.

But the Magistrate's order on the second complaint made the next day by applicant on the same facts is more open to question. The order dismissing the complaint is passed under section 203, Criminal Procedure Code, and the reason given for dismissal is that the Magistrate saw no sufficient reason for proceeding with another complaint on the same facts after the first one had been dismissed under section 259. But, as ruled in the cases of *Dwarka Nath Mondal* v. *Beni*

GANDA SINGH v. EMPEROR.

Madhub Banerji (1), *Chinnathambi Mudali* v. *Salla Gurusaamy Chetty* (2), *Emperor* v. *Chinna Kuliappa Gounden* (3), the prior discharge does not bar the jurisdiction of the Magistrate to entertain the second complaint, and the mere fact that the first complaint had been dismissed under section 259 is not, in my opinion, a sufficient ground for refusing to entertain the second complaint and dismissing it under section 203. It may give an additional ground for refusing to proceed upon the complaint, but by itself it seems to me insufficient, because it is not a ground which relates in any way to the merits of the complaint, more especially as the Magistrate had in this case issued process on the first complaint.

The Assistant Public Prosecutor urges that the Magistrate's order implies that the complaint itself is of a trivial and vexatious kind which should not be proceeded with, but there is nothing in his order to that effect. At the same time it is purely discretionary with this Court to order further inquiry under section 437, Criminal Procedure Code, and having regard to the nature of the complaint, I do not think that such enquiry should be ordered, unless applicant (1) pays into Court any expenses incurred by Government under section 544, Criminal Procedure Code, in connection with the first complaint which was dismissed, and (2) executes a bond, with one fit surety, undertaking to pay the reasonable costs of the accused (such costs to be assessed by the City Magistrate whose decision thereon shall be final) in the event of his being acquitted or discharged, and such acquittal or discharge not being reversed on appeal or revision by a competent Court.

As a precedent for the latter condition, I may cite section 526 (5), Criminal Procedure Code.

The applicant having duly complied with these conditions (which had already been intimated to and accepted by him), I direct the City Magistrate under section 437, Criminal Procedure Code, to make further inquiry into the second complaint referred to above.

Further Inquiry directed.

(1) 28 C. 652, 5 C W. N. 457 (F. B.).
(2) 28 M 310, 2 Cr. L J 768; 2 Weir 325(*a*).
(3) 29 M. 126; 1 M. L. T. 31; 16 M. L. J. 79; 3 Cr. L. J. 274 (F. B.).

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 1207 OF 1914.

December 14, 1914.

Present.—Mr. Justice Scott-Smith.

GANDA SINGH AND ANOTHER—CONVICTS—PETITIONERS

versus

EMPEROR—RESPONDENT.

Sentence—Hurt caused to complainant—Conviction of accused—Defence story believed by Appellate Court—Reduction of sentence

The accused were convicted of having trespassed into the *haveli* of the complainant and beaten him, causing severe injuries, and then having carried him to a house of one of the accused, where they charged him of having entered the house to commit theft. The accused were sentenced to rigorous imprisonment for eight months, including one month's solitary confinement The Sessions Judge in appeal believed the version of the accused and disbelieved all the witnesses for the prosecution, but maintained the sentence.

Held, that under the circumstances the sentence originally imposed should not have been maintained, as the accused met with great provocation and could hardly be blamed for giving the would-be thief a sound beating

Petition, under section 439 of Act V of 1898, for revision of the order of the Additional Sessions Judge, Amritsar Division, at Gurdaspur, dated the 14th April 1914, modifying that of the Magistrate, first Class, Gurdaspur, dated the 10th March 1914, convicting the petitioners.

Lala *Dharm Das Suri*, for the Petitioners.

JUDGMENT.—The learned Sessions Judge says: "The story told by the prosecution witnesses that the appellants (Ganda Singh and Harnam Singh, present petitioners) beat Makhu while he was sleeping in his *haveli*, and then carried him to Ganda Singh, appellant's house and shut him up there, and afterwards concocted the story that he had entered the house in order to commit theft, is to my mind a good deal more improbable than the defence theory that Makhu and two other men entered Ganda Singh's house to commit theft, and that the two other men ran away and Makhu was caught and shut up in the house."

He has then gone on to discuss the evidence, and has held that the defence theory is correct.

Under these circumstances I think that the sentences originally imposed should not have been maintained. Petitioners met with

great provocation and could hardly be blamed for giving the would-be thief a sound beating.

That they did give him a severe beating is clear from his condition, even though all the prosecution evidence has been rejected by the learned Sessions Judge. I, therefore, allow the revision so far as to reduce the sentence to one of three months' rigorous imprisonment on each of the petitioners.

Revision partly allowed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 439 OF 1914.
CRIMINAL REVISION PETITION No. 369 OF 1914.

December 17, 1914.

Present:—Mr. Justice Oldfield.

KUMBOLA GURAVADU AND OTHERS—ACCUSED—PETITIONERS

versus

YERAGATIPALLI KRISTNA REDDY—COMPLAINANT—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 143, 341—Restraint, when amounts to offence.

The restraint, to amount to an offence under section 341 of the Indian Penal Code, must be directed to a person and not to anything else.

Acting Government Pleader v. *Venkatachala Mudali*, 1 Weir 341; *Emperor* v. *Rama Lala*, 19 Ind. Cas. 177; 15 Bom. L. R. 103; 14 Cr. L. J. 177, followed.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Sub-Divisional Magistrate of Gudur, in Criminal Appeal No. 37 of 1913, preferred against that of the Stationary Second Class Magistrate of Gudur, in Calendar Case No. 408 of 1913.

Mr. *P. Narayanamurthi*, for the Petitioners.

The *Public Prosecutor*, for the Government.

ORDER.—The accused were convicted of offences punishable under sections 143 and 341 of the Indian Penal Code.

It is argued here that the convictions under the former were wrong, because there was no evidence to justify a finding that all the accused had any common object. There was, however, no suggestion that the accused, who were merely present, had any other business at the spot except to assist, if necessary, those who did overt acts, and the nature of the spot, a sandy tract, used for casuarina planting, negatived any presumption that they were there for any other purpose or merely by chance. There was moreover no evidence to that effect. In these circumstances the lower Court was justified in its conclusion.

Next, it is contended on the strength of *Acting Government Pleader* v. *Venkatachala Mudali* (1) and *Emperor* v. *Rama Lala* (2), that none of the accused were guilty of using criminal force, because those directly responsible merely stopped the bullocks and carts and did not stop 1st prosecution witness or the others driving them, who were throughout at liberty to proceed. Section 341 no doubt refers only to the restraint of persons, and it is not found and cannot be assumed that 1st prosecution witness and the others were on the carts or that they were prevented from proceeding. And accordingly the convictions of an offence punishable under section 341 must be set aside.

But there remains that under section 143. It requires proof only of an assembly with the common object of obstructing the use of a right of way by means of criminal force; and the lower Court had, I think, evidence to justify a finding in favour of the existence of such object, inasmuch as it found that accused actually stopped the carts, and the natural presumption might fairly be taken to be that they wanted to stop the persons with them. This presumption is not rebutted by anything on the record, there being no evidence of anything said by the accused to distinguish between the stoppage of the carts and that of the men and no circumstances indicating that they limited their purpose to the latter. The objection to the convictions under section 143, therefore, fails.

The petition is accordingly allowed only to the extent that the convictions of an offence punishable under section 341 are set aside, and the fines of 6th, 9th, 11th, 13th, 18th, 25th and 26th accused are reduced to Rs. 40 each on that account, and the fines of the other accused convicted, to Rs. 7 each. In other respects the petition is dismissed.

Order partly set aside and partly maintained.

(1) 1 Weir 341.
(2) 19 Ind. Cas. 177; 15 Bom. L. R. 103; 14 Cr. L. J. 177.

BHAGWAN BAKHSH SINGH v. SURAJ BALI SINGH.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 67 OF 1912-13 OF SULTANPUR DISTRICT.

November 18, 1914.

Present:—Mr. Tweedy, S. M., and Mr. Holms, J. M.

Raja BHAGWAN BAKHSH SINGH—DEFENDANT—APPELLANT

versus

SURAJ BALI SINGH—PLAINTIFF—RESPONDENT.

Oudh Rent Act (XXII of 1886), s. 48—Heirs of a deceased tenant—Joint Hindu family, member of, claim of—Widow of deceased tenant, right of.

A member of a joint Hindu family comprising himself and a deceased tenant, if not shown to be a co-tenant with the latter, cannot, under section 48 of the Oudh Rent Act, succeed as heir to the deceased's holding, so long as the deceased's widow is alive.

Appeal from the decree of the Officiating Commissioner, Fyzabad, dated 21st April 1913, upholding the order of the Assistant Collector, Sultanpur, dated 1st November 1912.

Babu *Rudra Dat Singh*, for the Appellant.

Babu *Hargovind Das*, for the Respondent.

JUDGMENT.

HOLMS, J. M. (*November 11th*, 1914)—It has been held that Lachhman Singh was an ordinary tenant. There is nothing to show that the land was given to any of his ancestors before him and presumably he was the first tenant. It is argued by the respondent that, as respondent and he were members of a joint family, therefore, respondent had an equal interest in the holding with Lachhman Singh. I cannot accept this view. The holding was Lachhman Singh's only, and there is no evidence whatever that the respondent was co-tenant with him. This being so, so long as the widow is alive, respondent cannot succeed as heir to the holding under section 48 of the Rent Act.

I would set aside the Commissioner's order and restore that of the Assistant Collector, the respondent paying costs throughout.

TWEEDY, S. M.—I concur.

Appeal allowed.

MATHRA DASS v. MUHARRAM DIN.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 1091 OF 1913.

October 29, 1914.

Present:—Mr. Justice Chevis.

MATHRA DASS AND OTHERS—PLAINTIFFS—PETITIONERS

versus

MUHARRAM DIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Revision—Material irregularity—Judgment without considering whole evidence—Punjab Courts Act (IV of 1912), s. 70—Civil Procedure Code (Act V of 1908), O. XLI, r. 31—Post card with post mark.

Where a Court passes a judgment in the following words:

"In view of the post mark of November 7th, 1908, Post of Sasoli, I do not consider the signature of Muharram Din on the deed as proved."

Held, that the judgment does not show that the evidence on the record has been fully weighed and considered, and, therefore, does not fulfil the requirements of Order XLI, rule 31, of Civil Procedure Code, 1908, and is liable to be set aside on revision.

Petition, for revision, under section 70, Punjab Courts Act as amended, of the decree of the District Judge, Kangra, at Dharmsala, dated the 25th June 1913, affirming that of the Munsif, second Class, Kangra, dated the 25th October 1912, dismissing the claim.

Bakhshi *Tek Chand*, for the Petitioners.

Mr. *Badr-ud-Din Qureshi*, for the Respondents.

JUDGMENT.—The main question is whether defendant No. 1 joined in executing the bond. The bond was executed on 6th November 1908. Both sides produced evidence. One piece of defendant's evidence was a post card, professedly written by him on 6th November 1908, at Chitan village, and posted on the 7th November at Sasoli Branch Post Office.

The first Court, after discussing all the evidence fully, held, mainly on the strength of this post card, that the defendant No. 1 was not at Nadaun where the bond was executed on the 6th November 1908.

The District Judge dismissed the appeal by the following curt judgment: "In view of the post card bearing the post mark of November 7th, 1908, Post Office Sasoli, I do not consider the signature of Muharram Din on the deed as proved."

Such a judgment does not fulfil the requirements of Order XLI, rule 31, to the provisions of which I would call the attention of the learned District Judge.

The decision of the lower Courts may or may not be correct, but the judgment of the District Judge does not show that he has fully weighed and considered all the evidence and I must send the case back for re-hearing of the appeal.

I may note that the District Judge seems to have assumed that the production of the post card is proof of defendant No. 1's presence at Sasoli on the 7th November 1908. Plaintiff challenges the genuineness of this post card. Apart from the possibility of defendant having written a card which he got some one else to post for him at Sasoli on the 7th November, (a theory which seems to me rather improbable) there is to be considered the possibility of this post card never having been in existence on 7th November 1908, and never having really passed through the post at all.

The connivance of a postal subordinate is all that is needed to get a card marked with any post mark desired. And in this particular case I note that the post card is addressed to a man at Bharwana, *but there is no Bharwana post mark to show that the card ever reached Bharwana.*

I accept this application, set aside the District Judge's decision, and return the appeal to the District Judge for re-hearing.

Petition accepted.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 573 OF 1911.

July 4, 1914.

Present:—Sir Alfred Kensington, KT., Chief Judge, and Mr. Justice Shah Din.

NUR MUHAMMAD AND OTHERS—PLAINTIFFS APPELLANTS

versus

Musammat ALLAH WASAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Alienation—Khakhi Jats of Mouza *Salihan, Tahsil Muzaffargarh—Transfer of landed property to wife in lieu of* shara *dower, validity of—Sale—Registration—Document thirty years old—Presumption—Evidence Act* (*I of* 1872), *s.* 90—*Registration Act* (*XVI of* 1908), *s.* 17.

Among *Khakhi Jats of Mouza* Salihan in Tahsil Muzaffargarh a sonless proprietor can validly transfer his holding to his wife in lieu of *shara* dower.

The wife has absolute power of disposing the property thus transferred to her, consequently a gift of it to her daughter is valid by custom and cannot be challenged by the reversioners of her husband.

A document thirty years old coming out of proper custody is to be presumed genuine under section 90 of Act I of 1872.

According to Muhammadan Law a gift by husband of landed property in lieu of dower in favour of his wife is tantamount to a sale, consequently such a deed of gift in lieu of dower below Rs. 100 does not require registration although the real value of the immoveable property thus transferred exceeds that amount and as such is admissible in evidence.

Second appeal from the decree of the Divisional Judge, Jhelum, dated the 11th February 1911, varying that of the District Judge, Muzaffargarh, dated the 22nd May 1911, decreeing claim.

Mr. *Nand Lal*, for the Appellants.

The Hon'ble Mr. *Muhammad Shafi*, K. B., for the Respondents.

JUDGMENT.—One Khair Muhammad or Khairu, a *Khakhi Jat* of *Mauza* Salihan, Tahsil Muzaffargarh, settled a half of his land, which now measures 454 *kanals* and 7 *marlas*, on his wife *Musammat* Qaim Khatun, in lieu of dower by an unregistered deed, dated the 10th January 1876. He died in 1884 leaving his widow, *Musammat* Qaim Khatun, and a daughter, *Musammat* Wasai. Mutation of the whole land left by Khairu was made in due course in the name of *Musammat* Qaim Khatun and she remained in possession of it. In October 1907, she made a verbal gift of half of the land, 454 *kanals* and 7 *marlas* to her daughter *Musammat* Wasai, and she exchanged the remaining half of the land (*i. e.* 454 *kanals* and 7 *marlas*) with certain land owned by her son-in law, Muhammad Hassan in *Mauza* Pind Ishaq. Mutation in respect of the land exchanged was effected in the name of *Musammat* Wasai and in Muhammad Hassan's name, respectively, on the 9th January 1908.

On the 28th July 1908, the plaintiffs-appellants who are nephews of Khairu brought two suits to obtain declaratory decrees to the effect that the gift and the exchange in question made by *Musammat* Qaim Khatun in favour of her daughter and with her son-in-law, respectively, shall not affect their reversionary rights in the land so dealt with after the death of the widow. The District Judge decreed both the suits; but on appeal the learned Divisional Judge while maintaining the

District Judge's decree in respect of the land which was the subject-matter of the exchange, set aside the decree relating to the land gifted by the widow to *Musammat* Wasai and dismissed the plaintiffs' suit regarding that land.

The plaintiffs have preferred a further appeal to this Court from the Divisional Judge's decree dismissing their suit regarding the last mentioned portion of the land.

This land is covered by the unregistered deed, dated the 10th January 1876, executed by Khairu in favour of *Musammat* Qaim Khatun and in regard to that deed the two questions which we have to decide are, (1) whether it is a genuine deed; and (2) whether it required registration and not being registered is inadmissible in evidence?

As regards the genuineness of the deed both the Courts below have recorded a concurrent finding in favour of the defendants. But they have differed on the question whether the deed was compulsorily registerable or not; the District Judge holds that it was compulsorily registerable and not being registered is inadmissible in evidence, while the Divisional Judge is of opinion that it did not require registration and can be admitted in evidence. The Counsel for the plaintiffs-appellants has contended before us that the deed is a forgery, and he has suggested that it was forged probably shortly before his clients instituted their suits. The deed purports to have been attested by nine witnesses of whom four were *lambardars*, its contents afford intrinsic evidence of the deed being a genuine one; and it has all the appearance of being an old document and has been produced from proper custody. We agree with the Courts below that under section 90 of the Evidence Act this deed which is more than thirty years old must be presumed to be genuine. This presumption has, in no way, been rebutted by the plaintiffs, in fact, their own witness, Budhan *lambardar*, who is an attesting witness to the deed proves its execution by Khairu; and the evidence of Gaman, *lambardar*, produced by the defendants to prove his attestation of the deed, may be left out of account as he says that he cannot identify the impression of his seal on the deed. Taking, then, the due execution of the deed by Khairu as established the next question for decision is as to whether it required registration or not. By this deed Khairu transferred half of his moveable and immoveable property in lieu of dower; the amount of dower is not specified in the deed but it is referred to as *haq mehr sharai* which indisputably is less than Rs. 100. It is obvious that if the deed be regarded as a deed of gift in respect of the immoveable property covered by it, it evidences what is known in Muhammadan law as a *hiba bil iwaz* which is tantamount to a sale of the property gifted. By this deed, therefore, Khairu transferred half of his estate to his wife, the consideration for the transfer being *haq mehr-i-sharai i.e.*, an amount of dower less than Rs. 100; and in these circumstances, the deed in question did not require registration under the Indian Registration Act. It follows that the deed is admissible in evidence; and this being the case, we have next to consider what rights were acquired by *Musammat* Qaim Khatun in the land that was gifted to her in lieu of dower by Khairu. By virtue of this gift *Musammat* Qaim Khatun became owner in her own right of half of her husband's estate, *i. e.*, of 454 *kanals* and 7 *marlas*, and as neither during Khairu's life-time nor after his death was this gift ever disputed by his collaterals, *Musammat* Qaim Khatun had every power to deal, as she chose, with the land in question in 1907. She made a gift of it to her own daughter and had mutation effected in her name, and the present plaintiffs-appellant, as collaterals of Khairu, had no power by custom to contest the validity of that gift.

For the reasons given we agree with the Divisional Judge in holding that the gift by *Musammat* Qaim Khatun in favour of *Musammat* Wasai in respect of 454 *kanals* and 7 *marlas* was valid; we accordingly maintain the decree of the Divisional Judge and dismiss this appeal with costs. Counsel's fee Rs. 50.

Appeal dismissed.

RAM UDAR SINGH v. WILLIAM COX.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 1914 OF 1908.
August 17, 1914.
Present:—Mr. Justice D. Chatterjee and Mr. Justice Beachcroft.
RAM UDAR SINGH AND OTHERS—PLAINTIFFS—APPELLANTS
versus
MR. WILLIAM COX AND OTHERS—DEFENDANTS—RESPONDENTS.

Occupancy holding, not transferable by local usage or custom, usufructuary mortgage of a portion of—Registered document—Covenant not to surrender—Bengal Tenancy Act (VIII of 1885), ss. 86 (6), 88—Encumbrance on part of holding, whether encumbrance on whole.

Where a part of an occupancy holding not transferable by local custom or usage was usufructuarily mortgaged by a registered document with the covenant not to surrender, and the mortgagor surrendered it:

Held, that as the encumberance is by a registered document and the surrender was without the consent of the plaintiff, the surrender is invalid under section 86 (6) of the Bengal Tenancy Act.

An encumbrance on a part of a holding is an encumbrance on the whole.

Second appeal from a decision of the District Judge of Mozaffarpore, dated the 3rd July 1908, reversing that of the Munsif of Motihari, dated the 23rd December 1908.

Dr. *Dwarka Nath Mitter*, for the Appellant.

Babu *Soroshi Charan Mitter*, for the Respondents.

JUDGMENT.

D. CHATTERJEE, J.—The defendant No. 1 had an occupancy holding which was not transferable by local custom or usage. He gave an usufructuary lease of a portion of this holding to the plaintiff by a registered document and made an express covenant not to surrender his *jote* to the landlord; in breach of this covenant, however, he surrendered his *jote* to the landlords who dispossessed the plaintiff and settled the remaining portion of the *jote* with a relation of defendant No. 1; the plaintiff sued for recovery of possession with mesne profits.

The Court of first instance gave a decree to the plaintiff holding that the surrender was collusive. The learned District Judge has dismissed the suit holding that no collusion was made out.

It is contended in second appeal before us, that even if no fraud or collusion is made out the plaintiff is entitled to succeed as the surrender made without his consent is not valid and cannot deprive him of his rights; reliance is placed on section 86 (6) of the Bengal Tenancy Act which provides "that when a holding is subject to an incumbrance secured by a registered instrument, the surrender of the holding shall not be valid unless it is made with the consent of the landlord and the incumbrancer." The learned Vakil for the respondents, on the other hand, contends that this sub-section applies only where the whole holding is under an incumbrance and could not have been intended to apply to a case like the present in which a part only of the holding is incumbered. He further contends that such a construction of section 86 (6) would offend against the express provisions of section 88 which provides that no division of a holding will be binding upon the landlord unless it is made with his consent. He relies on the cases of *Rajendra Kishore* v. *Chandra Nath Dutt*(1) and *Ganga Chandra Chowdhury* v. *Alak Chand Shaha* (2), *Krishna Chandra Dutta Chowdhury* v. *Khiran Bajania* (3). I think the contention of the appellant is sound and ought to be allowed; the incumbrance here is by a registered document and the surrender was without the consent of the plaintiff, the surrender is, therefore, invalid.

As regards the arguments addressed on behalf of the respondents I do not see how an incumbrance upon a part of a holding is not an incumbrance on the whole. A burden upon a part of a holding is a burden upon the holding taken as an undivided whole. Nor do I see how the appellants' construction of section 86 (6) offends against the provisions or the principle of section 88. It is true the landlords have after the surrender settled the part not covered by the plaintiff's *serpeshgi* with a third person and the effect is a division of the holding; this division, however, is one made by the landlords themselves by treating the unencumbered portion as a separate entity and assessing a separate rent upon it.

The cases relied upon do not help the respondents. The case of *Rajendra Kishore* v. *Chandra Nath* (1) was a case in which it

(1) 12 C. W. N. 878.
(2) 18 Ind. Cas. 996; 17 C. W. N. 606.
(3) 3 C. L. J. 222; 10 C. W. N. 499.

was held that there was abandonment by the tenant. The case of *Ganga Chandra Chowdhury* v. *Alak Chand Shaha* (2) was one of the surrender of a part of a holding and section 86 (6) was not referred to in that case. In the case of *Krishna Chandra Dutta Chowdhury* v. *Khiran Bajania* (3) the usufructuary mortgage of the entire holding for an indefinite time was held to be in breach of the conditions on which the tenant held his land. None of these cases decided any question under section 86 (6). There is on the other hand our express decision of this Court in the case of *Husain Bibi* v. *Sadir Mahmad Sircar* (4) in favour of the appellant. On general principles also I think the respondents have no reason to complain. In the case of *Walter* v. *Yalden* (5), Mr. Justice Channell, lays down the law on this subject in England thus: "The law is that a lessee can only give title to his lessor by a surrender to the same extent that he could give it to another person by his assignment. If the lessee has created under-leases, the under-leases remain notwithstanding the surrender; the lessee cannot assign his term to any one else so as to put an end to those under-leases. But that I think is only an example of what he can and cannot do; the point is that he has no power to effect by surrender anything that he could not do by assignment to a third person; the reason being that he cannot convey to his landlord, any more than to any one else, anything that he has not got himself." Section 86 (6) of the Bengal Tenancy Act embodies the same principle within certain bounds and is quite consistent with justice, equity and good conscience. It was intended, no doubt, to prevent fraud and collusion and no fraud or collusion of the landlord is proved in this case, but the conduct of the tenant was certainly fraudulent and in violation of his express contract not to surrender and I have no hesitation in decreeing this appeal with costs.

BEACHCROFT, J.—I agree.

Appeal decreed.

(4) Second Appeal No. 2955 of 1911.

(5) (1902) 2 K. B. 304; 71 L. J. K. B. 803; 87 L. T. 97; 51 W. R. 46; 18 T. L. R. 668.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1014 OF 1910.

May 12, 1913.

Present:—Sir Arthur Ried, KT., Chief Judge, and Mr. Justice Kensington.

BUTA SINGH—DEFENDANT—APPELLANT

versus

LAL SINGH AND OTHERS—PLAINTIFFS AND JIWAN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Inheritance—Suit by some heirs of deceased person against stranger—Their claim limited only to extent of their own individual shares—Estoppel—Evidence Act (I of 1872), s. 115.

Where some of the heirs of a deceased person sue to get possession of the deceased's property they are restricted to their own individual shares if such shares can be ascertained, and they have no right to recover whole of his property even if the remaining heirs have distinctly declined to make any claim. This rule equally applies whether the contest is between two sets of the reversioners or reversioners and a stranger who is unable to establish any *prima facie* right at all.

Kesar Singh v. *Ganga Singh*, 2 P. R. 1882; *Basanta* v. *Indar*, 51 P. L. R. 1903; *Hira Singh* v. *Gulab Singh*, 36 P. W. R. 1906; 111 P. L. R. 1908, followed.

An heir is not estopped from claiming rest of the property of a deceased person in the hands of a stranger by reason of his redeeming from him (stranger) a small portion of that property.

Second appeal from the decree of the Additional Divisional Judge, Lahore Division, dated 30th May 1910, confirming that of the Sub-Judge, first Class, Lahore, dated the 30th July 1909, decreeing the claim.

Pandit *Ram Bhaj Datta* and Lala *Tirath Ram*, for the Appellants.

Messrs. *Braodway*, *Gobind Ram* and Pandit *Jowala Parshad*, for the Respondents.

JUDGMENT.—In this case the lower Courts have concurred in giving plaintiffs a decree in full for possession of 2,031 *kanals* in *Mauza* Paji and for a declaration protecting their rights as reversioners in respect of 229 *kanals* in *Mauza* Sunder. The land in suit belonged to Khazan Singh of Paji, who died in or about 1903 leaving a young widow aged 20 or 22 years.

Khazan Singh had no near relatives of any sort. Looking to the entries in the pedigree-table of *Mauza* Paji his heirs appear to be the plaintiff as to 19/48 shares and the *pro forma* defendants Nos. 2 to 11 as to 29/48ths shares. Even these collaterals are some sixteen degrees removed, but in the absence of nearer collaterals

or of any claim to escheat on behalf of Government they would be entitled to recognition as reversioners of Khazan Singh, after the death or re-marriage of his widow.

Very shortly after the death of Khazan Singh, his widow, on the 25th August 1903, executed what is described by the lower Courts, as a deed of acquittance, but what for all practical purposes is a deed of sale in favour of Buta Singh, defendant No. 1, a resident of Sunder distant some 20 miles from Paji. This Buta Singh was a young man of 20 and he ostensibly purchased the whole large area concerned on a promise of maintenance to the widow, the value of the maintenance being taken for purposes of stamps at Rs. 1,000. As a matter of fact practically nothing can have been paid seeing that the widow herself re-married elsewhere within two months of the sale. On the strength, however, of this very suspicious transaction Buta Singh succeeded in obtaining a mutation order in his favour on the 19th May 1905, and the plaintiffs have thereupon come into Court by a suit instituted in July 1907. The case for Buta Singh is that he did not really take the land merely in his capacity of vendee so much as by right of inheritance as being a nearer collateral of Khazan Singh than latter, the plaintiffs or the *pro forma* defendants. Somewhat strangely this allegation of a right by inheritance was accepted by the Revenue Officer when the case came before him on the mutation proceedings of the 19th May 1905. There is really nothing to support Buta Singh's claim as an heir beyond the entirely inconclusive entries in the pedigree-table of village Paji and Sundar. It is no doubt conceivable that Buta Singh may really be descended from a somewhat less remote common ancestor of Khazan Singh than that of the plaintiffs, but the evidence to establish even that highly questionable point is entirely wanting. The pedigree-table of *Mauza* Sunder shows, Buta Singh descended from one Sahib Singh who had emigrated from Paji. Neither that table nor the pedigree-table of Paji gives any clue to enable Sahib Singh to be directly traced from a common ancestor of Khazan Singh by the most favourable construction of the entries —there is a gap of several generations rendering it absolutely impossible to trace Buta Singh's ancestors in the Paji's table. The whole of this part of the case has been very carefully discussed by the lower Court and we entirely agree in this conclusion against Buta Singh.

Even if Buta Singh's relationship could be established much more conclusively than it has been, we should still hold, so far as he is concerned, the case is clearly one of abandonment for such an extraordinarily long time that he could not now assert even a right of collateral succession. He and his predecessors had given up whatever connection they may once have held with village Paji for generations, going back to a period long before the introduction of British rule and it would be quite unsafe for the Civil Courts to attempt to adjudicate on Buta Singh's rights with nothing more to go on than vague tradition.

The appellant, Buta Singh, has been equally unsuccessful in attempting to prove something in the nature of either estoppel or acquiescence on the part of the plaintiffs. All this part of the case has been thoroughly discussed by the learned Divisional Judge that we need not refer in further detail to the arguments of defendant's Pleader based upon certain alleged leases and decrees of produce and on the fact that two of the plaintiffs and *pro forma* defendants have jointly allowed Buta Singh to redeem from them a petty mortgage for Rs. 300. It is enough to say that no sort of estoppel or acquiescence has been established.

If the matter rested there we should have no hesitation in confirming the decrees of the lower Courts in favour of the plaintiffs as against Buta Singh. But it has all along been contended by the latter that the plaintiffs are themselves entitled to not more than their 19/48ths share as by pedigree, and that there is no justification for giving them a decree in full for the whole of the land in suit. This part of the case has not been carefully dealt with by either of the lower Courts. It has not been referred to at all by the first Court, as it should have been with reference to issue 6 in the case, while it has been dealt with very briefly by the learned Divisional Judge in the last paragraph of his otherwise conclusive

judgment, and no real reason has been given why the plaintiffs should succeed to the extent of more than their own share. No reference has been made to authorities bearing on the point and we are not aware of any ruling which will justify the Courts in awarding to plaintiffs more than their strict share. It is true that the defendants 2 to 11 did not admit the rights of Buta Singh and only said that they were too poor to join the plaintiffs in a suit of the kind, but nonetheless it must be taken that they are not prepared to claim their share from Buta Singh either because they are unwilling to risk the expense of suit or because they may be satisfied in their own minds that Buta Singh has some sort of status as a collateral heir even though he is unable to prove it by authentic evidence. So far as we are aware the invariable rule of this Court has been, in such cases, to give the plaintiffs only such share as they can establish in their own right. The lower Appellate Court has looked into the matter and found this share to be 19/48ths, and this has been admitted by the defendant Buta Singh in paragraph 3 of his appeal to the Divisional Court and in paragraph 10 of his appeal to this Court. We see no reason for supposing that the plaintiffs' share has been incorrectly calculated. In the ruling *Kesar Singh* v. *Ganga Singh* (1) a majority of the Judges held in a somewhat similar case that the rights of the plaintiffs are limited to their own shares if such shares can be ascertained. The same line of argument has been adopted in Civil Appeal No. 57 of 1900, decided on the 9th December 1902, and published as 51 Punjab Law Reporter 1903 [*Basanta* v. *Indar* (2)] and again in Civil Appeal No. 169 of 1906, decided on the 15th January 1908, and published as 36 Punjab Weekly Reporter 1908 [*Hira Singh* v. *Gulab Singh* (3).] We do not think that it makes any difference in the argument whether the contest is between two sets of reversioners or between the reversioners and an outsider who can establish no *prima facie* right at all, we must take it that the plaintiffs are restricted to their individual shares and that they have no right to recover the whole of the land where the remaining reversioners have distinctly declined to make any claim. On this point alone we differ from the lower Courts.

The result is that we must accept the appeal to that extent. The decree of the lower Appellate Court in plaintiffs' favour is set aside and in place thereof we give the plaintiffs a decree for both possession and declaration to the extent of 19/48ths share in the areas claimed. It follows, as admitted by Counsel on both sides, that the decree will be conditional on plaintiffs' paying to the defendant Buta Singh the sum of Rs. 291 being 19/48ths of the Rs. 736 to which he has been found entitled. We are informed that this Rs. 736 has been already paid to Buta Singh in full and if this is correct the plaintiffs will accordingly be entitled to recover Rs. 445 from Buta Singh when required to surrender the 29/48ths share of the land in suit, which is now decreed in his favour. As the plaintiffs have eventually succeeded to something less than half of their original claim we direct that the parties shall pay their own costs throughout.

Appeal accepted.

(1) 2 P R 1882.
(2) 51 P. L. R. 1903.
(3) 36 P. W. R. 1908; 111 P. L. R. 1908.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 284 OF 1913.

December 22, 1914.

Present:—Mr. Kanhaiya Lal, A. J. C.

BABA DIN—PLAINTIFF—APPELLANT

versus

BANSRAJ AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Family business carried on—Debt contracted for family business—Creditor not bound to inquire as to purpose of loan—Manager, implied authority of.

Where a joint Hindu family carries on a business or profession, and maintains itself by means of it, the member who manages it for the family has an implied authority to contract debts for its purposes, and the creditor is not bound to inquire into the finances of the business, as long as that business forms the purpose of the debts, in order to bind the whole family thereby, because the power to contract debts is incidental to the carrying on of the business, from which the family derives its means of subsistence and support.

Raghunathji Tarachand v. *Bank of Bombay*, 2 Ind. Cas. 173; 34 B. 72; 11 Bom. L. R. 255, referred to.

VARDIPARTHI RAMAYYA v. KORUKONDA JAGANNADHAM.

Appeal from the decree of the Additional Judge, Lucknow, dated 30th April 1912, reversing that of the Subordinate Judge, Bara Banki, dated 20th February 1912.

Mr. *A. P. Sen* and Pandit *Gokaran Nath Misra*, for the Appellant.

Mirza *Samiullah Beg*, for the Respondents.

JUDGMENT.—This was a suit by a mortgagee for the recovery of money due on a mortgage effected by Ramsukh in favour of the plaintiff on the 30th October 1906. The allegation of the plaintiff was that the mortgage was made for family necessity. The defence of Ramsukh was that he had borrowed the money without any family necessity and squandered it over immoral purposes. He admitted, however, that he had been carrying on business in cloth for nine or ten years and that he occasionally dealt in grain. His son and grandson, Banaraj and Chet Ram, contested the claim on the ground that the property mortgaged was ancestral and that the loan was taken for immoral purposes and was not binding on them.

The Court of first instance decreed the claim holding that a portion of the loan was taken to pay an antecedent debt, but that the rest was not taken for any family necessity. The lower Appellate Court, however, was of opinion that it was immaterial to decide whether or not the debt was tainted with immorality, and whether the family business in grain was or was not a joint business started by Ramsukh and his son a year subsequent to the loan. It inclined to the view that the evidence adduced by both the parties was extremely unreliable and that the plaintiff had failed to establish that he had made an inquiry as to the purposes of the loan. It does not appear to have been noticed that the mortgage-bond in suit stated that the loan was taken for carrying on cloth business, the existence of which was admitted by Ramsukh, and the story that the money was taken for immoral purposes was not found to be true. The material point for the decision of the lower Appellate Court was whether the necessity mentioned in the mortgage-bond existed. If the family to which the defendants belonged was carrying on cloth business in addition to any other from the profits of which its means of subsistence were derived, and if the loan in question was taken for the purposes of carrying on that business, there is no reason why the plaintiff should not be allowed a decree for the amount due on mortgage. As held in *Raghunathji Tarachand* v. *Bank of Bombay* (1), where a family carries on a business or profession, and maintains itself by means of it, the member who manages it for the family has an implied authority to contract debts for its purposes, and the creditor is not bound to inquire into the finances of the business, as along as that business forms the purpose of the debts, in order to bind the whole family thereby, because the power to contract debts is incidental to the carrying of the business, from which the family derives its means of subsistence and support. The lower Appellate Court is, therefore, directed to determine, after taking such additional evidence relevant to the inquiry as the parties may offer,

(1) Whether the loan in question was taken for family necessity or for the purposes of family business, and if so, how much of it was so taken.

Two months' time will be allowed for a return of the finding and ten days from the date of the finding will be allowed to the parties for filing objections.

Issue remitted.

(1) 2 Ind. Cas. 173; 34 B. 72; 11 Bom. L. R. 255.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 67 OF 1913.

August 11, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

VARDIPARTHI RAMAYYA *alias* RAMANNA—COUNTER-PETITIONER No. 1—APPELLANT

versus

KORUKONDA JAGANNADHAM AND ANOTHER—COUNTER-PETITIONERS No. 2—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 57, applicability of.

VARDIPARTHI RAMAYYA v. KOSURUKONDA JAGANNADHAM.

Order XXI, rule 57, which provides that on the dismissal of an execution application the existing attachment on the attached property shall cease, can only apply to orders of dismissal passed after the Act came into force.

Appeal against the decree of the Court of the Subordinate Judge of Cocanada, in Appeal Suit No. 77 of 1912, preferred against that of the District Munsif of Peddapur, in Execution Petition No. 485 of 1911 (Original Suit No. 82 of 1899 Paddapur District Munsif's Court.)

FACTS of the case appear from the following portions of the Subordinate Judge's judgment:

"The decree is dated 27th February 1899 and it became 12 years old on 27th February 1911. The last execution petition (Execution Petition No. 485 of 1911) was put in on 26th June 1911: which was nearly four months after 27th February 1911; but the record shows that the sale of certain immoveable property which was ordered by the Court in the execution of the above decree, was on 21st February 1910, stayed by an injunction issued in Original Suit No. 96 of 1910 on the file of the lower Court. Both the parties to the appeal agree that the above Suit No. 96 of 1910 was disposed of on 7th June 1911 and there is nothing on record to show that the above injunction was withdrawn during the pendency of the above suit When the injunction was not withdrawn it must be taken to have terminated at the disposal of the suit and the suit was disposed of on 7th June 1911. *Ghulam Nasir-ud-din* v. *Har Deo Prashad* (1) shows that when an injunction like the above is issued the period during which the injunction is in force should be calculated in the decree-holder's favour although during the period of the injunction it may be open to him to proceed against any other property of the judgment-debtor. By the effect of the above ruling the period between 21st February 1910 and 7th June 1911 must be excluded in computing the period of 12 years referred to in section 48 of the Civil Procedure Code. If the above period be excluded in the present case, Execution Petition No. 485 of 1911, which was the last application of the decree-holder, was well within time. I hold, therefore, that the above execution petition was not barred by the 12 years' rule under clause 1 (a) of section 48 of the Civil Procedure Code and that the application was within time.

"The order of the lower Court is reversed and the execution petition is remanded to it with a direction that it be restored to file and disposed of according to law. Costs in this appeal to abide and follow the result."

Mr. *G. Venkataramiah*, for the Appellant.

Mr. *P. Narayanamurthi*, for the Respondents.

JUDGMENT.—The learned Subordinate Judge ought to have pronounced an opinion on the question whether the attachment made in 1907 was subsisting when the new execution application for sale was made in 1911.

The District Munsif considered that that attachment, though pending on 1st January 1909 came to an end by coming into force of the new Civil Procedure Code on that date, that is, the coming into force of Order XXI, rule 57, contained in that Code. If the District Munsif was right in that view, the Execution Application of 1911 which prayed for sale of the property could not be granted (as it stood) as the petition ought to have prayed for both attachment and sale.

However, it is unnecessary to remand this case for a finding on that question, as it is a pure question of law which we could decide ourselves.

We are clear that Order XXI, rule 57, which provides that, on the dismissal of an execution application, the existing attachment on the attached properties shall cease, can only apply to orders of dismissal passed after the Act came into force.

The other ground on which the District Munsif dismissed the application as barred has been dealt with by the learned Subordinate Judge, and we are prepared to follow *Ghulam Nasir-ud-din* v. *Har Deo Prashad* (1) which is relied on by the Subordinate Judge.

The Subordinate Judge was, therefore, right in remanding the execution case to the District Munsif for disposal on the

(1) 14 Ind. Cas. 343; 34 A. 436, 9 A. L. J. 540.

merits; and we dismiss the appeal against that remand order with costs.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL No. 24 OF 1914.

August 4, 1914.

Present:—Mr. Stuart, J. C.

Rani ITRAJ KUAR—AUCTION-PURCHASER—APPELLANT

versus

RAJA RAM AND OTHERS—JUDGMENT-DEBTORS, DEPUTY COMMISSIONER, BAHRAICH—DECREE-HOLDER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47—Representative—Judgment-debtor, application of—Auction-purchaser, relief against—Property erroneously sold in execution—Possession, restoration of, application for—Court, discretion of.

An auction-purchaser is a representative neither of the decree-holder nor of the judgment-debtor.

Prosunno Kumar Sanyal v. *Kali Das Sanyal*, 19 C. 683 at p 689; 19 I. A. 166, explained.

Sandhu Taraganar v. *Hussain Sahib*, 28 M. 87; 14 M. L. J. 474 and *Manikka Odayan* v. *Rajagopala Pillai*, 30 M. 507; 2 M.L.T. 347, 17 M.L.J. 291, dissented from.

Ananda Kunwari v. *Ajudhia Nath*, 30 A. 379, 5 A. L. J. 557; A. W. N. (1908) 157; *Lalji* v. *Munna Lal*, 8 O. C. 370 and *Maganlal Mulji* v *Doshi Mulji Bhaichand*, 25 B. 681; 3 Bom. L. R. 255, referred to.

Section 47, Civil Procedure Code, does not contemplate an application by a judgment-debtor asking as against the auction-purchaser possession of the property erroneously sold to him by the executing Court.

It is entirely discretionary for the Court to treat a proceeding under section 47, Civil Procedure Code, as a suit. An applicant is not entitled to the benefit as of right.

Appeal against an order of the District Judge, Gonda, dated 29th April 1914, reversing that of the Subordinate Judge, Bahraich, dated 29th May 1912.

Babu *Aditya Prasad*, for the Appellant.

Babu *Bisheshwar Nath* and the Government Pleader, for the Respondents.

JUDGMENT.—The Court of Wards as Manager of the estate of a lunatic named Chandrapal Singh obtained a decree for the sale of certain plots of land which had been mortgaged by Chhedi Ram to the ward. On the 23rd February 1911 an application was made for the sale of the land hypothecated and an area of 40·6 acres was sold to Rani Itraj Kuar. On the 16th March 1912, the judgment-debtor made an application under sections 47 and 151 of the Code of Civil Procedure, asking that the sale should be set aside, and that possession should be restored to him, on the ground that the area sold was not the area for the sale of which a decree had been obtained.

The learned Subordinate Judge rejected this application. In appeal the learned District Judge found that the application lay under section 47 of the Code, but held that it was time barred. On appeal to the Court of the Judicial Commissioner it was decided that the application was not time-barred, and the hearing of the appeal was remanded to the learned District Judge for a decision on the merits. Mr. Lindsay, Judicial Commissioner, in his order remitting the appeal for re-hearing clearly laid down that he did not decide whether the application was or was not barred under the provisions of section 47. He said: "In the present case, the argument has all along been, that the application which was made in this instance was one under section 47 of the Code of Civil Procedure, that is to say, it was an application relating to the execution, discharge or satisfaction of the decree. Indeed, the learned Judge of the Court below has conceded this position, and has held that the mere fact, that the auction-purchaser was made a party to the application, does not remove it from the category of an application which can be made under section 47. In this he has followed the ruling of the Privy Council which is reported as *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (1)."

"It appears, therefore, that the application was one which the judgment-debtor was entitled to make under the Code of Civil Procedure, and as, I have already said, looking to the allegations made in the application and sale and the antecedent circumstances, the argument of the learned Counsel for the appellant, that the application is strictly one to which Article 165 applies, is irresistible." He continued, "I do not desire to say anything about the merits of the case. It is sufficient for the purpose of disposing of this appeal, to hold that the

(1) 19 C. 683 at p. 689; 19 I. A. 166.

decision of the lower Appellate Court on the question of limitation is erroneous."

Thus Mr. Lindsay decided that if the application were, as the District Judge had found it to be, an application admissible under section 47 of the Code of Civil Procedure, it was not time-barred.

But he nowhere decided that the application was admissible under the provisions of section 47. He left open the question whether the application was or was not admissible under the provisions of that section. The learned District Judge has relied on the authority of the well-known case decided by their Lordships of the Privy Council in *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (1), finding that their Lordships decided therein that an auction-purchaser was a representative of a party to the suit. In that case the dispute was between certain judgment-debtors and the decree-holder, the allegation being that the decree-holder entered into an agreement with those judgment-debtors not to bring their property to sale and in breach of that agreement, after having received their quota of the debt decreed, had fraudulently brought their share of the property to sale. The dispute in that case was between certain judgment-debtors and the decree-holder, and all that their Lordships decided was that such being the case, although no doubt the auction-purchaser was affected by the decision of the point, the point should have been determined as between the aggrieved judgment-debtors and the decree-holder under the provisions of section 244 which corresponds to the present section 47, without bringing the auction-purchaser before the Court, and they laid down that the fact that the purchaser who was no party to the suit was interested in the result had never been held a bar to the application of the section and should not be held to be a bar. They further stated that they were glad to find that the Courts in India had not placed a narrow construction on the language of the section. They did not, however, lay down that an auction-purchaser who had not been a party to the original suit was representative of either of the original parties. Had they laid down this proposition a considerable difficulty would arise in cases such as the present, for the majority of the High Courts in India have found that if an auction-purchaser can be considered to be the representative of either party to the suit, he must be considered to be the representative of the judgment-debtor. The property that he has purchased is the property of the judgment-debtor, not the property of the decree-holder. So if he represents either party he represents the judgment-debtor. A contrary view has been taken in two rulings of the Madras High Court, *Sandhu Taraganar* v. *Hussain Sahib* (2) and *Manikka Odayan* v. *Rajagopala Pillai* (3), but that view has been dissented from by other High Courts, notably in a more recent decision of the Allahabad High Court in *Anandi Kunwari* v. *Ajudhia Nath* (4). I consider that, if an auction-purchaser is held to be the representative of either party, he must be considered to be the representative of the judgment-debtor, and upon that view a curious anomaly arises in a case such as the present which is between a judgment debtor who asserts himself to be aggrieved and the auction-purchaser, who upon this view of the case is his own legal representative. I am of opinion that their Lordships of the Privy Council did not lay down the view accepted by the learned District Judge. I could not arrive at any other decision unless I was willing to dissent from a decision of a Full Bench of this Court, which has never been dissented from since it was delivered, in *Lalji* v. *Munnu Lal* (5), which refers to a decision of the Bombay High Court in *Maganlal Muljt* v. *Doshi Muljt Bhaichand* (6). In the latter decision Jenkins, C. J., discussed the meaning of the ruling of their Lordships of the Privy Council, and found that their Lordships did not hold that an auction-purchaser was a party or representative under the provisions of the section, and that they merely held that his interest in the result did not prevent the question being treated as one between the parties. So far from wishing to dissent from the doctrine laid down by the Judicial Commissioner's Court, I am in complete agreement with it. The case, therefore, stands

(2) 28 M. 87; 14 M. L. J. 474.
(3) 30 M. 507; 2 M. L. T. 347; 17 M. L. J. 391.
(4) 30 A. 379, 5 A. L. J. 557; A. W. N. (1908) 157.
(5) 8 O. C. 370.
(6) 25 B. 631; 3 Bom. L. R. 355.

as follows: —The aggrieved judgment-debtor asserts that the sale to the auction-purchaser was a sale not permitted by the terms of the decree inasmuch as only a very small portion of the property sold was covered by the decree and the remainder was sold without right or title, and he asks as against the auction-purchaser that such portions of the property transferred as were not covered by the terms of the decree should be restored to his possession. I am unable to find that such an application can possibly fall under the provisions of section 47. The judgment-debtor desires that a third party, who was not a party to the suit and has obtained, owing to an error of the Court executing the decree, certain property to which he is not entitled, should be dispossessed and that the property in question should be restored to him.

Obviously this is not a case falling under the provisions of section 47, and in the circumstances the judgment-debtor's application, so far as it can be considered an application in execution, must be dismissed. I have been asked by the learned Counsel for the respondent judgment-debtor to apply the provisions of section 47 (2) to the case and to treat the proceeding as a suit. I see no reason to do this. Upon the merits the judgment-debtor deserves no consideration. It would appear that he took advantage of the mortgagee in order to enter into the mortgage-deed certain numbers which he did not possess leading the mortgagee to believe that he was mortgaging numbers which he did possess, and in the circumstances I do not propose to give him anything to which he is not strictly entitled. He is not entitled to the benefit of the section as of right. It is entirely discretionary for the Court to give him that benefit, and I see no reason to do so as I do not find that he has done anything to deserve it.

I decree the appeal and direct that the application be dismissed. The judgment-debtor will pay his own costs and those of the auction-purchaser and the decree-holder in all Courts.

Appeal allowed.

PUNJAB CHIEF COURT.

MISCELLANEOUS CIVIL APPLICATION No. 536 OF 1913.

May 11, 1914.

Present:—Mr. Justice Johnstone and Mr. Justice Rattigan.

MELA RAM AND OTHERS—DEFENDANTS —PETITIONERS

versus

Musammat RUKMAN—PLAINTIFF AND ANOTHER—DEFENDANT—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLV, r. 13—Execution of decree, stay of, pending decision of appeal to Privy Council.

Under Order XLV, rule 13, of the Code of Civil Procedure, execution of a decree will not, without sufficient cause being shown, be stayed pending the decision of the appeal to the Privy Council.

Application, under Order XLV, rules 2 and 13 (*c*), Civil Procedure Code of 1908, for leave to appeal to His Majesty in Council against the judgment and decree of the Chief Court, dated the 30th October 1913, passed in Civil Appeal Case No. 24 of 1909, reported in 22 Ind. Cas. 134 and for stay of execution of the said decree pending decision of the appeal by the Privy Council.

Mr. *Santanam*, for the Petitioners.

Mr. *Pestonji Dadabhai*, for the Respondents.

ORDER.—The plaintiff named Rukman, after losing her case in the first Court, obtained a decree from the Chief Court in full of her claim on the 30th October 1913. Certain defendants have now applied to this Court for leave to appeal to the Privy Council and they also ask that plaintiff be restrained from executing her decree pending the decision of the appeal by that Court. No objection is raised to the grant of certificate to appeal, but the plaintiff's Counsel strongly objects to any stay of execution.

We have heard arguments and we have considered the provisions of Order XLV, rule 13, of the Civil Procedure Code. We have also been referred to the ruling published as 234 Punjab Law Reporter 1912 [*Khadam Hussain Khan* v. *Murad Bibi* (1)] a case which, we think, is practically on all fours with the present case. Without going into details we may say at once that we do not think sufficient cause has been shown for stay of execution. The ruling aforesaid lays down certain principles which are

(1) 15 Ind. Cas. 187; 234 P. L. R. 1912; 87 P. W. R. 1912; 18 T. L. R. 668.

fully applicable to the present case. At the same time plaintiff decree-holder ought, in our opinion, to furnish security and Mr. Pestonji says that he has no objection to this. We, therefore, grant the usual certificate of leave to appeal to His Majesty in Council. We also allow at the same time the decree appealed from to be executed, directing that such security shall be taken from the respondent as the Court executing the decree thinks fit for the due performance of any order which His Majesty in Council may make on the appeal. We make no order as to costs.

Leave granted; Execution allowed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 770 OF 1912.

August 26, 1914.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Davar.

THE SURAT CITY MUNICIPALITY—

DEFENDANT—APPELLANT

versus

CHHABILDAS DHARAMCHAND—

PLAINTIFF—RESPONDENT.

Bombay District Municipalities Act (Bom. Act III of 1901), ss. 82, 83, 86—Bill to recover arrears—Statutory requirements not fulfilled—Failure to pay—Distress warrant, whether legal.

A bill to recover the arrears of house-tax served upon a person by a Municipality does not fulfil the requirements of section 82 *(2) (b) (ii)* of the District Municipalities Act, 1901, if it does not specify the time within which an appeal may be preferred under section 86 of the Act and in such a case the issue of a distress warrant on failure to pay the arrears is illegal inasmuch as the right of distress depends upon the observance of the statutory formalities, it being a right conferred only by the Statute upon those conditions.

Second appeal from the decision of the District Judge of Surat, in Appeal No. 57 of 1911, modifying the decree passed by the First Class Subordinate Judge at Surat, in Civil Suit No. 86 of 1908.

Mr. *Jardine*, acting Advocate-General (with him Mr. *S. S. Patkar*, Government Pleader), for the Appellant.

Mr. *T. R. Desai*, for the Respondent.

JUDGMENT.—This is an appeal by the Surat City Municipality against the decree of a District Judge, varying the decree of the first Court and holding that the plaintiff was entitled only to a sum of Rs. 23-13-0 in respect of moneys paid by him under protest to release certain property which was destrained by the Municipality in respect of arrears of taxes for a portion of the house in his possession. The money was recoverable by the plaintiff as having been paid under protest if he was able to show that the distress was not in accordance with law.

Now the power of the Municipality to levy distress upon the moveable property of a person from whom a tax is claimable depends upon the provisions of Chapter VIII of the District Municipal Act (Bom. Act III of 1901). It provides that: "When any amount, which is claimable as an amount on account of any tax which is now imposed in any Municipal District, shall have become due, the Municipality shall, with the least practicable delay, cause to be presented to the person liable for the payment thereof, a bill for the sum claimed as due, and every such bill shall specify the period for which and the property in respect of which the sum is claimed, and shall also give notice of the liability incurred in default of payment, and of the time within which an appeal may be preferred as hereinafter provided against such claim;" and clause (3) of section 82 provides that: "if the sum for which any bill has been presented as aforesaid is not paid within fifteen days from the presentation thereof, the Municipality may cause to be served upon the person liable a notice of demand;" and under section 83: "if the person liable for payment does not, within fifteen days from the service of the notice of demand, pay or show cause why he should not pay or prefer an appeal, such sum may be levied under a warrant by distress." Therefore, the notice of demand upon which the right of distress is based depends upon the previous presentation of a bill complying with the statutory provisions set out in section 82, clause (2).

It is not disputed that in this case the bill did not fulfil all the statutory requirements in that it did not state the time within which an appeal might be preferred under section 86 of the Act. The procedure followed, therefore, was not a legal procedure. The whole right of distress depends upon the observance of the statutory formalities, it being a right conferred by the statute only upon those conditions. We, therefore, agree with the first Court in this respect, and with-

out deciding the other questions which have been raised as to whether the amount of tax was claimable under the new Act of 1901, or whether any portion of the claim was barred by the Law of Limitation, we can dispose of the appeal upon the ground that the distress was illegal for the reasons above stated. We, therefore, hold that the decree appealed against was right. We have been asked to give relief to the respondent upon a cross-objection that certain costs in the way of proof of documents which have been incurred are not sufficiently covered by the order for costs in proportion to the sum awarded; but we have no materials which justify us in altering the order of the lower Court as to costs. We confirm the decree of the lower Appellate Court and dismiss the appeal and the cross-objections respectively with costs.

Decree confirmed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1355 OF 1912.

May 26, 1914.

Present:—Mr. Justice Shah Din and Mr. Justice Scott-Smith.

NUR KHAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat BAKHTAWAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (*IX of* 1908), *Sch. I, Art.* 120—*Punjab Limitation* (*Ancestral Land Alienation*) *Act* (*I of* 1900)—*Suit for declaratory decree setting aside a Will, incompetent during life-time of testator*—*Limitation*—*Six years.*

A suit will not lie for a declaratory decree setting aside a Will during the life-time of the testator.

Musammat Badho Bai v. *Chatta Ram*, 111 P. R. 1880, referred to.

Chukhun Lal Roy v. *Lolit Mohan Roy*, 20 C. 906, distinguished.

A declaratory suit for setting aside a Will is governed by Article 120 of the Indian Limitation Act, 1908. The Punjab Limitation (Ancestral Land Alienation) Act, 1900, does not apply to such suits.

Second appeal from the decree of the Divisional Judge, Attock Division, at Campbellpore, dated the 8th June 1912, reversing that of the District Judge, Attock, dated the 29th February 1912, decreeing the claim.

Mr. *Oertel*, for the Appellants.

Mr. *Fasal-i-Hussain*, for the Respondents.

JUDGMENT.—Ghulam Muhammad, an *Awan* of the Talagang Tahsil of the Attock District, executed a Will on the 2nd of April 1894, by which he bequeathed the whole of his property, including his reversionary rights in the estate of his cousin's widow, to Muhammad Nawaz Khan, defendant-appellant, his daughter's son. The Will was duly registered. Ghulam Muhammad died on the 17th March 1900, leaving a widow, *Musammat* Bakhtawari. Mutation of deceased's estate was sanctioned in favour of Muhammad Nawaz Khan on the 13th May 1900, with the consent of the widow. On the 24th of May 1911, the plaintiffs, who are nephews of Ghulam Muhammad, brought the present suit for a declaration to the effect that their reversionary rights should not be affected by this Will, on the ground that it was invalid according to custom. The first Court held that the suit was within time and that the Will was invalid according to custom, and decreed the plaintiffs' claim. On appeal the Divisional Judge held that the suit was time-barred, cause of action having arisen on the date when the Will was executed, *viz.*, the 2nd of April 1894, and the period of limitation under Article 120 of the Indian Limitation Act having expired before the Punjab Act I of 1900 came into force. On the question of custom he agreed with the first Court, but having regard to his finding on the question of limitation dismissed the plaintiffs' suit. The plaintiffs have filed a second appeal in this Court.

Now, the first point for our decision is whether the Divisional Judge is correct in his view that the cause of action arose on, and the period of limitation ran from, the 2nd April 1894. In our opinion his view is incorrect. In *Musammat Badho Bai* v. *Chatta Ram* (1), it was held that a suit will not lie for a declaratory decree setting aside a Will made by a Hindu widow, still living, and purporting to dispose after her death the immoveable property of her husband. In the judgment the learned Judges remarked: "We have heard the plaint and the Will on which it is based, and find that the document is nothing but a Will, and can take no effect until testator's death, and, as it is by its nature a revocable instrument, it may never take effect at all. There is, therefore, nothing which amounts to alienation of the property,

(1) 111 P. R. 1880.

or of any interest therein, and in the absence of such an alienation the plaintiffs' cause of action does not arise until the widow's estate comes to an end." Applying this principle we hold that plaintiffs had no cause of action to sue for a declaration in regard to the Will while Ghulam Muhammad was still alive. He had power to revoke the Will at any time, and it was, therefore, not certain until his death that it would take effect at all. We hold, therefore, that the plaintiffs' cause of action arose upon the death of Ghulam Muhammad, *i. e.*, on the 17th of March 1900.

The next question is whether the limitation is governed by the Punjab Act I of 1900. The first column of the Schedule to this Act gives a description of the suits to which the Act applies. It is as follows: "Suit under the Customary Law of the Punjab, by a son or reversioner of a male proprietor, to have an alienation of ancestral land made by such proprietor declared void, except for the life of the alienor." Now, as a Will only takes effect after the death of the testator, a suit for a declaration in regard thereto would not be included in this description. The third column of the Schedule also shows that such a suit would not be governed by this Act, for it gives the time from which the period begins to run as dependent on the date when possession is given or is agreed to be given. Now, under a Will possession is neither given nor agreed to be given during the life-time of the testator. It is, therefore, clear that this Act does not apply to the present suit. The General Limitation Law as contained in the Indian Limitation Act is, therefore, applicable, and the present suit is governed by Article 120 of the second Schedule of that Act. The period under that Article is six years and the suit is, therefore, clearly barred by time.

Mr. Oertel, on behalf of the appellants, has referred us to *Chukhun Lal Roy* v. *Lolit Mohan Roy* (2). But the facts of that case are clearly distinguishable from those of the present. That case related to the construction to be given to a Will and was for a declaration of the plaintiffs' rights under it. The present case, on the other hand, is for a declaration that the Will shall not affect the plaintiffs' reversionary rights. The plaintiffs-appellants may, no doubt, have a fresh cause of action to sue for possession of the land after the death of the widow, but we are clear that the present suit for a declaration is barred by time. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

(2) 20 C. 906.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 240 OF 1913.

December 21, 1914.

Present:—Mr. Stuart, A. J. C.

Musammat CHOTTI BEGAM AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAM PRASAD—PLAINTIFF—RESPONDENT.

Reliefs inconsistent and contradictory—Possession, claimed as owner—Redemption, alternative relief for—Fresh suit for redemption, maintainability of—Res integra.

In a suit for recovery of possession as owner, an alternative relief for redemption cannot be asked, inasmuch as the two reliefs are inconsistent and contradictory. And if the relief for possession is refused on merits and that for redemption owing to the said defect of misjoinder of reliefs, the plaintiff can bring a fresh suit for redemption as *res integra*.

Appeal against an order of the Additional Judge, Lucknow, dated 1st April 1913, modifying that of the Officiating Munsif, North Lucknow, dated 31st August 1912.

Mr. *Mumtaz Husain*, for the Appellants.

Babu *Baslev Lal*, for the Respondent.

JUDGMENT.—The facts of the case out of which this appeal arises are as follows:—

A certain Muhammad Husain Khan mortgaged with possession in 1884 plot No. 192 in village Muhammad Nagar to Mendai Lal. Mendai Lal permitted Muhammad Husain Khan to remain in possession of the plot as his tenant, and in 1886 Muhammad Husain Khan planted trees on the plot. On the 16th March 1896 Muhammad Husain Khan mortgaged with possession 5/8ths of his 5-annas 4-pies share in the village to Ram Prasad. According to the terms of the mortgage of 1896 it appears that the 5/8ths share was separated off and that it was the intention of the parties that the share so separated should be given into the possession of the mortgagee. The deed refers to a list in

which the specific plots mortgaged are entered. That list is not before the Court. There is no evidence of value to show whether plot No. 192 was or was not included in the property mortgaged by the deed of 1896. But granting for the sake of argument that it was so included, it is clear that Ram Prasad would not have obtained, by virtue of his mortgage, any rights with regard to plot No. 192 other than the rights of a subsequent mortgagee. Later on Mendai Lal brought a suit on the foot of his mortgage-deed and obtained a decree. Ram Prasad was not a party to that decree. In execution of the decree the land in No. 192 was brought to sale and purchased by Maulvi Muhammad Husain in 1900, and in 1902 the vendee transferred his rights in the land of the plot in question to *Musammat* Chhoti Begam. Ram Prasad brought a suit on the foot of the mortgage of 1896 and obtained a decree in 1910. He did not make Chhoti Begam a party to that suit. In execution of the latter decree Ram Prasad purchased the mortgaged property. Ram Prasad subsequently sued in the Court of the Munsif of North Lucknow for possession of plots Nos. 192 and 193 (which he described as groves) and for mesne profits on account of the produce of the groves for two years, and costs, and asked that if any charge should be found upon any of the lands he should be allowed to take possession after payment of the charge. The learned Munsif decided that Ram Prasad could not obtain possession of plot No. 192, as his only possible right with regard to that plot could be the right of a subsequent mortgagee, and decided that a suit for redemption should not be included in a suit for possession. He further found that the amount of mesne profits, if any, was not proved. He, therefore, gave the plaintiff a decree for possession of No. 193 only. The learned Additional Judge on appeal modified the decree by the addition of a relief of Rs. 100 on account of mesne profits and of possession of No. 192 subject to the redemption of the mortgage of 1884.

In the present appeal it is prayed that the decree of the learned Additional Judge be set aside and the decree of the learned Munsif be restored. This appeal is not concerned with No. 193. With regard to the question of mesne profits I find that there is evidence on the record on which a decree for mesne profits can be passed. I consider that the learned Munsif was right in refusing to go into the question of redemption. The plaintiff sued as owner of No. 192 and as having been kept out of possession by the defendants. I do not consider that he could be permitted to join to this relief, the alternative relief for redemption. The two cases were inconsistent and contradictory. He certainly had no right to join these two reliefs, and, the learned Munsif rightly refused him permission to include both causes of action in the same plaint. On the materials before me, it would not be possible to decide whether Ram Prasad has or has not a right to redeem a 5/8ths share of No. 192. Nor is it even possible to decide whether Chhoti Begam has title to the trees standing on the ground or any portion of them. I am in no position to determine the question of redemption, and if I referred the matter to the Courts below, I should be practically commencing a new case. There can be no doubt as to the fact that Ram Prasad is not entitled to a decree for possession. Possession of No. 192 was originally with Muhammad Husain Khan who planted the trees. From Muhammad Husain Khan it passed to Mendai Lal, from Mendai Lal it passed to Maulvi Muhammad Husain, and from Maulvi Muhammad Husain it passed to Chhoti Begam. Possession cannot be obtained by Ram Prasad unless he has a right of redemption, and then only, when he has obtained redemption, either by private arrangement or through the Court. As I have already stated I do not consider that he can be allowed to have the question of redemption decided in this case.

Thus the appeal succeeds on every point. I decree the appeal accordingly and direct that the decree of the learned Additional Judge be set aside and the decree of the learned Munsif be restored. The respondent will pay his own costs and those of the appellants in this and the lower Courts. He will still have the remedy of instituting a suit for redemption, and the matter, should he institute such a suit, will come up as *res integra*. I have decided nothing, one way or the other, which can affect the decision of such a suit.

Appeal allowed.

MAHAMMAD DIN *v.* AHMAD DIN.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 547 OF 1912.

December 15, 1914.

Present:—Mr. Justice Rattigan and Mr. Justice Scott-Smith.

MUHAMMAD DIN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

AHMAD DIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom or Muhammadan Law—Succession—Arains of Lahore depending on agriculture.

The parties were *Arains* by caste, and resided in the Lahore City, but they owned land in the neighbourhood of the City, and cultivated their own land, and admittedly depended entirely upon agriculture for their living

Held, that in these circumstances, seeing that the parties are members of a large agricultural tribe, custom and not the *shara* governed the parties in matters of succession.

Second appeal from the decree of the Additional Divisional Judge, Lahore, dated the 12th January 1912, affirming that of the Subordinate Judge, 1st class, Lahore, dated the 20th July 1910, decreeing the claim.

The Hon'ble Mr. *Muhammad Shafi*, K.B., for the Appellants.

Rai Bahadur Pandit *Sheo Narain* and *Lala Parduman Das*, for the Respondents.

JUDGMENT.—The facts are fully stated in the judgments of the Subordinate Judge and the Additional Divisional Judge and need not be repeated. The parties are *Arains* by caste and though they actually reside in Lahore City, they own land in the neighbourhood of that City and admittedly depend entirely upon agriculture for their living. The first and most important question before us is whether in matters of succession, they are governed by Muhammadan Law or by the rules of customary law which generally prevail among agriculturists of this Province. If it be found that among them custom and not the Muhammadan Law prevails, then it is not denied that plaintiffs as grandsons would be entitled to succeed to ⅛th of the landed property left by their grand-father, Sadar Din, and would have the right, quite apart from any question of gift, to redeem the mortgage effected by Sadar Din in 1882 in favour of *Musammat* Nathi, who is now represented by her assignee, Muhammad Bakhsh.

Both the Subordinate Judge and the Additional Divisional Judge are agreed in holding that the parties are governed by custom and after hearing Mr. Shafi on behalf of appellants, we are satisfied that this finding is correct. The principal appellant, Muhammad Din, frankly admitted before us that his family are agriculturists in the strict sense and that they cultivate their own lands and make their living by agriculture. In these circumstances, seeing that the parties are members of a large agricultural tribe, we can find no justification for differing from the concurrent finding of the Courts below upon this point, especially as plaintiffs have been able to cite at least three instances (those numbered as 2, 3 and 4 at page 9 of the paper-book) where among *Arains* of this class and residents of Lahore City, the customary rule of representation was recognized in matters of succession, grandsons succeeding along with sons. Furthermore, in *Imam Din* v. *Dulo* (1) which was a case relating to *Arains* of Muzang (a Lahore suburb), it was conceded in this Court that custom and not the *shara* governed the parties. Mr. Shafi, on behalf of appellants, relied upon three rulings of this Court, *Miran Bakhsh* v. *Musammat Allajawai* (2), *Shib Dyal* v. *Musammat Chiragh Bibi* (3) and *Musammat Fakhur-un-Nissa* v. *Malik Rahim Bakhsh* (4) but none of these cases are in point.

In *Miran Bakhsh* v. *Musammat Allajawai* (2) and Civil Appeal No. 353 of 1904, the parties were *Arain* flower-sellers, resident in Lahore and Amritsar, and as observed in those judgments, were in no sense agriculturists. In *Musammat Fakhur-un-Nissa* v. *Malik Rahim Bakhsh* (4) the parties were by origin *Punjabi Arains* but had for many generations lived amongst, and gave themselves out as being Muhammadan Sheikhs of Sabzi Mandi, a suburb of Delhi; they owned agricultural land but merely as market-gardners and capitalists and were (as Chatterji, J., remarks): "too well off to be actual cultivators themselves." Obviously this case is no authority for holding the present parties who are true agriculturists

(1) 25 Ind. Cas. 278, 239 P. L. R. 1914.
(2) 25 P. R. 1882.
(3) 1 Ind. Cas. 321; 12 P. R. 1909; 73 P. L. R. 1909; 124 P. W. R. 1908.
(4) 23 P. R. 1897.

and actually cultivate their own lands, to be bound by Muhammadan Law simply because as a matter of convenience to themselves they live in Lahore City In point of fact, the ruling cited is against appellants, as at page 106 of the report, Chatterji, J. observed, " If they are really *Arains*, I should be inclined to give considerable weight to the argument that we should start with the presumption that they continued to follow the customs by which they were governed while in the Punjab." Again at page 121 the learned Judge points out that the circumstances of the *Arains* with whom he was dealing were peculiar and that they could not be regarded as ordinary agriculturist *Arains*.

We have, therefore, no hesitation in holding that appellants have failed to prove that the lower Courts are wrong in finding them to be governed by custom. Upon this we must further hold that plaintiffs were entitled to redeem the mortgage in question, and indeed Mr. Shafi admitted that this consequence must ensue if once we hold that custom and not Muhammadan Law applied.

The next question is whether plaintiffs are bound to repay appellants the whole or any part of the sum of Rs. 1,000 which the latter claim to have paid, out of their own pockets, to redeem the additional mortgage charge effected by Sadar Din on the 2nd May 1893. This was a charge upon the whole of the land belonging to Sadar Din and if appellants could satisfy us that they actually paid off the charge out of their own pockets, we would be inclined to hold that under sections 69 and 70 of the Indian Contract Act, they would have a right to be reimbursed by plaintiffs to the extent that the $\frac{1}{4}$th part of the mortgaged property (which is plaintiff's share) has been relieved of the charge upon it But the Additional Divisional Judge has found that the sum of Rs. 1,000 which was paid to the mortgagee in or about January 1909, when Sadar Din was alive, was paid from the joint family funds and not from appellants' own purse, and nothing has been said in appeal to show that this finding is incorrect. This mortgage charge was certainly paid off and according to the endorsement on the mortgage-deed, the payment was made by appellants, "*Babat Sadar Din.*" The lower Appellate Court reads this endorsement as meaning that appellants made the payment but that the money came from Sadar Din, and the probabilities are all in favour of that supposition. There is admittedly no other property belonging to the family than that left by Sadar Din and as long as he lived, appellants had no independent source of income, so that presumably the money paid to the mortgagee came from the family funds then in the hands of Sardar Din.

As a result we agree with the conclusions of the lower Appellate Court and we accordingly dismiss this appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2980 OF 1910.

August 19, 1914.

Present:—Mr. Justice Stephen and Mr. Justice Mullick.

GIRDHAR DAS AND OTHERS—DEFENDANTS—APPELLANTS

versus

SITARAM NAIK AND OTHERS—PLAINTIFFS—RESPONDENTS.

Issue, object of, framing of—Judge, discretion of—Issue, when not necessary—Failure to frame—Error of law.

Where a Judge considers that the determination of an issue is necessary for the right decision of a suit, it is his duty to frame such an issue, but where it is not necessary to frame the issue he does not err in law in not framing it.

Second appeal from a decision of the District Judge, Shahabad, dated 23rd May 1910, affirming that of the Sub-Judge, 2nd Court, at that place, dated the 26th July 1909.

Dr. *Rash Behary Ghose* and Babu *Karunamoy Bose*, for the Appellants.

Mr. *S. P. Sinha* and Babus *Umakali Mukerjee* and *Raghunath Singh*, for the Respondents.

JUDGMENT.—The plaintiffs in this case brought a suit to have it declared that they were entitled to have their water carried down a certain channel for the purpose of irrigation of the lands, and they also prayed for an order that if the defendants do not remove the *bund* which they have built, it

may be removed by the Court. The Courts below have ordered that the obstruction shall be removed. The intention of the Judge in doing this was that the parties should, as far as the irrigation is concerned, be put in the same position in which they would have been before a partition which took place had they then been separate; that is to say, the removal of the *bund* should cause the plaintiffs' land to be irrigated as it was previously, to the partition. It is argued that the Judge ought to have gone further, and to have framed an issue to see whether the complete removal of the *bund* was necessary for this purpose. Such an issue might have been framed under the pleadings as they stand ; it was not framed, however, and the lower Court on being asked to frame it, declined. In our opinion if he considered that the determination of that issue was necessary for the right decision of the suit it was his duty to frame such an issue. It does not, however, appear to us clear that such an issue was necessary for the right decision of the suit. The facts of the case not clearly indicating that this was so, the intention of the Judge, as we have said, was to restore the state of things as existed before the partition, and we cannot hold that it was necessary to frame the issue in order to produce this result. We accordingly cannot accede to the argument that the Judge has erred in point of law in not framing the issue. At the same time we must not be understood as taking the view that the Judge has finally decided that the removal of the *bund* will restore the state of things which had existed before.

The appeal is therefore, dismissed with costs

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1066 OF 1912.

December 2, 1914.

Present:—Mr. Justice Chevis and Mr. Justice Shadi Lal.

GOPAL DAS AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

GHULAM MOHY-UD-DIN—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. II, r. 2—Contract Act (IX of 1872), s. 23—Mortgage—Suit for interest on bond executed after mortgage—Consideration—Abstention from suit—Suit to defeat provisions of any law.

The plaintiffs sued for interest due on a mortgage but later on obtained from the mortgagor bonds for further sums of interest, and then sued for the amounts due on those bonds. The first Court decreed the claim, but the Appellate Court held that as the mortgagees had no rights left which they could enforce under the mortgage, the bonds were without consideration:

Held, that the bonds were executed in return for plaintiffs' abstaining to sue for the interest, and that in view of the fact that the bonds were executed before the case of *Chaudhri Kundan Mal v. Sardar Allah Dad Khan*, 5 Ind. Cas. 821, 19 P. R. 1910, 36 P. W. R. 1910, 167 P. L. R. 1910, had been decided, the plaintiffs were under the *bona fide* impression that their suit would succeed, if brought, and that, therefore, section 23 of the Contract Act did not apply.

A claim which is barred by Order II, rule 2, of the Civil Procedure Code, is not on exactly the same footing as a time-barred claim. A Court is bound to dismiss a time-barred suit, even though limitation be not pleaded by the defendant but a Court is not bound to take up *proprio motu* the question of a suit being barred by Order II, rule 2. The rule is a provision in favour of a defendant of which he may or may not choose to avail himself, the option lies with him.

Muhammad Nur v. Musammat Mahroia, 37 P. R. 1885, referred to.

If an intending litigant *bona fide* forbears a right to litigate a question of law or fact which it is not vexatious or frivolous to litigate, he does give up something of value. It is a mistake to suppose it is not an advantage, which a suitor is capable of appreciating, to be able to litigate his claim, even if he turns out to be wrong.

Second appeal from the decree of the Divisional Judge, Jullundur, dated the 10th June 1912, reversing that of the Munsif, 1st class, Jullundur, dated the 20th January 1912, decreeing claim in part.

Rai Bahadur Pandit *Sheo Narain*, for the Appellants.

The Hon'ble Mr. *Muhammad Shafi*, K. B., for the Respondent.

GOPAL DAS v. GHULAM MOHY-UD-DIN.

JUDGMENT.—The facts are as stated by the learned Divisional Judge, namely, that the plaintiffs, having sued for interest due on a mortgage, later on obtained from the mortgagor bonds for further sums of interest, and now sue for the amounts due on those bonds. The first Court decreed the claim, making, however, some reduction in the amount claimed as interest on the bonds. The learned Divisional Judge held that there was no consideration for the bonds and dismissed the suit. The plaintiffs appeal to this Court, asking that the decree of the first Court should be restored. The plaintiffs had in the Divisional Court lodged cross-objections as regards the reduction in the interest made by the first Court but all that is asked in this Court, is that the decree of the first Court should be restored.

Two questions only have been argued before us.

(1) Whether the contract is void for want of consideration, and

(2) Whether it is void on account of the consideration being opposed to provisions of law.

It is admitted by the learned Advocate for the appellants that in the absence of the bonds a suit to recover the principal sum due under the mortgage or the interest for which the bonds were executed would be barred by Order II, rule 2, of the Civil Procedure Code. The learned Divisional Judge holds that as the mortgagees had no rights left which they could enforce under the mortgage, the bonds are without consideration. The following rulings are quoted by the Divisional Judge; *Alimoodden* v. *Wazeer Ali* (1), *Banda Ali* v. *Banspat Singh* (2), *Ram Lal* v. *Makhan Mal* (3). The first of these is a case in which it was held that to refrain from bringing a suit which, if brought, would be dismissed as time-barred, is no consideration. This ruling was, of course, passed before section 23, sub-clause 3, of the Contract Act, as it now stands, was made law. The Allahabad ruling does not seem to us to be of much assistance; the plaintiff's suit was dismissed because it was held that the bond on which he sued was executed under duress. The Punjab ruling lays down that the withdrawal of a suit, which the plaintiff knew to be a claim to recover monies due on a wagering contract, is no consideration for a *hundi*.

None of these rulings seem to us to be exactly in point. We are not prepared to admit that a claim which is barred by Order II, rule 2, is on exactly the same footing as a time-barred claim. A Court is bound to dismiss a time-barred suit, even though limitation be not pleaded by the defendant, while there is authority for the proposition that a Court is not bound to take up *proprio motu* the question of a suit being barred by Order II, rule 2 [See *Muhammad Nur* v. *Musammat Mahroia* (4).] As to the Punjab ruling, we note that a wagering transaction is clearly a matter opposed to public policy.

Moreover, there seems to us to be another substantial difference between the above quoted cases and the present one. The above cases are cases in which it seems to have been clear that the plaintiff knew that he had no right to bring a suit, and that if he did sue, his suit would inevitably be dismissed; to refrain from bringing such a suit is, therefore, held not to constitute consideration. But in the present case can it be said that the parties thought at the time when these bonds were executed that the plaintiffs were debarred from recovering the interest due by suit? We may even go further and ask whether it can be said that such a suit, if it had been brought, would have been dismissed. No doubt the law on the subject is now understood to be as laid down in *Chaudhri Kundan Mal* v. *Sardar Allah Dad Khan* (5), but this interpretation of the law is modern (we do not, in saying this, intend to cast doubts on the correctness of the interpretation) and we feel sure that when these bonds were executed both parties were under the *bona fide* impression that

(1) 23 W. R. 52.
(2) 4 A. 352; A. W. N. (1882) 64; 6 Ind Jur. 668.
(3) 74 P. R. 1881.
(4) 37 P. R. 1885.
(5) 5 Ind. Cas. 821; 19 P. R. 1910; 36 P. W. R. 1910; 107 P. L. R. 1910.

the plaintiffs could have sued for their interest. And we go further and say that if plaintiffs had sued for their interest, their suit would very probably have been decreed. We doubt very much whether the applicablity of Order II, rule 2, would have occurred to the mind of either litigant or to the Court. The remarks on page 153 of Pollock's Indian Contract Act, 3rd Edition, seem to us appropriate. We read here: "Every man who honestly thinks he has a claim deserving to be examined is free to bring it before the proper Court, and have the judgment of the Court on its merits, without which judgment it cannot be certainly known whether the claim is well-founded or not, for the maxim that every man is presumed to know the law... is clearly inapplicable here. That which is abandoned or suspended in a compromise is not the ultimate right or claim of the party, but his right of having the assistance of the Court to determine, and, if admitted or held good, to enforce it. 'If an intending litigant *bona fide* forbears a right to litigate a question of law or fact which it is not vexatious or frivolous to litigate, he does give up something of value. It is a mistake to suppose it is not an advantage, which a suitor is capable of appreciating, to be able to litigate his claim, even if he turns out to be wrong.'"

That the bonds were executed in return for plaintiffs' abstaining to sue for the interest we have no doubt, and further we are of opinion that the plaintiffs were under the *bona fide* impression that such a suit would succeed if brought. We hold, therefore, that there was consideration for the bonds.

As to the plea that the consideration was of such a nature as to "defeat the provisions of any law," we note that in this case the consideration was the abstaining from bringing a suit to recover the interest. Now assuming for purposes of argument that to bring such a suit is forbidden by Order II, rule 2, it certainly cannot be said that there is any provision of law forbidding plaintiffs from abstaining from bringing such a suit. Further, we may add that in our opinion Order II, rule 2, is a provision in favour of a defendant of which he may, or may not, choose to avail himself; the option lies with him. We are, therefore, of opinion that section 23 of the Contract Act is in no way applicable to the present case.

We accept this appeal and reversing the decision of the lower Appellate Court we restore the decree of the first Court. The defendant will pay costs, calculated on Rs. 650, in all Courts.

Appeal accepted.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 77 OF 1913.

January 8, 1915.

Present:—Mr. Stuart, A. J. C., and Mr. Kanhaiya Lal, A. J. C.

LAL BAHADUR AND ANOTHER—DEFENDANTS —APPELLANTS

versus

ZALIM SINGH—PLAINTIFF, BALWANT SINGH AND ANOTHER—DEFENDANTS —RESPONDENTS.

Redemption and foreclosure, rights of, whether co-extensive—Mortgage-deed containing onerous and one-sided conditions—Mortgagor authorised to recover his money at any time he liked—Redemption, right of, postponed to 60 years—Equity of redemption, fetter on, effect of—Consideration, want of, allegation as to—Burden of proof, mitigation of—Loans, oral—Lekha bahi, entries in, whether reliable by themselves—Extrinsic evidence, necessity of.

As a general rule, the right of foreclosure and the right of redemption should be co-extensive, and every agreement by which the right of redemption is fettered for the benefit of the mortgagee without any corresponding advantage to the mortgagor must be examined with close scrutiny.

Thus, where a mortgage-deed contained onerous and one-sided conditions, the effect of some of which was to permit the mortgagee to call in the mortgage-money together with the money spent by him in making improvements on the mortgaged property at any time he liked, and to postpone redemption till the expiry of 60 years from the date when the mortgage would be converted from simple into usufructuary.

Held, that the covenant postponing redemption was an unreasonable fetter on the equity of redemption and could not be enforced, so that the mortgagor was entitled to redeem irrespective of that fetter.

Sayad Abdul Hak Sardar Diler Jung Bahadur v. *Gulam Jilani*, 20 B. 677; *Sari* v. *Motiram Mahadu*, 22 B. 875 and *Durga Singh* v *Nawab Mirza Muhammad Raza Husain Khan*, 25 Ind. Cas. 912; 17 O. C. 318, referred to.

LAL BAHADUR *v.* ZALIM SINGH.

The onus of proving want of consideration lies heavily on the party alleging it, but where it is found that he is a man weak in intellect and hard of hearing who played the part of an irresponsible puppet in the hands of the opposite party, the onus is mitigated to some extent in this way that the Court may for its own satisfaction demand from the opposite party, if it thinks proper under the circumstances of the case, reliable evidence of the fact that there was no want of consideration as alleged.

In the absence of corroborative evidence, no reliance can be placed on the entries of oral loans as appearing in a *lakha bahi*, inasmuch as it is not a regular account-book kept in the ordinary course of business from day to day.

Appeal from the decree of the Subordinate Judge, Hardoi, dated the 14th April 1913.

Pandit *Gokaran Nath Misra*, for the Appellants.

Mr. *A. P. Sen* and Syed *Amjad Ali*, for Respondent No. 1.

JUDGMENT.—This was a suit for redemption of a mortgage effected by Zalim Singh in favour of Shankar Singh on the 14th November 1895, and of a deed of further charge executed by Zalim Singh in favour of the same person on the 5th June 1896. The property mortgaged comprised a 5 *biswas* share in the village of Tajpur including *sir* plots belonging to the mortgagor. The mortgage purported to have been made in lieu of Rs. 5,000 out of which Rs. 2,131 were left with the mortgagee for payment of certain prior incumbrances due to him and another person named Balwant Singh, Rs. 219-6-0 were left for payment to Chunni Lal on account of a promissory-note dated *Magh Sudi* 5th, *Sambat* 1951, Rs. 511-10-0 were left for payment of an unregistered bond held by Sardar Singh dated the 14th September 1895, and Rs. 1,912-8 were stated to have been credited towards some money due on account of books, and balance to have been paid partly for the purchase of stamp and partly at the time of execution and registration. The deed of further charge purported to have been executed in lieu of Rs. 100 out of which Rs. 90 were credited towards money said to have been due to the mortgagee on account books, and the balance was stated to have been paid in cash partly for the purchase of stamp and partly before the Sub-Registrar. The mortgage deed provided that the mortgagee shall pay Rs. 2,131 on account of prior mortgages due to the mortgagee and Balwant Singh jointly when those mortgages became payable 4 years and 4 months later and obtain possession over the mortgaged property, that till such payment and the recovery of possession, the balance of the mortgage money was to bear interest at annas twelve per cent. per mensem, compoundable annually, that from the date of possession the profits of the mortgaged property were to be appropriated in lieu of interest, and that if the mortgagee wanted to recover his money he would be entitled to do so at any time after giving a month's notice to the mortgagor, but the mortgagor would not be entitled to redeem the mortgage for a period of 60 years from the date of the recovery of possession by the mortgagee of the mortgaged property. The allegations of the plaintiff were that he did not receive anything more than Rs. 1,451-5 out of the consideration specified in the mortgage of the 14th November 1895, and Rs. 9/8 out of the consideration specified in the deed of further charge dated the 5th June 1896, and that the mortgagee, taking undue advantage of the fact that he was an old banker (*Mahajan*) of the plaintiff and that the plaintiff was hard of hearing, fraudulently got unreasonable and unconscionable conditions entered in the mortgage deed and got sixty (*sath*) years entered instead of seven (*sat*) years as the period for which redemption was to be postponed from the date of the recovery of possession. The suit was filed on the 31st May 1912, and it is admitted by the parties that till that date the mortgagee had not paid the sum of Rs. 2,131 left with him for payment of the prior mortgage and deed of further charge due to him and Balwant Singh, or recovered possession over any portion of the mortgaged property. It is in fact conceded that a suit for redemption of the said mortgage and the deed of further charge was then pending on behalf of the heirs of Shankar Singh, who had died meanwhile, against Balwant Singh, the co-mortgagee, for possession of a two and a half *biswas* share comprised in the mortgage and deed of further charge, held by Sankar Singh and Balwant Singh jointly, and that the money due on the said mortgage and deed of further charge was not paid to Balwant Singh till the 16th May 1912.

The main defence, so far as it is material

for the purposes of this appeal, was that the plaintiff had received the full amount of consideration specified in the deeds of mortgage and further charge, that the allegations of fraud and undue influence were incorrect, and that the suit for redemption was premature and not maintainable. The pleas of fraud and undue influence were given up during the hearing of the suit in the Court below. The learned Subordinate Judge found on the other issues that the plaintiff had failed to prove that he had not received the consideration money specified in the deeds of mortgage and further charge, that the covenant, postponing redemption for a period of 60 years from the date of the recovery of possession, operated as an unreasonable fetter on the equity of redemption and was not enforceable. He gave a decree accordingly for redemption of the mortgage and deed of further charge in question on payment of Rs. 10,777-7-0 to the mortgagee. Defendants Nos. 1, 2 and 3 who are the heirs of Shankar Singh have appealed from that decree, contending that the plaintiff was not entitled to a decree for redemption and that the amount of mortgage money awarded by the Court below was inadequate. The plaintiff has filed cross-objections, impugning the finding of the Court below in regard to the payment of the disputed consideration money and the amount adjudged as payable to the mortgagee.

In view of the onerous and one-sided conditions contained in the mortgage deed, the effect of which is to permit the mortgagee to call in his money at any time he likes and to postpone redemption till the expiry of 60 years from the date of the recovery of possession, we agree with the learned Subordinate Judge that the covenant postponing redemption was an unreasonable fetter on the equity of redemption. As a general rule the right of foreclosure and the right of redemption should be co-extensive, and every agreement by which the right of redemption is fettered for the benefit of the mortgagee without any corresponding advantage to the mortgagor must be examined with close scrutiny. The mortgage deed in this case provided for the conversion of a simple into a usufructuary mortgage on payment of the money left with the mortgagee on account of certain prior incumbrances when they fell due, thereby securing to the mortgagee the fullest possible opportunity of realizing his interest from the profits. Yet it allowed the mortgagee to call in his money at any moment he liked giving a month's notice to the mortgagor and restrained the mortgagor from seeking redemption before the expiry of 60 years from the date of possession and further burdened him with an obligation to pay the arrears of rent and *takavi* which may be then due by the tenants and the costs of wells constructed, partition obtained or suits instituted by the mortgagee for any purpose whatsoever in augmentation of the principal and interest due on the mortgage. If a mortgagee constructs wells, obtains partition or files suits against tenants for arrears of rent, enhancement or ejectment, he does so evidently for his immediate benefit, or in other words, to increase his profits from the mortgaged property. It would be unreasonable under the circumstances to allow him to enjoy the benefit of the increased profits for an unduly long period and also to recover the money spent in making improvements from the mortgagor at the time of redemption. Section 72 of the Transfer of Property Act defines the purposes for which a mortgagee in possession may spend money and add it with interest thereon to the principal sum secured by the mortgage. The covenants contained in the mortgage deed thus enable the mortgagee by heavy outlays on improvements to prevent redemption for a much longer period than 60 years. The principle laid down in *Sayad Abdul Hak Sardar Dilor Jung Bahadur* v. *Ghulam Jilani* (1) and *Sari* v. *Motiram Mahadu* (2), which was followed by this Court in *Durga Singh* v. *Nawab Mirza Muhammad Rasa Husain Khan* (3), applies to this case and the plaintiff is entitled to redeem the mortgage irrespective of the fetter which the mortgage deed seeks to impose.

The term of 60 years provided for redemption does not moreover begin till the mortgagee succeeds in obtaining possession from the prior mortgagees of the mort-

(1) 20 B. 677
(2) 22 B. 375.
(3) 25 Ind. Cas 912; 17 O. C. 313.

gaged property. The suit was filed before the mortgagee had succeeded in obtaining possession, or in other words, before the term of 60 years had begun to operate and it cannot therefore in either view of the case be regarded as premature.

The finding of the Court below as to the amount of the mortgage money payable by the mortgagor does not, however, appear to be satisfactory. The learned Subordinate Judge rightly held that the onus of proving want of consideration lay on the plaintiff. But in view of his subsequent findings the onus does not appear to lie on him as heavily, as the learned Subordinate Judge supposed, for he found from the impression made and the conduct of the plaintiff in the witness-box that the plaintiff was a man of weak intellect and hard of hearing, and that he had played the part of an irresponsible puppet in the hands of the mortgagee in this transaction. The learned Subordinate Judge further found that the plaintiff was not even capable of deposing to the facts mentioned by him in his deposition and that they too had most probably been put into his mouth by some interested persons before he stepped into the witness-box. He was not even satisfied as to how the documents were obtained and the plaintiff made to set his hand on them. On these findings, it was obviously dangerous for the Court below to have accepted, as it would be unsafe for us to accept, the statements made by the defendants as to the payment of the consideration, unless corroborated by reliable evidence. The first item credited in the mortgage deed, dated the 14th November 1895, is a sum of Rs. 1,912-8-0 said to have been due on a book account. The account book containing this is a mere ledger, the first three pages of which purport to bear the plaintiff's accounts, authenticated by his alleged signatures. Those signatures were not shown to the plaintiff in the course of his examination, and if the evidence of Beche Lal, one of the attesting witnesses of the mortgage deed in suit, be true the entries were made in the account book, and the signature of Zalim Singh taken either at the time of execution of the mortgage deed or about a month or so prior to its execution. The plaintiff was at that time on bad terms with Balwant Singh and was evidently at the mercy of those who fed and supported him. Beche Lal says that Shankar Singh was feeding and supporting Zalim Singh, but whether the latter was being fed and supported from the income derived from his *sir* lands or from money borrowed from others, the evidence does not make clear. The accounts entered in the *lekha bahi* comprise various items of oral loans said to have been advanced between the 18th October 1894 and the 15th February 1896. But in the absence of corroborative evidence, apart from the alleged signatures of the plaintiff, the authenticity of which has been left undetermined, no reliance can be placed on the *lekha bahi*, inasmuch as it is not a regular account book, kept in the ordinary course of business from day to day. The other items of consideration mentioned in the mortgage deed in suit relate to monies said to have been left for payment to Chunni Lal and Sardar Singh on account of a promissory-note stated to have been due to the former and an unregistered bond held by the latter. But the promissory-note and the bond aforesaid have not been filed or otherwise proved by independent evidence. Chunni Lal is admittedly at present in the service of the defendants, and Sardar Singh was the father of defendant No. 2. The Court below did not definitely find whether any money was actually due by the plaintiff to Chunni Lal and Sardar Singh. It did not determine one way or the other whether the money entered as credited towards the *bahi* debt in the mortgage deed in suit and the deed of further charge dated the 5th June 1896, was actually due, and in view of the circumstances of the case, we do not consider ourselves justified in coming to a finding on the question of consideration without giving the contesting defendants an opportunity of establishing, by such evidence as they may possess, that the items credited in the deeds of mortgage and further charge or left with the mortgagee for payment to Chunni Lal and Sardar Singh, were actually due and that the entire consideration was paid in the manner described in the said deeds. We are not in any way relieving the plaintiff of the burden that lay on him of proving that he had not received the consideration. But we consider it desirable that we should have more definite

materials placed at our disposal either by the plaintiff or by the defendants, to enable us to determine whether the items of consideration entered in the deeds in suit are genuine. The award of interest by the learned Subordinate Judge on the profits of the *sir* plots which remained in the possession of the mortgagor, also seems to be questionable, for the defendants have already been allowed interest on the sum of Rs. 2,869 claimed to have been paid by the mortgagee from the date of the mortgage till the 16th May 1912. The mortgagee was either entitled to the profits of the mortgaged property, or if possession was wrongfully withheld from him to interest on the amount actually paid by him, but not to both. The mortgagor having failed to deliver possession over *sir* plots, the mortgagee was entitled to recover interest on the money paid by him till the date on which he recovered possession over the mortgaged property. The mortgagee rights held by Bhup Gir were assigned to Shankar Singh and Balwant Singh by a sale deed dated the 15th August 1881. The portion of the mortgage money due to Balwant Singh is stated to have been paid, but that due to Shankar Singh is stated to be still recoverable. The plaintiff, however, alleges that he had paid both the assignees, but the Court below has recorded no finding on the point.

Before determining the amount due to the mortgagee, we direct the Court below accordingly to take evidence on the following matters and report its findings to this Court within two months from this date.

1. Whether any money was due by the plaintiff to Shankar Singh on the book account, as entered in the deeds of mortgage and further charge in suit and, if so, how much ?

2. Whether any money was due to Chunni Lal and Sardar Singh by the plaintiff as described in the said deeds and whether Shankar Singh paid the same and, if so, when and how much ?

3. Whether a sum of Rs. 25-8-0 was paid to the plaintiff at the time of the execution of the mortgage deed in suit ?

4. What is the amount of the mortgage money payable by the plaintiff for the redemption of the deeds of mortgage and further charge in suit, taking into account the amounts admitted to have been received by the plaintiff or proved to have been paid by him ?

5. Whether the mortgage-money due to Bhup Gir was paid by the plaintiff and, if so, how much and when ?

Ten days from the date of the finding will be allowed to the parties for filing objections.

Issue remitted.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 28 OF 1913-14 OF BARA BANKI DISTRICT.

January 6, 1915.

Present:—Mr. Campbell, J. M.

MANSA DIN—DEFENDANT—APPELLANT

versus

THAKUR PRASAD—PLAINTIFF—RESPONDENT.

Oudh Rent Act (XXII of 1886), s. 107H—Muafi, heritable but not transferable—Transferee from muafidar, right of—Under-proprietary rights, non-accrual of.

A transferee from a *muafidar* who has only a heritable but not a transferable interest in the *muafi*, cannot claim under-proprietary rights under section 107H of the Oudh Rent Act.

Appeal from the decree of the Commissioner, Fyzabad, dated the 8th April 1914, upholding the order of the Deputy Commissioner, Bara Banki, dated the 14th July 1913, upholding that of the Assistant Collector, Bara Banki, dated the 12th May 1913.

Mr. *Sarju Prasad Misra*, for the Appellant.

Mr. *G. H. Thomas*, for the Respondent.

JUDGMENT.—The Commissioner has found, as a matter of fact, that Narbadapuri was dispossessed for a time between 1893 and 1896; and that he must, therefore, be holding under a new grant since that time; and that consequently he has not held rent-free continuously for fifty years. This finding of fact cannot be disputed in third appeal. Appellant then urges that the land was acquired by him, in perpetuity, by written instrument and for a valuable consideration, and that, therefore, he must, under section 107H, Oudh Rent Act, be held to be an under-proprietor,

The flaw in this argument, however, is that appellant, who professes to have purchased Narbadapuri's rights from Ajudhia Prasad, who purchased them at auction sale, cannot have a better title than his predecessors-in-title. At Settlement, in the *wajib-ul-arz*, it is distinctly recorded that the *muafidar* had a heritable, but not a transferable, interest in the *muafi*: and there is absolutely nothing to show that this condition has ever since been amended.

Ajudhia Prasad and appellant, therefore, purchased what Narbadapuri had not the right to sell. They have not, therefore, acquired a right under section 107H, Oudh Rent Act.

I, therefore, uphold the Commissioner's order and dismiss the appeal with costs.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 6 OF 1912-13 OF UNAO DISTRICT.

April 19, 1914.

Present:—Sir Duncan Colvin Baillie, S. M., and Mr. Tweedy J. M.

Nawab SULTAN HUSAIN KHAN—APPELLANT

versus

SEWAK SINGH—RESPONDENT.

Mortgage before 1st January 1902, effect of, upon sir—*Sir, when ceases to be so—Ex-proprietary rights, how surrendered and extinguished—Abandonment, actual—Limitation for claim of ex-proprietary rights—Oudh Rent Act (XXII of 1886), s. 7A.*

A mortgage with or without possession before 1st January 1902 has no effect whatsoever upon *sir*, so that a *sir* thus mortgaged does not cease to be so.

A holder of *sir* when his proprietary rights are transferred cannot surrender his ex-proprietary rights except by actual abandonment.

If a *sir*-holder fails to take up his ex-proprietary rights, in Agra within six months, and in Oudh within a year, after their accrual, they are extinguished.

Appeal from the decree of the Commissioner, Lucknow, dated the 26th May 1913.

Mr. *J. Jackson*, for the Appellant.

Babu *Pertab Chandra Gupta*, for the Respondent.

JUDGMENT.

TWEEDY, J. M.—This is a third appeal under section 36 of Act III. The admitted facts are that the father of the respondent gave a usufructuary mortgage of his *sir* in 1871 and the mortgagee remained in possession until 1907, when he obtained a decree for foreclosure and the property was sold. The sale was ultimately confirmed in December 1910. No application for mutation seems to have been made by the purchaser for some time, and it was not until April 1912 that the Tahsildar instituted a case under section 36 and the respondent then claimed occupancy rights. It is important to note that until the Tahsildar called the attention of the respondent to the fact that ex-proprietary rights had arisen he made no attempt to claim them.

The first Court held that the claim was time-barred as the rights were created in December 1910 and no attempt was made to take them up until April 1912, while the respondent admits that he has been out of possession of the *sir* since 1871. In first appeal the Deputy Commissioner upheld the finding of the Deputy Collector but apparently on totally different grounds. He held that the land ceased to be *sir* when it was transferred by mortgage in 1871. This view is clearly wrong, and it has been repeatedly held by the Board that a mortgage with or without possession before 1st January 1902 has no effect whatever upon *sir*. In second appeal the Commissioner cancelled the erroneous view of the Deputy Commissioner, but found that the Court of first instance was wrong in holding that the claim was time-barred as it was made not under section 7A of the Rent Act, but under section 36 of Act III. This is a mistaken idea as no rights arise under section 36, which is purely mandatory. It prescribes the procedure which the Revenue Authorities must adopt when occupancy rights have been created in Agra under section 10 of Act II and in Oudh under section 7A of the Rent Act. It is perhaps misleading as it is couched in too general terms, and directs the Collector when rights of occupancy have been created to mark off the area in which such rights exist, and to fix the rent. It omits to state that,

the Collector during the course of the inquiry must ascertain not only that the rights arose, but are still alive. It is settled law that a holder of *sir* when his proprietary rights are transferred cannot surrender his ex-proprietary rights except by actual abandonment. In Agra if he fails to take them up within six months they are extinguished, and in Oudh section 129 bars their recovery after a year has elapsed. The unpublished ruling of the Board quoted by the Commissioner does not touch this point at all. It is clear then that section 36 must be read along with section 129 and that in the present instance as the rights arose in December 1910 and were not claimed until April 1912, they were dead and gone when the case under section 36 was instituted. There can be no reasonable doubt that the respondent had no intention of claiming these rights until the Tahsildar put the plea for their existence into his mouth.

I would decree the appeal with costs and reversing the decision of both the lower Appellate Courts would restore the finding of the Assistant Collector.

BAILLIE, S. M.—I concur.

Appeal allowed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 3 OF 1913-14 OF GONDA DISTRICT.

April 18, 1914.

Present:—Sir Duncan Colvin Baillie, S. M.

TRIBHUWAN DAT AND OTHERS—DEFENDANTS—APPELLANTS

versus

BALAK RAM MISRA—PLAINTIFF—RESPONDENT.

Review by subordinate Revenue Courts in Oudh, power of—Board and other Revenue Courts, powers of review of, difference between—Oudh Rent Act (XXII of 1886), s. 120A—Decree, when considered as nullity—Fraud of party to case, effect of.

Every Revenue Court in Oudh has the power of review—the Courts subordinate to the Board having only a limited power in that respect, as provided by section 114 and Order XLVII, Civil Procedure Code, while the Board having a special and wider power as provided by section 120A of the Oudh Rent Act.

A decree which is based on and solely due to fraud by a party can be held to be a nullity, even though it cannot be said to have the effect of preventing an opposite party from placing his case properly before the Court.

Bansi Lal v. *Dhapo*, 24 A. 242, A. W. N. (1902) 38; *Barkat-un-nissa* v. *Fasal Haq*, 26 A. 272, A. W. N. (1904) 25; *Lakshmi Churan Shaha* v. *Nur Ali*, 11 Ind. Cas 626; 15 C. W. N. 1010; 38 C. 936; *Mahomed Gulab* v. *Mahomed Sulliman*, 21 C. 612 and *Mohesh Chandra Bose* v. *Radha Kishen Bhattacharjee*, 12 C. W. N. 28; 6 C. L. J. 580, considered.

Appeal from the decree of the Commissioner, Fyzabad, dated the 23rd July 1913.

Babu *Aditya Prasad*, for the Appellants.

Babu *Lachhman Prasad*, for the Respondent.

JUDGMENT.—Although I have made up my mind that the Commissioner's finding of fact that no fraud has been proved, cannot be disturbed in this second appeal, there are several features connected with this case which make it desirable to remark on the proceedings which have taken place at some length.

Appellant had issued a notice of ejectment against the respondent. The latter contested the notice on the ground that he had ex-proprietary rights and produced a sale-statement dated dated 21st July 1885. This, as it stood, showed that ex-proprietary rights had been reserved in favour of respondent's father in the whole of certain *sir* lands which were then being sold by auction. The result was that a decree was given in respondent's favour cancelling the notice and upheld on appeal by the Commissioner. An application for review was subsequently presented in the Commissioner's Court, in which it was alleged that the copy of sale-statement filed by the respondent was incomplete and that endorsements on the back of the sale-statement showed that the order reserving ex-proprietary rights in the entire area had been withdrawn and rights reserved only in an area of 1 *bigha* 10 *biswas* 10 *dhurs*. The Commissioner recorded that the correct copy then submitted made it clear that the decree was wrong and that appellant had not got ex-proprietary rights in the entire area in

question but only in one number. He held, however, that he was not under the law in Oudh entitled to review his judgment under section 114 and Order XLVII of the Civil Procedure Code. The line of argument taken was as follows.

The Civil Procedure Code applies in Oudh where not inconsistent with the Rent Act. Section 120A of the Rent Act provides power of review for the Board of Revenue, but there are no sections providing for review by other Courts. The Rent Act, therefore, did not contemplate review by other Courts and the Civil Procedure Code in this matter must, therefore, be considered to be inconsistent.

It appears to me clear that this argument is entirely fallacious. The power of review given to the Board by section 120A is of a special character and very much wider than the power given to Courts in general by the Civil Procedure Code. To confer this power a special section was necessary. No special section was necessary to give Courts the powers contemplated by the Civil Procedure Code. There is, in my opinion, no inconsistency between the provisions of the Rent Act and the exercise of powers of review by Revenue Courts in Oudh. The matter is made to my mind absolutely clear when it is considered that section 120A was inserted by Act XX of 1890. If the line of argument taken by the Commissioner is accepted, Revenue Courts in Oudh had powers of review till Act XX of 1890 was passed. There was certainly up to that date nothing to suggest that they had no such powers. Is it possible to conceive that the Legislature then by adding the section giving special powers of review to the Board intended to take away the powers of review enjoyed by other Courts and did not in any way express its intention in so many words. There appears to be no doubt whatsoever that Revenue Courts in Oudh have the power of review allowed to Civil Courts. It would be impossible to conceive they are not being given such powers and being unable to correct any error however obvious in a judgment recorded by them.

This matter does not, however, affect the case before us. Review was refused and the order giving respondent ex-proprietary rights in all the land sold was maintained. In the present case it was maintained that the previous decree was a nullity because it had been obtained by the fraud of the respondent. The Court of first instance accepted this view, thereby giving respondent only the land which he was in fact entitled to. The question whether any decision obtained by means of fraud could be treated as a nullity was argued at some length before me. For appellant, I have been referred to *Bansi Lal* v. *Dhapo* (1), *Barkat-un-nissa* v. *Fazal Haq* (2) and *Lakshmi Charan Saha* v. *Nur Ali* (3). For respondent it was urged that the fraud which made a judgment a nullity must be such as to prevent an opposite party from placing his case properly before the Court and *Mahomed Gulab* v. *Mahomed Sulliman* (4) and *Mohesh Chandra Bose* v. *Radha Kishen Bhattacharjee* (5) were cited in support. Having considered all the rulings referred to, there appears to me to be no doubt that a decree which is based on and solely due to fraud by a party can be held to be a nullity, even though it cannot be said to have the effect of preventing an opposite party from placing his case properly before the Court.

The ground, however, on which the Commissioner decided was that fraud by the respondent had not been proved. It is certain that respondent's father was well aware that ex-proprietary rights had been retained only in a limited area. It is extremely unlikely that respondent himself in examining the file regarding the sale case and obtaining a copy of sale-statement did not become aware that the sale-statement really restricted the area of ex-proprietary land, but I am not prepared to say that the Commissioner's finding is untenable, more specially because the ex-proprietary lands and the lands held without such rights have been included in a single holding in the *patwari's* papers and the difference between the two tenures therefore obliterated. It is within the bounds of possibility that respondent did not know that the copy he produced was incomplete, and

(1) 24 A. 242; A. W. N. (1902) 38.
(2) 26 A. 272; A. W. N (1904) 25.
(3) 11 Ind. Cas. 626; 15 C. W. N. 1010; 38 C. 936.
(4) 21 C. 612.
(5) 12 C. W. N. 28; 6 C. L. J. 580.

on this ground I decline in second appeal to interfere with the Commissioner's decision.

The appeal is, therefore, dismissed, but in view of the fact that respondent got the land to which he is clearly not entitled, I pass no orders as to costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2432 OF 1913.

November 16, 1914.

Present:—Mr. Justice Shah Din.

BABU LAL—DECREE-HOLDER—APPELLANT

versus

CHANDA—JUDGMENT-DEBTOR—RESPONDENT.

Second Appeal—Finality of order passed on appeal by judgment-debtor against order refusing to set aside auction-sale of his immoveable property to decree-holder—Civil Procedure Code (Act V of 1908), ss. 2, 47, 104, O. XXI, rr. 90, 92, O. XLIII, r. 1 (j)—Revision—Punjab Courts (Amendment) Act (IV of 1912), s. 70—Punjab Courts Act (III of 1914), s. 44.

An order of the Appellate Court in appeal by the judgment-debtor, under rule (1) *(j)* of Order XLIII of the Code of Civil Procedure, 1908, against the order of the Court executing the decree refusing, under rule 92 of Order XXI, to set aside, on his application under rule 90 of the said Order, the auction-sale of his immoveable property to the decree-holder, is not a decree within the meaning of sections 2 and 47 of the said Code, and consequently, under the force of sub-section (2) of section 104 of the Code, no second appeal lies therefrom to the Chief Court.

The Chief Court is not bound to interfere on revision with an order which is not so unjust or so perverse that it should not be allowed to stand.

Second appeal from the order of the District Judge, Delhi, dated the 1st October 1913, accepting the application for review of his own order, dated the 30th June 1913, and holding that the sale is invalid, thus reversing the order of the Munsif, 1st class, Delhi, dated the 19th March 1913, who sanctioned the sale.

Lala *Madan Gopal*, for the Appellant.

Bukhshi *Tek Chand*, for the Respondent.

JUDGMENT.—The Pleader for the respondent urges as a preliminary objection that no appeal lies to this Court in this case. The material facts are these. On the 8th February, 1913, the respondent's property was sold in execution of a decree which the appellant had obtained against him. On the 12th February he (the respondent) made an application to the executing Court, that of a Munsif, 1st class, Delhi, under Order XXI, rule 90, of the Civil Procedure Code, praying that the auction-sale be set aside on the ground of a material irregularity in publishing it, the result of the alleged irregularity, according to the respondent, being that his property, which was said to have been of the value of about Rs. 2,000, was sold to the decree-holder himself for Rs. 140. The Munsif disallowed the application on the 17th March, holding that no material irregularity had taken place in respect of the auction-sale in question; and he confirmed the sale on the same date. From the order of the Munsif, which was one passed under rule 92 of Order XXI, Civil Procedure Code, the respondent preferred an appeal to the District Judge; the District Judge agreed with the Munsif that no material irregularity in the conduct of the sale had been proved and he dismissed the appeal on the 30th June 1913. On the 23rd July the respondent made an application for review of the order of the District Judge, dated the 30th June, urging *inter alia* that the auction-sale was invalid under Order XXXIV, rule 14, Civil Procedure Code, because the decree-holder (the present appellant) was mortgagee of the property sold in execution of his decree and the decree was for the payment of money in satisfaction of a claim arising under the mortgage. The District Judge accepted the application for review and holding that the auction-sale was invalid, set it aside. This order is dated the 1st October 1913.

The decree-holder has preferred an appeal to this Court from the last-mentioned order under section 40 of the Punjab Courts Act, as it stood before its amendment by Act III of 1914, the order in question being treated by him as a decree. The respondent's Pleader urges by way of a preliminary objection that the order appealed from is not a "decree" within the meaning of sub-section (2) of section 2, Civil Procedure Code, but is an order not amounting to a decree, inasmuch as it has been passed by the District Judge upon an appeal preferred to him under Order XLIII, rule 1 (*j*), from the order of the Munsif under rule 92 of Order XXI of the Code refusing to set aside

the auction-sale. It is contended that the District Judge having passed his order on an appeal properly filed in his Court under clause (*j*) of rule 1 of Order XLIII, read with section 104 of the Code, under sub-section (2) of the said section 104 no further or second appeal is competent to this Court from the order passed by the District Judge, it being perfectly immaterial for purposes of the competency of the appeal whether or not the grounds upon which the District Judge's order was based are covered by rule 90 of Order XXI of the Code. To this argument the reply of the appellant's Pleader is two-fold. In the first place, he says that an appeal lies from the District Judge's order under rule 7, Order XLVII, Civil Procedure Code, inasmuch as there was no sufficient reason for granting the review within the meaning of the rule, read with rule 4 (2) of Order XLVII and, therefore, the application for review, which was in contravention of the provisions of rule 4, should not have been granted. In the second place, he urges that the order of the District Judge falls within section 47 of the Code and is tantamount to a "decree" and not an order, within the the meaning of section 2, sub-section (2), of the Code, the decision of the District Judge not being an adjudication from which an appeal lies as an appeal from an order. In my opinion the first contention of the appellant's Pleader has no force. The respondent's application for review in the District Judge's Court did not contravene the provisions of rule 4 of Order XLVII, Civil Procedure Code, the provisions referred to in rule 7 (1) (*b*) being those contained in the proviso to rule 4 (2) and having no connection whatever with rule 1 of Order XLVII. The argument that the said rule 1, must be read, by necessary implication, into rule 4, sub-rule (2) is, in my opinion, unsound, and I must reject it; and it, therefore, follows that the application for review which the respondent had made to the District Judge did not contravene the provision of rule 4 of Order XLVII of the Code, and that no appeal lies to this Court from the order of the District Judge under rule 7.

The second contention of the appellant's pleader is, in my opinion, equally untenable. It is clear that the respondent made his application in the Munsif's Court under rule 90 of Order XXI of the Code, and the Munsif disallowed it under rule 92 of the said order. That order clearly was not a "decree" within the meaning of section 2, sub-section (2), of the Code, inasmuch as an appeal lay from that order under section 104, sub-section (1), read with Order XLIII (1) (*j*). An appeal was accordingly preferred from the said order as an order by the respondent to the District Judge, and the District Judge heard the appeal as an appeal from an order; and although he at first dismissed the appeal, he afterwards accepted an application for review of his own order and accepting the appeal held that the auction-sale was invalid and set it aside. To this order of the District Judge, on whatever grounds it was based, sub-section (2) of section 104 of the Code applies with full force, the words of the section being: "No appeal shall lie from *any order passed in appeal* under this section." The expression "any order" is wide enough to include an order of the kind passed by the District Judge on the 1st October 1913, and with reference to the facts of this particular case, it means the order setting aside the auction-sale—the grounds upon which the order is based being a matter of no importance as regards the application of the said sub-section (2) of section 104. In my opinion it would be anamolous to hold that, although the order of the Munsif, which was one admittedly passed under rule 92 of Order XLI, was an "order" not amounting to a decree and was, therefore, appealable as an order to the District Judge under section 104 (1) read with Order XLIII (1) of the Code, the order of the District Judge passed in appeal was a "decree" within the meaning of section 47 read with section 2, sub-section (2), of the Code, and was appealable to this Court, notwithstanding the express provisions of sub-section (2) of section 104. In my opinion the order of the District Judge is covered by the terms of the said sub-section (2) of section 104 and no appeal lies from it.

For the reasons given, my conclusion is that no appeal lies to this Court from the order of the District Judge, dated the 1st October 1913. Next, the decree-holder's

CARL FORSTMANN v. H. T. S. FORREST.

Pleader prays that the memorandum of appeal may be treated as a petition for revision under section 70 of the Old Punjab Courts Act, or under section 44 of the new Act, because the District Judge has acted with material irregularity in setting aside the auction-sale upon a ground not covered by rule 90 of Order XXI, Civil Procedure Code, and not urged by the respondent in his first application, dated the 12th February 1913. As I am not convinced that the order passed by the District Judge is so unjust or so perverse that it should not be allowed to stand, I am not prepared to interfere with it on the revision side. I accordingly dismiss the appeal. In the peculiar circumstances of the case, I leave the parties to pay their own costs in this Court.

Appeal dismissed.

CALCUTTA HIGH COURT.

FIRST CIVIL APPEAL No. 401 OF 1912.

May 19, 1914.

Present:—Mr. Justice Holmwood and Mr. Justice Chapman.

CARL FORSTMANN, PROPRIETOR, BEECHWOOD ESTATE, DARJEELING—PLAINTIFF—APPELLANT

versus

H. T. S. FORREST—DEFENDANT—RESPONDENT.

Malicious prosecution—Plaintiff accused of theft of electricity and acquitted—Dishonest conduct—Suit for damages—Liability of defendant, when arises—Malice in law—"Mains," use of, effect of—"Dishonestly" in s. 39, Electricity Act, meaning of—Electricity Act (III of 1903), s. 39—Penal Code (Act XLV of 1860), s. 379.

The plaintiff made certain alterations in the electric wires on his estate, which had the result of conducting the current directly from wires conveying the current supplied by the Municipality without passing through the meter supplied for the purpose of measuring the amount of energy consumed on his estate. The Chairman of the Municipality charged him for theft of electricity under section 39 (5) of the Electricity Act, but he was acquitted of all charges. He then sued the Chairman of the Municipality for damages for malicious prosecution:

Held, that the plaintiff may have been honestly mistaken in his views of law, but he cannot as a reasonable man have been ignorant of the fact that his alteration of the wires would cause wrongful loss to the Municipality and that on the principle that a man's intention should be held to be the reasonable and probable consequence of his acts, his conduct was dishonest within the meaning of the Indian Penal Code;

Held, further, that as the defendant had reasonable and probable cause for directing the prosecution of the plaintiff, there was no malice in law in his conduct and he was not liable for damages.

The use of the word "mains" for the words "any electric supply-line through which energy is supplied by the licensees" in section 39 of the Electricity Act in a notice issued by a Municipality Engineer to an accused, would operate as an admission against the Municipality and would be a good defence to a criminal charge under section 379, Indian Penal Code.

Where the word 'mains" is qualified by such words as "outside your meter," the accused gets full notice that he must not take current except through the meter.

The word "dishonestly" as used in section 39 of the Electricity Act is a legal expression having the same sense as that in which it is used in the Penal Code

Appeal against the decree of the District Judge, Dinajpur, dated the 28th June 1912.

FACTS.—The plaintiff is the owner of the Beechwood Estate, including the building called the Rink, at Darjeeling; and the defendant was the Deputy Commissioner of Darjeeling as well as the Chairman of the Municipality when the cause of action arose.

On the 7th June 1910 the Municipal Engineer submitted a report to the defendant as Chairman from the Assistant Electrician to the effect that he had discovered that the plaintiff had made certain alterations in the electric wires on his estate, which had the result of conducting the current directly into the Rink from wires conveying the current supplied by the Municipality without passing through the meter supplied for the purpose of measuring the amount of energy consumed on the Beechwood Estate, the consequence being that electricity could be used in the Rink without the Municipality having any means of checking the amount consumed. The report further stated that, as a matter of fact, electric light had been used in the Rink on the night of the 4th June and that the amount consumed on the occasion had necessarily not been recorded, there being no meter to do so.

The Engineer added this note on the report: "Chairman, this amounts to a charge of dishonestly abstracting energy and under section 29 of the Indian Electricity Act, this is deemed to be theft within the meaning of the Indian Penal Code."

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The defendant as Chairman then saw the Engineer personally and having, from his explanations, grasped the situation, recorded this order on the report, 'Assistant Electrician to lay a First Information under section 379, Indian Penal Code, at the *Sadar Thana*—H. F. Ch. 7-6.'

This was done and on the 10th June the plaintiff was put under arrest by Inspector Daly, who took him to the *katchery* before a Magistrate where he was admitted to bail. The plaintiff was then tried on charges of theft of electricity on two occassions *viz.*, the 2nd and the 4th June, and under section 39 (5) of the Indian Electricity Act, but was finally acquitted of all the charges on the 18th July 1910. Upon this the plaintiff sued the defendant for damages for malicious prosecution on 20th February 1911.

Dr. *Rash Behary Ghose* and Mr. *G. Sircar*, for the Appellant.

Mr. *S. R Das*, Counsel, and Babu *Ram Charn Mitra*, for the Respondent.

JUDGMENT.—This is an appeal from the judgment and decree of the learned District Judge of Darjeeling dismissing the plaintiff's suit for damages for malicious prosecution. The learned Judge in a long and a very careful judgment has set out all the facts alleged and proved on both sides, and we need not recapitulate them here.

The plaintiff is a foreigner and seems to have exaggerated ideas of his own capacity as a lawyer. But we are unable to find that he has been able to establish any case that the defendant acted without reasonable and probable cause in directing his prosecution under section 39 of the Indian Electricity Act read with section 379, Indian Penal Code. Mr. Forstmann may have been honestly mistaken in his views of the law, but he cannot as a reasonable man have been ignorant of the fact that his alteration of the wires would cause wrongful loss to the Municipality and on the principle that a man's intention must be held to be the reasonable and probable consequence of his acts, his conduct was therefore dishonest within the meaning of the Indian Penal Code. It would, therefore, fall within the purview of section 379, Indian Penal Code, read with the connected sections of the Electricity Act. The only indignity to which Mr. Forstmann was put in consequence of his misconduct in helping himself, as the learned Judge puts it, to what did not belong to him was the unfortunate arrest by Inspector Daly and the parading of Mr. Forstmann through the streets of Darjeeling in Police custody. This, however, though a matter for which we think the head of the Police might well have expressed regret afterwards was, not an illegal act. That at most was an indiscretion on the part of the Inspector, Mr. Daly, no responsibility for which has been traced to anybody else, far less to the defendant; for we do not think that we can accept the statement which Mr. Forstmann says the Inspector Mr. Daly made to him to excuse his own conduct, namely, that the arrest was by order of Mr. Forrest. There is no evidence that Mr. Daly had any authority for making this statement or that in fact it had any foundation. Mr. Forrest was bound on the facts reported to him to hold that Mr. Forstmann had been dishonestly taking the Municipal supply of electricity without making any provision for paying for it; and as a matter of fact the Municipality did suffer loss which could not, owing to the plaintiff's conduct, be ascertained, and Mr. Forrest, therefore, had a reasonable and probable cause for his action. There was, therefore, no malice in law in Mr. Forrest's proved conduct. The plaintiff may have had his own private reasons for supposing hostility. But nothing has been averred or proved against Mr. Forrest which would indicate malice in fact, and indeed malice in fact is irrelevant in a case of this nature.

It is contended that Mr. Forstmann made a *bona fide* mistake of fact with reference to the meaning of the word 'mains' and was justified in making connection with the supply line, which he had originally laid himself but which was then outside his meter and used by the Municipality as the supply line for his premises. As a matter of fact the Engineer made a mistake in his letter Exhibit 6 in using the expression 'mains' instead of the words used in the law in section 39, 'any electric supply line through which energy is supplied by the licensees'. It might be that the misuse of the word 'mains' would

operate as an admission against the Municipality and would be a good defence to a criminal charge under section 379, Indian Penal Code. But the qualification of the word 'mains' by the words 'outside your meter' gave the plaintiff full notice that he must not take current, except through the meter which would show the consumption for which payment had to be made.

As regards the argument that Mr. Forstmann's conduct was not dishonest in intention, using dishonesty in its everyday sense, it is only necessary to say that the word 'dishonestly' as used in section 39 is a legal expression having the same sense as that in which it is used in the Penal Code. While, therefore, the Criminal Court which heard the case might well have exercised its discretion in recording any conviction which was necessary under clause (5) of the section, which directly applied, rather than under clause (1) which involves the stigma of theft, there is no doubt that the prosecuting authority was bound to lay its charge strictly according to the letter of the law. As a matter of fact for reasons which do not commend themselves to us, the Magistrate gave the plaintiff the benefit of the doubt and acquitted him altogether. The learned Magistrate appears to have fallen into the same errors of law as the plaintiff himself. But the fortunate result to Mr. Forstmann, so far from inducing him to enter upon this retaliatory litigation, should have taught him the advisability of meddling no further with law.

We are unable to find either in law or in fact that the plaintiff can maintain any action for malicious prosecution, and the appeal is, therefore, dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 679 OF 1913.

November 5, 1914.

Present:—Mr. Justice Shah Din.

KARM ILAHI—DEFENDANT—PETITIONER

versus

NUR MAHI—PLAINTIFF—RESPONDENT.

Revision—Finding of fact without fully considering evidence of parties—Punjab Courts Act (III of 1914), s. 44.

A finding of fact arrived at by an Appellate Court without fully considering and discussing the evidence of the parties is liable to be set aside in revision under section 44 of the Punjab Courts Act III of 1914.

Petition, under section 70 of Act IV of 1912, for revision of the order of the District Judge, Sialkot, dated the 26th February 1913, reversing that of the Munsif, First Class, Sialkot, dated the 21st December 1912, dismissing plaintiff's claim.

Mr. *Nand Lal*, for the Petitioner.

Lalas *Moti Lal* and *Dharm Das Suri*, for the Respondent.

JUDGMENT.—The facts are stated in the judgments of the Courts below. The Honorary Civil Judge dismissed the plaintiff's suit, holding that it was not proved that the goods, of which the price was claimed by the plaintiff, had been actually delivered to the defendant, although the latter had ordered the goods as evidenced by the entry made by him in the plaintiff's book. On appeal the Subordinate Judge held that the plaintiff's claim was clearly proved, because the defendant had ordered the goods, the goods were consigned to the defendant by rail, the defendant had refused to accept the Railway receipt, and he had made contradictory statements in Court when questioned as to whether the order in the plaintiff's book regarding the goods in question was in his handwriting or not.

The Honorary Civil Judge discussed in some detail the evidence of the parties as to the alleged delivery of the goods to the defendants; while, on the other hand, the Subordinate Judge has altogether omitted to consider that evidence and has contented himself with remarking that the evidence in support of the plaintiff's claim is sufficient and the claim has been clearly proved. It is admitted before me that the goods were not consigned by the plaintiff direct to the defendant's address, but that in the

railway receipt plaintiff himself was entered as consignee, the receipt being endorsed in favour of the defendant. The receipt was sent per value payable post to the defendant, but he refused to accept it. The goods were then received from the Railway by the plaintiff's son; and it is alleged that he took the goods to the defendant's shop and delivered them to the latter. There is only oral evidence in support of this allegation, and the Honorary Civil Judge has given certain reasons for holding that evidence as unreliable. The Subordinate Judge does not discuss that evidence at all, and holds it to be reliable, simply on the ground that the defendant's statement regarding the order in the plaintiff's book is not straightforward and, therefore, no reliance can be placed on his word. This is not a sufficient ground for decreeing the plaintiff's claim, and the Subordinate Judge should have fully considered the evidence of the parties as to the alleged delivery or non-delivery of the goods in question and then come to a decision in the case.

I set aside the order of the Subordinate Judge and send the case back to him for re-decision. The costs will abide the event.

Case remanded.

BOMBAY HIGH COURT.

CIVIL APPEAL No. 12 OF 1912.

February 25, 1914.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Batchelor.

DAGON—DEFENDANT—APPELLANT

versus

SAKHARAM—PLAINTIFF—RESPONDENT.

Mortgage—Raxinama *by mortgagor and complementary* kabuliat *by mortgagee—Equity of redemption, transfer of.*

A *razinama* executed by a mortgagor in favour of his mortgagee relinquishing occupancy rights in the mortgaged land and the complementary *kabuliat* given by the mortgagee operate to transfer the equity of redemption from the mortgagor to the mortgagee.

JUDGMENT.—In this case we have no doubt that the *razinama* and the *kabuliat* (assuming that we cannot look at the document Exhibit 37, which was contemporaneous with them) operate to transfer the equity of redemption to the mortgagee, in whose favour the Court had found that a sum of money was payable by the mortgagor. The case is not distinguishable from *Tarachand Pirchand* v. *Lakshman Bhawani* (1) and *Vishnu Sakharam Phatak* v. *Kashinath Bapu Shankar* (2). The words are apt to declare the relinquishment of all the rights of the mortgagor in favour of the mortgagee, and the transaction was such as was contemplated by the terms of the old section 74 of the Land Revenue Code. We reverse the order of the lower Appellate Court and restore the decree of the original Court with costs throughout upon the plaintiff.

Appeal allowed.

(1) 1 B. 91.
(2) 11 B. 174.

PUNJAB CHIEF COURT.

CIVIL MISCELLANEOUS APPEAL No. 1011 OF 1914.

January 27, 1915.

Present:—Mr. Justice Shadi Lal.

HANS RAJ BHANDARI—DEFENDANT—APPELLANT

versus

THE LIQUIDATOR OF THE LAHORE BANK, LTD., IN LIQUIDATION—PLAINTIFF—RESPONDENT.

Companies Act (VI of 1882), s. 214—Liability of Director, grounds of—Onus—Position of Director.

Section 214 of the Companies Act applies to the conduct of a Director *as such*, and anything done by him during the period of his directorship in his capacity *as a debtor* cannot be made a ground of liability under the section.

The onus is on the applicant to prove the facts which bring the case within the section.

Cavendish Bentinck v. *Fenn*, 12 A. C. 652 at p. 661; 57 L. J. Ch. 552; 57 L. T. 773; 36 W. R. 641, followed.

A Director is not a trustee of the loans advanced by a Company before his acceptance of office as such.

Forest of Dean Coal Mining Co., In re, 10 Ch. D. 450; 40 L. T. 287; 27 W. R. 594, followed.

Where in an application under section 214 of the Companies Act the Liquidator sought to establish the liability of an ex-Director on the ground that he did not, at the time of his appointment as Director, disclose his indebtedness to the Company:

Held, that it was the duty of the applicant to satisfy the Court that loss or damage resulted to the Company from the alleged non-disclosure by the ex-Director.

HANS RAJ BHANDARI v. LIQUIDATOR OF THE LAHORE BANK.

Miscellaneous first appeal from the order of the District Judge, Lahore, dated the 27th April 1914, directing the appellant to pay to the respondent the sum of Rs. 79,720-13-10 and interest at Rs. 9 per cent. until payment in full.

Messrs. *Bhagat Ram Puri* and *Nand Lal*, for the Appellant.

Messrs. *C. Bevan Petman* and *Jai Gopal Sethi*, for the Respondent.

JUDGMENT.—This case arises upon an application made in the winding-up of the Lahore Bank, Limited, under section 214 of the Indian Companies Act, VI of 1882; the respondent, who is the Liquidator of the Bank, claiming under that section that the appellant, Mr. Hans Raj Bhandari, who was a Director of the Company, should, in the summary proceeding, be called upon to pay Rs. 79,720-13-10 due by him on a pro-note, dated the 18th of May 1912. The Additional Judge, who heard the application, has acceded to the prayer of the Liquidator and in this appeal against his order, the sole point which I have to decide is whether the facts of the case bring it within the four corners of that section. I may state at once that the question, whether the appellant is a contributory and as such can be compelled under section 150 to pay the debt to the Liquidator, is not before me and I do not, therefore, pronounce any opinion upon it. The only matter, with which I am concerned in this misfeasance proceeding under section 214, is whether the conduct of the appellant as a past Director of the Company has been such as to justify an order under that section requiring him to pay to the Liquidator by way of compensation a sum of money equal to the amount due from him in his capacity as a debtor of the Company.

The facts of the case, which are relevant to the matter in issue, are simple and lie in the narrowest possible compass. There is no doubt that the appellant was a local Director of the Rawalpindi branch of the Bank for about two years from January 1909 to February 1911, that at the time when he became Director he, as a partner in a firm, owed a sum of about Rs. 50,000 to the Bank, and that during the period of his directorship he borrowed Rs. 5,000 and paid about Rs. 10,000 towards liquidating his liability. It appears that he consolidated his debt to the Bank by executing, on the 18th of May 1912, a pro-note for Rs. 68,000 with interest at 9 per. cent per annum and that the Bank went into liquidation some time about the end of 1913.

These facts are fully proved upon the record and do not admit of any dispute. Now it seems to me quite clear, and in fact it is admitted by the learned Counsel for the respondent, that section 214 applies to the conduct of a Director as such and that any act or omission of the appellant which took place before January 1909 or after February 1911, or anything done by him during that period in his capacity as a *debtor*, cannot be made a ground of liability under that section. The Court is, therefore, confined to the examination of the appellant's conduct as a Director from January 1909 to February 1911. It is necessary to state this proposition at the outset, because it appears to me that the learned Judge of the Court below, while recognizing its validity in the beginning of his judgment, has lost sight of it later on and has relied upon certain matters which are outside the period of directorship.

The learned Judge has set out in his judgment the portion of section 214 upon which the Liquidator bases his claim and which runs as follows:

"Where in the course of the winding-up of any Company under this Act, it appears that any past Director of such Company has become liable or accountable for any moneys of the Company, or been guilty of any misfeasance or breach of trust in relation to the Company, the Court may. . . . ."

This section undoubtedly authorizes the recovery, at the instance of the Liquidator, of moneys for which the appellant has become accountable to the Company, and also of pecuniary loss sustained by the Company through the misfeasance or breach of trust by him. But it is clear that the onus of proving the facts which bring the case within the section is on the applicant, Vide *Cavendish-Bentinck* v. *Fenn* (1).

(1) 12 App. Cas. 652 at 661; 57 L. J. Ch. 552; 57 L. T. 778; 36 W. R. 641.

What then are the grounds upon which the Liquidator seeks to establish the liability of the appellant? After a careful consideration of the arguments advanced before me, it seems to me that there are only three points which can possibly be urged on behalf of the Liquidator and they are briefly as follows:—

(1) That the appellant did not, at the time of his appointment as Director, disclose his indebtedness.

(2) That he failed, during the period of his office as Director, to recover the debt due from him to the Company.

(3) That he took a loan of Rs. 5,000 during the same period which he was not authorized to do.

Taking the above points *seriatim*, I must say as regards No. 1 that there is not a particle of evidence on the record to prove that the appellant did not disclose his indebtedness. In fact it is hard to believe that the Directors of the Head Board did not, at that time, know that the appellant was indebted to the Company to the extent of about Rs. 50,000. The learned Counsel for the respondent has not drawn my attention to any evidence which goes to show that at that time the appellant owed any debt to any other person except the Bank. Moreover, it is the duty of the applicant to satisfy the Court that loss or damage resulted to the Company from the alleged non-disclosure by the appellant. The only thing which can possibly be said in this connection is that if the Company had been aware of his indebtedness, it might not have appointed him a Director. But his appointment as such did not directly cause any loss to the Company [*Vide* the observations of the Court of Appeal in *Coventry and Dixon's* case (2)]. I have, therefore, no hesitation in holding that the first ground has not been made out and that in any case it does not in the circumstances amount to misfeasance or breach of trust contemplated by section 214.

As regards the failure to recover the loan advanced to the appellant's firm before his appointment as a Director, I am quite clear that it does not amount to misfeasance or breach of trust such as will establish the liability under section 214. In the *first* place, a Director is not a trustee of the loans advanced by a Company before his acceptance of office as such. "Again directors," observed Jessel, M.R., in *Forest of Dean Coal Mining Company, In re*(3) "are called trustees. They are no doubt trustees of assets which have come into their hands, or which are under their control, but they are not trustees of a debt due to the Company. The Company is the creditor, and, as I said before, they are only the managing partners. In my opinion it is extravagant to call them trustees of a debt when it has not been received. You may, of course, have an actual trust of a debt, as in the case I put before, where trustees have assigned to them a debt to get in, but that is not the case with Directors of a Company. A Director is the managing partner of the concern and although a debt is due to the concern, I do not think it is right to call him a trustee of that debt which remains unpaid, though his liability in respect of it may in certain cases and in some respects be analogous to the liability of a trustee."

In the *second* place, Mr. Hans Raj Bhandari was, as stated above, a local Director and it cannot be said that it was the duty of a local Director to recover the debt when the Directors of the Head Board did not take any action in that connection. *Further*, it is not alleged that the omission to realize the money can be attributed to any fraud or dishonesty on his part. So much for the question of the unpaid debt.

The *last* point is that in view of the large amount he already owed to the Company, the appellant should not have borrowed a further sum of Rs. 5,000 and that in taking that loan he was guilty of a breach of duty and is accountable for the money which he thus received. It is observable that the learned Counsel, for the respondent, has expressly confined the liability on this ground to the refund of Rs. 5,000 with interest thereon. The facts in connection with the loan are not clear on the record and it is difficult to ascertain on the material before me the

(2) 14 Ch. D. 660; 42 L. T. 559; 28 W. R. 775.

(3) 10 Ch. D. 450; 40 L. T. 287; 27 W. R. 594.

circumstances under which the money was advanced. It, however, appears that the loan was taken on the strength of a resolution of the Head Board which authorized a Director to borrow up to Rs. 5,000, and it is contended for the Liquidator that as the appellant was already indebted in a sum larger than the sanctioned amount, the additional loan of Rs. 5,000 was not governed by the terms of the resolution and must, therefore, be regarded as unauthorized. The resolution is not before me and on the record as it stands; I am unable to say how far this argument is sound. But it does not appear that the Board of Directors at Lahore or any other person connected with the Bank raised the slightest objection to the loan, either at the time or after the appellant had ceased to be a Director. It is not suggested that the loan was *ultra vires* the Company or was in any way a void transaction. On the meagre record before me it is difficult, as I have already observed, to know the exact circumstances of the loan or to determine the part which the appellant took in connection therewith. It is, however, significant that, as stated above, he re-paid about Rs. 10,000, a sum much larger than what he had borrowed, during the period of his directorship. Having regard to the aforesaid considerations, I cannot hold that this loan transaction establishes the liability under section 214.

The result is that the Liquidator has, in my opinion, failed to make out a case for the exercise of the power conferred upon the Court by section 214. I accordingly accept this appeal, set aside the order of the lower Court and dismiss the application of the Liquidator. In view of all the circumstances of the case, I leave the parties to bear their own costs in both the Courts.

Application accepted.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL No. 53 OF 1913.

June 9, 1914.

Present:—Mr. Kanhaiya Lal, A. J. C.

Maharaja BADRI PRASAD—JUDGMENT-DEBTOR—APPELLANT

versus

Babu GAURI NATH—DECREE-HOLDER AND ANOTHER—JUDGMENT-DEBTOR—RESPONDENTS.

Execution of decree—Decree transferred with certificate of non-satisfaction but with no order for execution—Objection as to decree-holder's right to proceed against property not mentioned in decree—Executing Court, power of, to entertain objections—Civil Procedure Code (Act V of 1908), s. 42, O. XXI, r. 28.

Where the transmitting Court has made no order for execution but has merely transmitted the decree and the certificate of non-satisfaction, the executing Court can entertain an objection impugning the right of the decree-holder to proceed against any property other than that charged in the decree.

Husain Ahmad Kaka v. *Saju Mahomed Sahib*, 15 B. 28, referred to.

Appeal against the order of the District Judge, Sitapur, dated 22nd May 1913, upholding that of the Subordinate Judge, Tahsil Biswan, dated 7th February 1913.

Babu *Ishwari Prasad*, for the Appellant.

Babu *Jiban Krishna Banerji*, for the Respondents.

JUDGMENT.—The question for consideration in this case is, whether a Court to which the execution of a decree is transferred under section 39 of the Code of Civil Procedure can entertain an objection impugning the right of the decree-holder to proceed against any property other than that charged in the decree. The Court below found that such an objection could not be entertained in the Court to which the execution of a decree was transferred. Section 42 of the Code of Civil Procedure confers on a Court executing a decree sent to it the same powers in executing such decree as if it had been passed by itself. The exercise of those powers is subject to the reservation contained in Order XXI, rule 28, of the Code, that it cannot go behind any order, of the Court by which the decree was passed in relation to the execution of such decree. In the absence of any such order the duty of the executing Court is to enforce the decree in such manner and against such property as the law or terms of the decree may permit or allow.

A certificate of transfer does not specify the property against which execution is to be obtained in the Court to which execution is transferred. It merely specifies the amount which remains due under the decree and intimates that satisfaction of the decree to the extent of such amount has not been obtained by execution within the jurisdiction of the Court by which it was passed. No order for the execution of the decree against the property now sought to be attached was passed in this case by the transmitting Court, and as held in *Husein Ahmad Kaka* v. *Saju Mahomed Sahib* (1) where the transmitting Court has made no order for execution but has merely transmitted the decree and the certificate of non-satisfaction, there is nothing in section 42 or Order XXI, rule 28, of the Code to prevent the Court, to which execution is transferred, from determining questions arising from the enforcement of that decree in a particular manner. The decree in this case was obtained by the decree-holder respondent for the enforcement of his lien for the unpaid portion of the purchase money payable to him under a sale-deed dated the 8th August 1907. Its construction will depend to some extent on the pleadings and judgment in the case, but no copy of the plaint is on the record.

The appeal is, therefore, allowed. The lower Appellate Court is directed to re-instate the appeal under its original number and to dispose of it in accordance with law. The costs will abide the result.

Appeal allowed.

(1) 15 B. 28.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1292 OF 1910.

June 11, 1914.

Present:—Sir Alfred Kensington, KT., Chief Judge, and Mr. Justice Shah Din.

MUNSHI RAM AND OTHERS—DEFENDANTS—APPELLANTS

versus

Musammat MISRI AND OTHERS, REPRESENTATIVES OF RAM CHANDAR DAS, DECEASED—PLAINTIFF—RESPONDENTS.

Legal representative, appointment of—Account—Commissioner not knowing characters in which accounts are kept, appointment of, whether allowable—Objections to report not taken in first Court or not raised in grounds of appeal before lower Appellate Court, whether allowed in second appeal.

In the presence of the widow and the mother of a deceased, the widow of deceased's cousin should not be added as a legal representative and her name, if added, should be struck off.

A local Commissioner appointed by consent of parties, cannot be superseded simply on the ground that he is incompetent to go into the accounts as he cannot himself read the characters in which such accounts are kept.

The objections against the report of the Local Commissioner not raised in the original Court, or those against the said report and decree of that Court not put forward in the grounds of appeal before the lower Appellate Court and, therefore, not dealt with by the latter Court, cannot be allowed to be raised for the first time in the further appeal before the Chief Court.

Second appeal from the decree of the Divisional Judge, Ambala, dated the 18th November 1910, confirming that of the District Judge, Ambala, dated the 18th October 1909, decreeing plaintiff's claim.

The Hon'ble Mr. *Muhammad Shafi*, K. B, and Lala *Sundar Das*, for the Appellants.

Messrs. *Dhanpat Rai* and *Dina Nath Mehra*, for the Respondents.

JUDGMENT.—Before we deal with the merits of this appeal, it is necessary to decide the question as to who are the legal representatives for the purposes of the appeal. The deceased plaintiff-respondent, Ram Chandar Das, died on 29th May 1912, during the pendency of this appeal and that on application made by the appellants on the 24th October 1912, three persons were brought on the record as his legal representatives, namely (1), the deceased's widow, *Musammat* Misri, (2) his mother, *Musammat* Madi, and (3) one *Musammat* Chowli, widow of the deceased's first cousin, Beni Parshad. Lala Dhanpat Rai, who appears for *Musammat* Misri, says that she as the widow of Ram Chandar Das, deceased, is his sole legal representative and that neither his mother, *Musammat* Madi, nor his cousin's widow, *Musammat* Chowli, should have been brought on the record as his legal representatives. A reference to page 3 of the printed paper-book in Civil Appeal No. 1326 of 1906, which relates to an earlier stage of this case, shows that the District Judge, Mr. Holder, had held in his judgment that the widow of Beni Parshad was only entitled to maintenance and that Mangal Sain, father of Ram Chandar Das, was the sole proprietor

of the firm of Mangal Sain-Beni Parshad. The finding being *inter partes* is binding upon the appellants in this litigation; and it follows that the name of *Musammat* Chowli has been improperly brought on the record as one of the legal representatives of Ram Chandar Das, deceased. We direct that her name be struck off and that the appeal proceed against the widow and the mother of Ram Chandar Das.

This appeal constitutes the final stage in the litigation between the parties and is the sequel to Civil Appeal No. 1326 of 1906, which was decided by a Division Bench of this Court on the 27th April 1907. By its judgment of that date this Court dismissed the plaintiff's suit as against defendants Nos. 3 and 4, Gokal Chand and his son, Murli Dhar, and accepting the appeal of the plaintiff as regards defendants Nos. 1 and 3, Bindar Ban and Munshi Lal, and defendans Nos. 5 to 8, the four sons of Munshi Lal, it remanded the case to the first Court under section 562 of the Civil Procedure Code of 1882 for fresh decision on a claim limited to the Meerut shop debits and credits in the manner indicated in the body of the judgment.

We re-produce here from that judgment the pedigree-table showing the relationship of defendants:

DHANI RAM

Bindra Ban, defendant No 1.	Munshi Lal, defendant No 2,	Gokal Chand, defendant No 3,
	Four sons, defendants Nos. 5 to 8.	Murli Dhar, defendant No 4.

It was held by this Court that while the Ambala shop was jointly owned by all the members of the family, Gokal Chand and his son, Murli Dhar, were not concerned in the Meerut shop. Bindra Ban as Manager of both the shops had struck two balances on the 12th September 1903 in favour of the plaintiff, Ram Chandar Das, showing the amounts due to the latter on account of each shop as follows:—

(1) On account of Ambala shop—Rs. 3,480-7-0.

(2) On account of Meerut Shop—Rs. 8,452-8-0.

Bindra Ban in striking the two balances had wrongly debited a sum of Rs. 2,000 due from the Meerut shop to the Ambala shop, with the result that while the balance of the Ambala shop was improperly increased that of the Meerut shop was decreased by Rs. 2,000. This Court held that the total amount really due from the Ambala shop at the time when the balances were struck was only Rs. 1,480-7, and that this amount together with interest was subsequently paid off by the Amballa firm and the Ambala firm thereafter owed nothing to Ram Chandar Das, plaintiff. Upon that ground the suit was dismissed against Gokal Chand and Murli Dhar, who had no connection with the Meerut shop, and the case was remanded for the decision of the plaintiff's claim as against the Meerut shop with reference to the balance, dated the 12th September 1903, amounting to Rs. 10,452-3 (which includes the sum of Rs. 2,000) that had been wrongly debited by Bindra Ban to the Ambala shop.

Both the Courts below have now found that after Bindra Ban had struck the balance of the 12th September 1903, miscellaneous items aggregating Rs. 419-14-6 were spent by the plaintiff on account of the Meerut Shop and that therefore Rs. 10,872-6-6 was the total amount due to the plaintiff from the Meerut shop. The credits amounted to Rs. 7,259-6-3 and the balance due by the Meerut shop was thus Rs. 3,613-0-3. The interest due to the plaintiff came to Rs. 1,276-1-6, and so the total amount due to the plaintiff at the date of the amended claim was Rs. 4, 889-1-9. A decree has accordingly been passed for that amount by the lower Courts in favour of the plaintiff against the original defendants Nos. 1 to 2 and 5 to 8

From the decree of the Divisional Judge a further appeal has been preferred by the said defendants to this Court and although a large number of grounds have been taken in the written memorandum of appeal, Mr. Muhammad Shafi, who has argued the appeal for the appellants, has confined his arguments to the more important of those grounds. The first point raised by him is that since the local Commissioner, Sardar Tulsa Singh, Pleader, who was appointed by the District Judge to examine the account-books of the parties and to report the result, was not acquainted with Hindi characters in which the accounts were written, his report could

not be of much value in a case of this kind. We do not think that there is much force in this argument. Sardar Tulsa Singh was appointed a local Commissioner on the 22nd March 1909 with the consent of the Pleaders for both parties, and we have been unable to find any indications on the record of his inability to examine the account-books properly owing to his alleged lack of knowledge of the Hindi characters. He submitted his report on the 17th April, and he was examined as a witness on the 10th June, 1909; and it does not appear to have been made out that he did not do the work entrusted to him as satisfactorily as any other local Commissioner would have done.

Next, the learned Counsel urged that no less than eight items aggregating Rs. 3,366-5 which, according to him, were paid by his clients to the plaintiff, were not given credit for by the local Commissioner. This seems to be an afterthought, for we can find no reference to these items in the objections which were filed by the appellants after the local Commissioner had submitted his report to the District Judge. We cannot, therefore, allow this contention to be raised at this stage of the case.

We now come to that part of Mr. Muhammad Shafi's arguments which related to the objections raised by his clients to the report of the local Commissioner, which form the subject-matter of 13 issues set out in the judgment of the District Judge at page 4 of the paper-book. The learned Counsel first took up issue No. 6, and argued that the two items of interest, Rs. 573-3 and Rs. 684-14-6, had been charged by the plaintiff twice over. The local Commissioner, Sardar Tulsa Singh, has found that interest has been correctly charged by the plaintiff and the District Judge has agreed in that finding. A reference to paragraph 5 of the amended plaint shows that interest at the rate of 6 per cent. per annum amounting to Rs. 1,276-1-6 has been charged by the plaintiff from 8th June 1902 to 10th July 1907, and there is an apparent discrepancy between this statement in the plaint and the statement made by the plaintiff's *gumáshta* on the 16th July 1908, that on *Asauj Badi* 5 *Sambat* 1960 (corresponding to the 12th September 1903) Rs. 570-3 was debited as interest to defendants upto date. The probable explanation of this discrepancy is that when the item of Rs. 2,000 which had been wrongly debited to the Ambala shop was transferred in 1907 to the Meerut shop account, interest was charged on that amount against the Meerut shop for five years from 1902 to 1907. The objection as to interest being charged twice over was not raised in the written grounds of appeal before the Divisional Judge and the Divisional Judge has not, therefore, cleared up this part of the case. In the circumstances the explanation given above may be accepted as satisfactory and we hold that it is not shown that the plaintiff is not entitled to the interest which he has claimed.

The next contention raised related to issue No. 8 at page 4 of the paper-book *viz.*, whether the defendants were entitled to credit of Rs. 808-15-9 according to the entries in the plaintiff's *mandi bahi*. The District Judge says that this item is included in the total of Rs. 1,043-10-6 for which credit has been given to the defendants, and the defendants' Counsel after referring to the *mundi bahi* had to admit that the District Judge's finding was correct.

The last contention advanced by the defendants' Counsel was that at the time when Bindra Ban struck the balance of Rs. 8,452-8 as due by the Meerut shop to the plaintiff, the latter had 2,202 bags of grain belonging to the defendnats to dispose of; that he did not sell those bags in accordance with the instructions of the defendants' firm; and that Rs. 7,000-12-6, alleged to be the sale-proceeds of the bags in question, was not the correct price of the grain sold by plaintiff on behalf of the defendants. The learned Counsel urged that the plaintiff had purchased 2,202 bags of grain for the defendants at 23½ seers per rupee in May 1903; and that they were sold by him without the defendants' authority between the 31st January and 6th February 1905 at 35¼ seers per rupee, thus causing a loss to the defendants of about Rs. 2,290. In connection with this part of the case Counsel relied on Exhibit D2, dated *Bhadon Badi* 15 *Sambat* 1960 (corresponding to the 23rd August 1903) as showing that the plaintiff was asked by the defendants to sell the bags of grain at a profit. But

there is on the record a letter written by Munshi Ram defendant, to the plaintiff on *Maghar Badi* 7 *Sambat* 1961 (29th November 1904) marked as Exhibit P6A, in which the plaintiff was instructed by Munshi Ram to sell the grain at once, and it was in pursuance of the instructions given in that letter that the bags of grain in question were sold by the plaintiff and the sale proceeds, Rs. 7,000-12-6, credited by him to the defendants' account. Exhibit P6A was produced and proved by the plaintiff on the 12th May 1908, and neither Bindra Ban, who was examined as a witness on the same date for Munshi Ram, who was examined on the 28th July, denied the genuineness of this letter. We must, therefore, hold that the bags of grain were sold by the plaintiff for the defendants in accordance with their instructions; and we agree with the Courts below that the price of the grain must be presumed to have been correctly entered by the plaintiff in his *mundi bahi* in the ordinary course of business.

For the reasons given, we agree with the learned Divisional Judge in holding that the amount due to the plaintiff, Ram Chandar Das, by defendants Nos. 1 and 2 and defendants Nos. 5 to 8 was Rs. 4,889-1-9 at the date of the amended plaint; and we accordingly maintain the decree of the Divisional Judge and dismiss this appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 332 OF 1912.

May 22, 1914.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice N. Chatterjea.

RAM PRASAD—PLAINTIFF—APPELLANT

versus

RAM CHARAN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 65, scope of—Rent, when first charge—Landlord and tenant, relationship of—Landlord parting with his proprietary right, whether entitled to sell tenant's holding under s. 65—Civil Procedure Code (Act V of 1908), O. XXI, rr. 89 to 96—Court, power of, not to confirm sale.

Under section 65 of the Bengal Tenancy Act the sale of a holding is possible, so long as the rent is a first charge thereon, and it remains the first charge only so long as the relationship of landlord and tenant subsists.

Therefore, a landlord who has parted with his proprietary interest, is not entitled to invoke the special remedies vested in a landlord under section 65 of the Bengal Tenancy Act, but still he can have a sale in execution of his decree under the Code of an interest which is saleable.

Where after a sale in execution of a decree the decree-holder is paid the amount of his decree and there is a concurrent wish of the parties that the sale should be set aside, the Court, although not warranted by any provisions of rules 89 and onwards of Order XXI of the Civil Procedure Code, 1908, to set aside the sale, may treat the sale as being of no effect and may decline to confirm it.

Appeal against the decree of the Officiating Subordinate Judge of Saran, dated the 13th November 1911, reversing that of the Munsif, Third Court, at Chapra, dated the 22nd of May 1911.

Babus *Umakali Mukerjee* and *Rajendra Prasad*, for the Appellant.

Babu *Sachindra Prasad Ghose*, for the Respondents.

JUDGMENT.

JENKINS, C. J.—This second appeal arises out of a suit in effect for possession of land, and the case made by the plaintiff against defendant No. 1, who is the principal defendant, is, *first*, that the land in suit is *serait*, and *secondly*, that defendant No. 1 is a trespasser and not a tenant. He established both these points to the satisfaction of the Munsif.

The learned Officiating Subordinate Judge, however, took an opposite view on both these points, and we must, therefore, apart from any point of law which can be opposed to that conclusion, accept as binding on us, *first*, that the land is not *serait* and *secondly*, that defendant No. 1 is not a trespasser but is a tenant.

To the first of these propositions no objection has been or can be taken in second appeal. But it has been argued with ingenuity that on the facts as found defendant No. 1 cannot be regarded as still a tenant, for by a sale in execution of a decree obtained by one Radhe Misser, the defendant No. 1's interest as tenant passed to the purchaser under that decree.

Now, this calls for a word of explanation Radhe Misser was the proprietor. Defendant No. 1 was his tenant. There

was a failure or omission to pay rent and this led to the institution of a suit in May 1904 by Radhe Misser against defendant No. 1. A decree was obtained on the 21st September 1904. On the 6th of October 1904, Radhe Misser's proprietary right was purchased by the plaintiff. Subsequently to this, Radhe Misser took steps for the execution of his decree. There was a sale in execution, and it is said that under that sale the holding of defendant No. 1 passed to Radhe Misser who was the purchaser at that sale. This argument has been founded upon the theory that section 65 of the Bengal Tenancy Act was still applicable at the time of the execution proceedings. Whether it was so or not is a point of some nicety, but we are assisted in determining the scope of that section by a recent decision of the Privy Council, *Arthur Henry Forbes* v. *Maharaj Bahadur Singh* (1). It is true that the precise position with which we are now confronted was not before their Lordships on that occasion, but I think that the first result of their decision is that the sale of the holding is possible so long as the rent is a first charge thereon. But the rent remains a first charge only so long as the relation of landlord and tenant subsists; in other words, the charge is an incident of that relationship. Certainly this is a convenient view, because otherwise there might be introduced into this law, which regulates the relation between landlord and tenant, a supervening right of serious consequence, and, I think, we must in the circumstances hold that Radhe Misser, having parted with his proprietary interest, was not entitled to invoke the special remedies vested in a landlord under section 65 of the Bengal Tenancy Act. Still there could be a sale in execution of the decree under the Code, but it would be a sale of that which is saleable. I am not at present satisfied that the interest of defendant No. 1 was saleable. Over and above that, we have the important circumstances that notwithstanding the fact that there had been a sale, yet prior to its confirmation, Radhe Misser, the decree-holder, was paid by the judgment-debtor the decretal amount. That decretal amount was accepted by the decree-holder in full satisfaction of his decree, and the decree-holder, as any honest man would do, brought this to the notice of the Court and asked that the sale should be set aside. The learned Judge before whom this reasonable application was made seems to have felt that his action was paralyzed, because this particular predicament did not fall within the precise words of the rules 89 onwards of Order XXI. But I venture to think that where a case of that kind arises, it certainly is open to the Court not to confirm the sale and to treat the sale as being of no effect, that being the concurrent wish of the parties and the obvious requirement of the case.

In the circumstances of the case then, I think, it may fairly be said, as it does not appear that the defendant No. 1 had a saleable interest and as there can be no suggestion of defendant No. 1 being still bound by the execution proceedings, that the interest of defendant No. 1 did not pass to Radhe Misser.

The result is that though this point was not discussed, and as far as I am aware not raised before the lower Courts, still the conclusion of the lower Appellate Court must be affirmed by reason of the findings of fact at which that Court arrived, for the point now suggested does not justify us in disturbing those findings.

The result is that the decree must be confirmed with costs.

N. CHATTERJEA, J.—I agree.

Decree confirmed.

(1) 23 Ind. Cas. 632; 18 C. W. N. 747; (1914) M. W. N. 397; 15 M. L. T. 389; 12 A. L. J. 653; 27 M. L. J. 4; 41 C. 926; 1 L. W. 1059 (P. C.).

RAM SINGH v. NANAK CHAND.

PUNJAB CHIEF COURT.

CIVIL MISCELLANEOUS APPEAL No. 459 OF 1914.

December 3, 1914.

Present:—Mr. Justice Rattigan.

RAM SINGH—JUDGMENT-DEBTOR—APPELLANT

versus

NANAK CHAND AND ANOTHER—DECREE-HOLDERS—RESPONDENTS.

Joint decree—Execution by one of decree-holders—Decree in favour of joint Hindu family—Power of managing member to give discharge—Civil Procedure Code (Act V of 1908), O. XXXII, r. 6.

A joint decree-holder is not bound by the acts of another who has compromised or received payment from and has given discharge to the judgment-debtor beyond the extent of his own share in the decree but a discharge given by a managing member of a joint Hindu family is binding on the members of the family.

Harihar Pershad Singh v. *Mathura Lal*, 35 C. 561; 8 C. L. J. 256; 12 C. W. N. 598 and *Duraiswami Sastrial* v. *Venkatarama Iyer*, 12 Ind. Cas. 503; (1911)2 M. W. N. 420; 10 M. L. T. 370; 21 M. L. J. 1088, followed.

Where the managing member of a joint Hindu family is on the worst possible terms with the other members and the judgment-debtor's conduct has been throughout dishonest and fraudulent and the latter is colluding with the former in order to defraud the other members of the family, the members are not bound by the acts of the managing member.

Miscellaneous appeal from the order of the Divisional Judge, Rawalpindi, dated the 13th February 1914, confirming that of the Munsif, first Class, Rawalpindi, dated the 20th February 1913, directing the execution of the decree to the extent of the minor decree-holder's share.

Bhagat *Gobind Das*, for the Appellant.

Mr. *Nand Lal*, for the Respondents.

JUDGMENT.—The facts are sufficiently stated in the judgments of the Munsif and the Divisional Judge and I need not repeat them. The sole question now is whether an alleged payment of the decretal amount by the judgment-debtor to Nanak Chand, one of the two joint decree-holders, is a sufficient discharge of the debt and a complete answer to the claim by the other decree-holder. The ordinary rule, of course, is that one joint decree-holder is not bound by the acts of another who has compromised or received payment out of Court and that in such cases a joint decree-holder is not competent to give a discharge out of Court to a judgment-debtor for more than his own share of the decree (see the authorities cited at page 864 of Ameer Ali and Woodroffe's Civil Procedure Code). It has, however, been held (and I am ready to assume) that when the decree is in favour of members of a joint Hindu family the managing member of that family can give a discharge for the decretal money, [*Duraiswami Sastrial* v. *Venkatrama Iyer* (1)] and further that Order XXXII, rule 6, of the Civil Procedure Code is inapplicable under such circumstances [*Harihar Pershad Singh* v. *Mathura Lal* (2)].

The contention here is that Nanak Chand (who is the elder son of the late Kanhaya Lal) is the manager of the joint Hindu family to which he and his step-brother Mulk Raj (a minor) belong, and that payment to Nanak Chand completely exonerates the judgment-debtor. Other consideration apart, this contention might have had weight, but in the present case I cannot accept it, as I am satisfied that the judgment-debtor's conduct has been throughout dishonest and fraudulent. Nanak Chand is obviously on the worst possible terms with his step-mother, *Musammat* Maya Wanti, and her son, Mulk Raj, so much so indeed that in the course of the suit, which resulted in a decree against the judgment-debtor, he actually asserted that *Musammat* Maya Wanti was not the wife of his late father and that Mulk Raj was illegitimate.

Then, immediately upon Nanak Chand's attaining majority, the judgment-debtor induces him to grant him a receipt for full satisfaction of the amount of the decree Rs. 780, though according to the terms of the receipt itself (dated 7th March 1910) a sum of about Rs. 400 had not been paid. Later on, (see the Application, dated 15th January 1911) Nanak Chand himself asserts that the receipt was obtained from him by fraudulent misrepresentations, an allegation which, though subsequently given up by Nanak Chand who had clearly been bought over once again, I see no reason to suppose, was not true. The Courts below are obviously of opinion that the judgment-debtor has colluded with Nanak Chand, an immature youth who had only just come of age and was ill-disposed towards his step-brother, and this is certainly the view I take. In

(1) 12 Ind. Cas. 503, (1911) 2 M. W. N. 420, 10 M. L. T. 370; 21 M. L. J. 1088.

(2) 35 C. 561; 8 C. L. J. 256; 12 C. W. N. 598.

these circumstances I cannot agree that Mulk Raj is bound by a fraud practised upon him by the judgment-debtor and the so-called managing member of the family acting in collusion with the object of defrauding him.

In my opinion, Mulk Raj is competent in these circumstances to claim execution of the decree so far as his share is concerned, and I accordingly dismiss the appeal with costs.

Appeal dismissed,

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL NO. 120 OF 1914.

January 11, 1915.

Present:—Sir Charles Fox, KT., Chief Judge, Mr. Justice Hartnoll and Mr. Justice Robinson.

MA ARRAY—APPELLANT

versus

MG. E PO—RESPONDENT.

Divorce Act (IV of 1869), ss. 22, 31—Divorce, petition for, by wife—Adultery and desertion—Delay in petitioning, when cured—Desertion and delay, meaning of.

A wife, who was made to believe by her husband that he would be coming back to her, but who afterwards discovered that he had taken another woman and had in fact abandoned her, is entitled to a divorce though she delayed in presenting her petition for divorce, specially when she believed that she had to wait for three years before filing the petition instead of two years from the date of abandonment.

Desertion under the Divorce Act implies an abandonment against the wish of the person charging it, but it is not a universal rule that the abandonment must be against the expressed wish of that person.

Ma Yin Za v. *Nash*, 15 Ind. Cas. 353; 6 L. B. R. 53; 5 Bur. L. T. 85, referred to.

Delay intended by section 31 of the Divorce Act must be understood to be culpable delay somewhat in the nature of connivance, condonation or acquiescence.

Newman v. *Newman*, (1870) 2 P. & D. 57; 39 L. J. Mat. 36; 23 L. T. 552; 18 W. R 584; *Pellew* v. *Pellew and Berkeley*, (1859) 1 Sw & Tr. 553; 29 L. J. Mat. 44; 2 L. T. 89, *Tollemache* v. *Tollemache*, (1859) 1 Sw. & Tr. 557; 30 L. J. Mat 113; 2 L. T. 87, referred to and followed.

Mr. *Gregory*, for the Appellant.

JUDGMENT.

FOX, C. J.—The parties are Christian *karens*. They were married in May 1910, and they lived together in the petitioner's father's house for about three months after the marriage. The petitioner became pregnant, and subsequently a child was born to her. The respondent was in the Police and was stationed at Mogok. He took leave and was married to the petitioner while on leave. According to both the petitioner and her father she and the respondent lived happily together whilst living in the father's house. On the last day she saw him, the respondent told her he was going to Hmawbi to see his parents. He went away and never came back to her; a day or two afterwards she heard that he had gone to Henzada, and from there he had gone back to Mogok with a woman. About a month after he left, he wrote the petitioner a letter from Mogok saying that he was well, but not asking her to come to him. She replied saying merely that she was well. She did not ask him to provide a home for her at Mogok, and she did not go there. It is proved that the respondent has been living with the woman he took from Henzada and that she has three children by him. The respondent has not contributed anything towards the petitioner's support since he left her. She took service as a child's nurse to earn her livelihood.

She presented her petition for divorce nearly four years after his parting from her. The grounds on which she asked for a divorce were adultery coupled with desertion without reasonable excuse for upwards of two years.

Adultery by the respondent has now been adequately proved. The Divisional Judge refused a decree for divorce, holding that desertion within the meaning of the Indian Divorce Act had not been proved and that the petitioner had been guilty of unreasonable delay in presenting her petition.

"Desertion", under the Act, implies an abandonment against the wish of the person charging it, but as pointed out in *Ma Yin Za* v. *Nash* (1), it is not a universal rule that the abandonment must be against the expressed wish of that person. In the present case the respondent left the petitioner telling her an untruth about where he was going and not leading her to suspect in any way that he was going to abandon her. She must have been under the impression that he was coming back to her. She had no opportunity then of expressing any wish against his

(1) 15 Ind. Cas. 353; 6 L. B. R. 53; 5 Bur. L. T. 85

abandoning her. Shortly afterwards she heard that instead of taking her to where he had to live, he had taken another woman to live with him there. This abandonment of her must have been against her wish. No woman who had been so recently married to a man and who thought they were living happily together could have felt other than resentment at such conduct.

She was in no way bound to ask him to provide a home for her in which to live together again after such treatment. Section 22 of the Act gave her a right to a judicial separation: she was not bound to forgive the adultery, and by asking him to live with her she would have done so and have condoned it. The element of abandonment against the wish of the party charging it seems clear in the present case.

In regard to the question of unreasonable delay, the petitioner had to wait for two years before she could present her petition for divorce. Her petition was presented short of two years from the time she might have presented it. She says she was told she had to wait three years, so that according to her lights she delayed something short of a year.

In *Newman* v. *Newman* (2) Lord Penzance said that the cases which the Legislature had principally in view in enacting the provision regarding unreasonable delay in the English Statute were those in which a husband's honour had been wounded and he had put up with his disgrace for a long time.

In *Pellew* v. *Pellew and Berkeley* (3) the Judges said: "We think that the delay intended by the 31st section of the Divorce Act must be the sort of delay which would show the petitioner to have been insensible to the loss of his wife; and might almost be said to be equivalent to condonation." In *Tollemache* v. *Tollemache* (4) it was said that the word "delay" must be understood to be culpable delay somewhat in the nature of connivance or acquiescence. Considering her circumstances and her station in life, it does not appear to me that the petitioner's delay can properly be held to be of the above description.

I would allow the appeal and would grant the petitioner a decree for divorce from the respondent.

HARTNOLL, J.—I concur.

ROBINSON, J.—I concur.

Appeal allowed.

(2) (1870) 2 P. & D. 57; 39 L. J. Mat. 36, 22 L. T. 552, 18 W. R. 584.

(3) (1859) 1 Sw. & Tr. 553; 29 L. J. Mat. 44; 2 L. T. 89.

(4) (1859) 1 Sw. & Tr. 557, 30 L. J. Mat 113; 2 L. T. 87

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1412 OF 1911.

December 7, 1914.

Present:—Mr. Justice Holmwood and Mr. Justice Carnduff.

ANGNU GHASI AND OTHERS—DEFENDANTS—APPELLANTS

versus

CHAITHU PATRAS AND OTHERS—PLAINTIFFS—RESPONDENTS.

Chota Nagpur Tenancy Act (B. C. VI of 1908), s. 11—Suit to recover rent—Rent not recoverable for period prior to registration in office of landlord.

Under section 11 of the Chota Nagpur Tenancy Act (B. C. VI of 1908), the transferee of a tenure can never recover any rent for the period prior to his application to the landlord for registration in his office.

An entry in the Record of Rights gives the transferee only the presumption of possession under the title he claims, but it cannot give him the right to recover rent which is barred by a statutory provision of the rent law, and such entry cannot take the place of the procedure which the law has laid down as a condition precedent to the collection of rent.

Second appeal from a decision of the Judicial Commissioner of Chota Nagpur, dated the 24th March 1911, affirming that of the Deputy Commissioner of Gumla, dated 6th June 1910.

Babus *Harihar Prasad Singh* and *Rajeswari Prasad*, for the Appellants.

Babu *Kulwant Sahay*, for the Respondents.

JUDGMENT.

HOLMWOOD, J.—This second appeal was remanded to the lower Appellate Court for a finding whether the plaintiffs' claim was barred by section 11 of the Chota Nagpur Tenancy Act. The lower Appellate Court has treated the issue as if it was whether the plaintiffs' suit was barred by that section, which is rather a different question. It has held that the entry in the finally published

Record of Rights, a copy of which was served on the *semindar*, amounts to registration, and that the plaintiffs' suit is, therefore, not barred. But this is an insufficient finding and does not touch the case, which is, whether the plaintiffs are able to recover rent for the period between the acquisition of their title to the tenure and the application for registration in the landlord's *sherishta*, which, as laid down in the section, has to be accompanied by a tender of the necessary fee to the landlord. On the plain wording of the section, we must hold that however good the plaintiffs' title may be and whatever their rights to sue for rent under the law may be, they cannot recover the rent claimed by them in this suit, and that no decree can, therefore, be passed in their favour.

It was held by a majority of the Full Bench in the case of *Alimuddin Khan* v. *Hira Lal Sen* (1) in a case under the Land Registration Act, where the impediment was not nearly so clear as under the Chota Nagpur Tenancy Act, that the right to the rent of an estate is in the true proprietor, although unregistered, and his right to sue for rent is not taken away by anything in the sections of the Act which do not affect his cause of action, but merely put an impediment in the way of his realising the rent until he has complied with the law by obtaining registration. Now even on this rule the plaintiffs would recover nothing in this suit, since it is not pretended that they have complied with the provisions of the law. But the provisions of section 11 go much further and lay down that they can never recover any rent for the period prior to their application to the landlord for registration in his office. Clearly, therefore, any application they might make during the pendency of the suit or in future would not operate retrospectively and their claim for rent is altogether barred and will remain barred as to the rents prior to the date of application, even when they have complied with the provisions of the Act. The entry in the Record of Rights gives them only the presumption of possession under the title they claim, but it cannot give them the right to recover rent which is barred by a statutory provision of the rent law, and such entry cannot take the place of the procedure which the law has laid down as a condition precedent to the collection of rent.

I am, therefore, of opinion that the learned Judicial Commissioner's finding is erroneous and the appeal of the defendants must be decreed and the plaintiffs' suit dismissed with costs in all Courts.

CARNDUFF, J.—I agree. Where the language of an enactment is clear, there is no room for speculating as to the object of the Legislature and suggesting that something different from what the law prescribes should be accepted as sufficient, because it would equally give effect to the supposed object. Here the language of section 11 of the Chota Nagpur Tenancy Act, 1908, is perfectly plain, and I cannot entertain the view that the granting by the Settlement Department to a landlord of a copy of a *khewat* containing the name of a certain person as the holder of a tenure, is equivalent to registration in the office of the landlord of the transfer of the tenure to that person, which the section expressly requires such person to have effected. Nor do I understand how it is possible in this case to assign any date to the transferee's application for registration referred to in the section, or how we can surmount the difficulty that here there has been no tender of the registration fee to the landlord within the time prescribed.

Appeal decreed.

(1) 23 C. 87.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 541 OF 1913.

November 10, 1914.

Present:—Mr. Justice Rattigan.

THAKAR DAS—PLAINTIFF—APPELLANT

versus

CHUNI LAL—DEFENDANT—RESPONDENT.

Appeal—Second—Finding of—Interference.

Where the lower Court after considering the whole evidence adduced by the parties, finds an adoption proved, the finding cannot be interfered with in second appeal.

Second appeal from the decree of the Divisional Judge, Amritsar Division, dated the 9th July 1912, reversing that of the Munsif, first Class, Batala, District Gurdaspur,

dated the 18th March 1912, decreeing the claim.

Mr. *Bhagat Ram Puri*, for the Appellant.

Mr. *Nand Lal*, for the Respondent.

JUDGMENT.—There is really no ground for second appeal. The Divisional Judge has found that Chuni Lal was adopted by Fakir Chand and he has given grounds upon which his conclusion is based. It may be that the question is arguable and that there are many points to urge against the learned Judge's finding, but it is not for this Court to discuss the facts. Chuni Lal admittedly was brought up from infancy by Fakir Chand, and he informs me that his natural father (Ram Chand) was then alive and died only recently. Further, he assisted in performing the *kiria karam* after Fakir Chand's death and finally, plaintiff in his plaint describes Chuni Lal as the son of Fakir Chand. His attention was drawn to this fact, but he could give no explanation and merely stated that the heading of the plaint was correct. There is no question of law involved and the Divisional Judge had undoubtedly materials before him, to which he refers, in support of his finding. I accordingly dismiss this appeal with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1058 OF 1912.

November 3, 1914.

Present.—Mr. Justice Scott-Smith.

MAHIA MAL—DEFENDANT—APPELLANT

versus

GHULAM KADIR—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Limitation (Ancestral Land Alienation) Act (I of 1900)—Sale of equity of redemption of land by sonless male proprietor—Declaratory suit by reversioner to protect his right—Limitation Act (IX of 1908), Sch. I, Art 120.

A person is entitled to the benefit of the new Law of Limitation extending the period, if on the date of its coming into force his right to sue subsists. Therefore, where an alienor died before the Punjab Limitation Act I of 1900 came into force and the right of his reversioner to sue for his land still survived the suit is governed by Act I of 1900, even if it extends the period of limitation.

The Punjab Limitation (Ancestral Land Alienation) Act I of 1900 applies also to the sale of the equity of redemption by the alienor.

After the death of an alienor, his reversioner is entitled to maintain merely a suit to declare that the sale is not binding upon him.

Second appeal from the order of the Divisional Judge, Jullundur Division, dated the 23rd May 1912, reversing that of the Subordinate Judge, second Class, Jullundur, dated the 30th November 1911, dismissing plaintiff's suit and remanding the case to the first Court for trial on the merits.

Mr. *Dalip Singh*, for the Appellant.

Mr. *Fasl-i-Husain*, for the Respondents.

JUDGMENT.—The land in suit was sold by the plaintiff's father to Mahia Mal, defendant, on the 12th February 1892. At the time of the sale the land was under mortgage and was in possession of the mortgagee and has not up to the present been redeemed by the vendee. The vendor having died, the plaintiff brought the present suit for a declaration that the sale shall not affect his rights. The first Court dismissed the suit as barred by time, but the lower Appellate Court has held that the suit is governed by the Punjab Limitation Act I of 1900 and is within time, because it was brought within twelve years of the time when the plaintiff obtained knowledge of the sale, and has remanded the case for decision on the merits. From this order of remand Mahia Mal has appealed to this Court.

The alienor died before Act I of 1900 came into force, and Mr. Dalip Singh, therefore, urges that the case is governed by the former Law of Limitation. It is admitted that at the time when the Punjab Limitation Act I of 1900 came into force plaintiff had still a subsisting right to bring the suit. Clearly the suit comes within the purview of any new Act of Limitation which may have extended the period of limitation. As Act I of 1900 extended the period of limitation plaintiff is entitled to the benefit of it. *Jiwana* v. *Abdulla* (1) is an authority in support of this view, and I am, therefore, unable to accept Mr. Dalip Singh's argument that the Punjab Limitation Act I of 1900 is not applicable.

The next point urged by him is that a suit such as the present is not provided for by the Punjab Limitation Act I of 1900. His argument is that what was sold was the equity of redemption, which is an incorporeal right

(1) 2 Lnd Cas. 902, 64 P. R. 1909; 56 P. L. R. 1909; 92 P. W. R. 1909.

not susceptible of possession. He refers to the third column of the Schedule in which those cases are dealt with where at the time of the alienation possession is given or agreed to be given. He says that in the present case possession could not be given, therefore, the sale is one to which the Act is not applicable. I am unable to accept this argument. The land itself was sold and though it was subject to a mortgage, the vendor could give and did give proprietary possession to the vendee at the time of the sale. I am clearly of opinion that it was never intended by the Legislature to exclude from the operation of this Act the case of a sale of land which was subject to a mortgage with possession. Now it is clear that the proprietary possession was given at the time of the sale, but as mutation of names has not yet taken place and as the vendee has not taken physical possession of the land sold, limitation runs from the date when the facts entitling the plaintiff to impeach the sale first become known to him. The lower Appellate Court has held that the plaintiff got knowledge of those facts within twelve years of the date of institution of the suit, which is, therefore, within time. Mr. Dalip Singh urged that there should have been a remand to enable his client to show when plaintiff had knowledge of the sale. It was, however, admitted in the lower Appellate Court that there was no other evidence available on this point except what was already on the record. Under these circumstances it would have been useless for the lower Appellate Court to have remanded the case for further inquiry on this point.

The fourth issue framed by the first Court was whether the suit was maintainable in the form in which it has been brought. The first Court gave no finding on this point, but it has been argued before me and I, therefore, proceed to dispose of it. Mr. Dalip Singh urges that the plaintiff should sue for possession and for redemption and, therefore, a suit for mere declaration was not maintainable. It is, however, clear that the plaintiff could not have obtained actual physical possession from the vendee and that he could only have got actual possession in a suit against the mortgagee. There is, however, no reason why he should be forced to sue for redemption until it is convenient for him to do so. He could not seek further relief against the vendee alone than what he is asking now in the present suit. I, therefore, hold that the suit in the present form is maintainable and I dismiss the appeal with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 654 OF 1913.

November 16, 1914.

Present:—Mr. Justice Rattigan.

NANAK SINGH AND OTHERS—PLAINTIFFS—PETITIONERS

versus

KESHO DAS—DEFENDANT—RESPONDENT.

Limitation—Hundi *payable after certain period*—*Days of grace*—*Date of maturity*—*Negotiable Instruments Act (XXVI of* 1881*)*, ss. 22 (2), 24.

Every bill of exchange *(hundi)* made payable a certain number of days after date of its execution is at maturity on the third day after the day on which it is expressed to be payable under section 22 (2) of Act XXVI of 1881, and the day of that date is also to be excluded as is laid down in section 24 of the Act. Thus a *hundi* payable on 28th January falls due on 31st of that month.

Petition, under section 25 of Act IX of 1887, for revision of the decree of the Judge, Small Cause Court, Amritsar, dated the 7th March 1913, dismissing the suit.

Lala *Hukam Chand*, for the Petitioners.

Mr. *Roshan Lal*, for the Respondent.

JUDGMENT.—The learned Judge of the Small Cause Court in holding that the suit is barred by limitation has overlooked the provisions of sections 22 and 24 of the Indian Negotiable Instruments Act, 1881. The *hundi* was executed on the 29th September 1906, and the amount was payable after 120 days. Thus under the provisions of section 24 of the Act the money was payable on the 28th January, and under the provisions of section 22 (2) the *hundi* was at maturity (*i.e.* it fell due) three days *thereafter*, that is, on the 31st January 1907. The present suit was instituted on the 30th January 1913, (*i.e.*, within the prescribed period of six years) and, therefore, within time.

I accept the petition and setting aside the order of the lower Court, remand the case for determination of the suit on merits. Costs will abide the event.

Petition accepted; Case remanded.

GAJRAJ SINGH *v.* GAURI SHANKAR.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL No. 40 OF 1914.

December 22, 1914.

Present:—Mr. Lindsay, J. C.

GAJRAJ SINGH AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

versus

GAURI SHANKAR AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Party in lower Court not impleaded in appeal, effect of—Limitation for adding party in appeal—Civil Procedure Code (Act V of 1908), O. XLI, r. 20—Court, power of, to direct addition of parties in appeal.

Where by a mere act of inadvertence the appellant fails to implead a person who was a party in the lower Court, the appeal ought not to be dismissed on the simple technical ground that the said person is no party to the appeal and that limitation has expired for the purpose of making him a party, but must be decided on merits after that person is directed by the Appellate Court to be made a party; for, under Order XLI, rule 20, Civil Procedure Code, the Court has full authority to direct the addition of parties in an appeal, and when it takes action under this rule, no question of limitation can arise.

Bindeshri Naik v. Ganga Saran Sahu, 14 A. 154 (F. B.; A. W. N. (1892) 13 and *Girish Chandra Lahiri v. Sasi Sekhareswar Roy*, 33 C. 329, referred to.

Appeal against the order of the District Judge, Sitapur, dated 1st August 1914, upholding that of the First Subordinate Judge, Sitapur, dated the 20th April 1914.

Babus *Baidev Lal* and *Gopal Sahai*, for the Appellants.

Babu *Hari Kishen Dhawn*, holding brief of *Pandit Gokaran Nath Misra*, for the Respondents.

JUDGMENT.—The facts of this are as follows. A decree was obtained against one Sheodin Singh by three decree-holders, namely, Gauri Shankar, Ram Prasad and *Musammat* Umrai. After Sheodin Singh's death an application was made to execute this decree against his legal representatives. A notice was issued to these representatives and they appeared before the Court and filed certain objections to the execution of the decree. Their objections were dismissed and they went in appeal to the Court of the District Judge. In their appeal these objectors failed to implead *Musammat* Umrai, one of the decree-holders, but they impleaded her son, one Jagannath. *Musammat* Umrai, it may be observed, was a party in the Court of first instance. At the time the appeal was up for hearing before the District Judge, an objection was made to him that Umrai was not a party to the appeal and it was contended that as limitation had expired for the purpose of making her a party, the whole appeal was bound to fail and must be dismissed. The learned Judge accepted this contention and allowed the preliminary objection to prevail, with the result that the appeal was dismissed with costs.

It is contended here that the learned Judge ought not to have acted in this way and in my opinion the appeal should be allowed. It seems to have been no more than an act of inadvertence on the part of the appellants that they did not implead *Musammat* Umrai in the proceedings before the District Judge. After the application for execution had been made, notice was sent to the judgment-debtors to appear and show cause. It has been proved that the copies of the notices which were served upon these judgment-debtors did not disclose the names of all the decree-holders. The heading of the notices received by them was "Gauri Shankar, etc., decree-holders." It is true that in counterparts of these notices which are on the Court's file all the names of the decree-holders are entered; but it is quite clear that the duplicates served on these judgment-debtors do not correspond with the copies of the notices which are on the Court's file. Be that as it may, I think the Judge was entirely wrong in allowing the appeal to be dismissed, on a technical ground like this. A reference to Order XLI, rule 20, of the Code of Civil Procedure shows that the Court has full authority to direct the addition of parties in an appeal and it has been held in *Bindeshri Naik* v. *Ganga Saran Sahu* (1) and *Girish Chandra Lahiri* v. *Sasi Sekhareswar Roy* (2) that when a Court takes action under this rule, no question of limitation can arise. I allow this appeal and set aside the order of the Court below. The case will now go back to the District Judge with instructions to add *Musammat* Umrai as a party under the rule just referred to, and to decide the case on the merits after this has been done. The appellants here will get the costs of the appeal from the respondents.

Appeal allowed; Case remanded

(1) 14 A. 154(F. B.); A. W. N. (1892) 13.
(2) 33 C. 329.

LOWER BURMA CHIEF COURT.

CIVIL REVISION No. 215 OF 1914.

December 21, 1914.

Present:—Mr. Justice Ormond.

ASRI JAN AND ANOTHER—DEFENDANTS—PETITIONERS

versus

S. S. CHELLAPPA CHETTY—PLAINTIFF—RESPONDENT.

Pardanashin *lady—Power-of-attorney — Document executed by Agent, claim on basis of—Evidence—Burden of proof.*

When a claim is made against *pardanashin* ladies on the basis of a document executed by an Agent on behalf of them, the plaintiff must show not only that a power-of-attorney was actually signed by the *pardanashin* ladies, but also that they knew what they were doing, knew the nature of the document and the extent of powers they were conferring by such a document.

Mr. *Munshi*, for the Petitioners.

Mr. *Sivaya*, for the Respondent.

JUDGMENT.—The plaintiff sued these two petitioners, who are *pardanashin* ladies, in the Small Cause Court on a promissory note executed in their names by one Abdul Hamid, who produced a power-of-attorney said to have been executed by the petitioners. The defendants put in a written statement denying Abdul Hamid's authority to borrow money on their account. The plaintiff has satisfied the Court that these *pardanashin* ladies executed the power-of-attorney in favour of Abdul Hamid. The power-of-attorney contains a power to borrow money on their behalf, but the authorities show that when a claim is made against *pardanashin* ladies in such a case as this, the plaintiff must show not only that there is a document purporting to be a power-of-attorney which was actually signed by the *pardanashin* ladies, but he must go further and show that the *pardanashin* ladies knew what they were doing, knew the nature of the document and the extent of powers they were conferring by executing such a document. The plaintiff has not attempted to do this. The 1st and the 4th defendants, the present petitioners, were the only defendants who contested the suit in the Small Cause Court. The 2nd and 3rd defendants are sisters and also *pardanashin* ladies, the 1st defendant being the wife of Abdul Hamid.

The evidence adduced by the plaintiff is not sufficient to support a decree *ex parte* against the *pardanashin* ladies and although the 2nd and 3rd defendants have not applied

to this Court in revision, when the decree is set aside as against the 1st and 4th defendants, I think, it must also be set aside against the 2nd and 3rd defendants, the ground being that there was no evidence that the defendants who are *pardanashin* ladies understood the contents of the deed or knew what powers they were conferring when they signed the power-of-attorney.

The suit must, therefore, be dismissed with costs and two gold *mohurs*, costs of this application.

Petition allowed; Suit dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2445 OF 1913.

February 4, 1915.

Present:—Mr. Justice Johnstone.

KHUDA BAKHSH—PLAINTIFF—APPELLANT

versus

KARMUN AND OTHERS—DEFENDANTS—RESPONDENTS.

Possession, when becomes adverse against absentee owners—Suit for recovery of possession—Limitation Act (IX of 1908), Sch. I, Art 144.

It is the duty of persons possessing rights to keep an eye on those rights.

Any overt act of adverse possession by the person in possession of property starts adverse possession as against the absentee owner thereof.

Where, therefore, the plaintiff's step-mother mortgaged the property in suit on the 2nd December 1898, expressly declaring herself in the deed to be the sole owner and that the plaintiff had no concern with it, in a suit for possession brought on the 5th March 1912:

Held, that the step-mother's possession became adverse when she mortgaged the house and the plaintiff's suit having been brought more than 12 years afterwards was barred by time.

Ramachandra v. *Sadashiv*, 11 B 422, distinguished.

Second appeal from the decree of the Divisional Judge, Jhelum, dated the 13th of October 1913, affirming that of the Munsif first Class, Jhelum, dated the 30th July 1912, dismissing claim.

Dr. *Muhammad Iqbal*, for the Appellant.

Mr. *Nanak Chand*, for the Respondents.

JUDGMENT.—In this case both the Courts have held that the suit of the plaintiff is barred by time. The lower Appellate Court, remarking that the only Articles of the Limitation Act which can possibly apply

are Nos. 123, 142 and 144, held that the last-named Article governs the case, and that, inasmuch as the plaintiff's step-mother, as long ago as 2nd December 1898, mortgaged the property in suit, expressly declaring herself in the deed to be the sole owner and that plaintiff had no concern with it, the suit brought on 5th March 1912 was out of time. It is admitted on both sides that the Article 144 should be applied. Therefore, the only question to be decided is, when did the possession of the step-mother become adverse? For the plaintiff Mr. Iqbal argues that it did not become adverse, until his client became aware of the setting up of an adverse title, that is, until he returned to the village in 1905. On the other hand, respondent's case is that the step-mother in 1898, as already stated, mortgaged the house, and that it is not necessary, for adverse possession to begin, that the person whose rights are interfered with should be aware of the overt act. Mr. Iqbal in support of his proposition quotes *Ramachandra* v. *Sadashiv* (1), but I do not think that that ruling really deals with the same question as that now before me. The condition of knowledge of the persons whose rights were interfered with was only incidentally stated. That does not seem to have been the point really in issue in that case. Here in the Punjab we have many rulings in connection with suits by absentees for recovery of their property, in which it has been held that any unmistakable overt act by the person in possession of that property starts adverse possession and the circumstances in those cases were obviously such that the absentees could have had no notice of what was going on. The fact is that it is the duty of persons possessing rights to keep an eye on those rights. There is no question in the present case of property being entrusted by the appellant to the widow.

There are also other reasons for rejecting the plaintiff's claim. It was held by the first Court that the alienation by the step-mother was for consideration and "necessity" and this seems perfectly clear. Again, the plaintiff has expressly invoked the Muhammadan Law, according to which he was entitled to possession of a share of the house from the date of his father's death which occurred early in 1898. In these circumstances there can be no doubt whatever that under the Law of Limitation plaintiff's suit has been rightly dismissed.

For these reasons I dismiss the appeal with costs.

Appeal dismissed.

(1) 11 B. 422.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 397 OF 1912.

December 22, 1914.

Present:—Mr. Lindsay, J. C.

MANIK RAM—PLAINTIFF—APPELLANT

versus

RAM AUTAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Estoppel—Evidence Act (I of 1872), s. 115—"Omission," interpretation of—Property decreed to be sold—Party having lien on property—Charge not notified in sale-proclamation—Auction-purchaser, position of—Civil Procedure Code (Act V of 1908), O XXI, r 66

The doctrine of estoppel cannot be said to rest absolutely upon any notice of duty on the part of the person sought to be estopped; and the word "omission", used in section 115 of the Evidence Act does not mean only an omission to perform such a duty as is prescribed by law

If a party to a suit having a charge or incumbrance on the property in suit ordered to be sold fails to have that charge or incumbrance notified in the sale-proclamation, he is estopped from subsequently setting up his lien against the auction-purchaser

Ramchandra Vithuram v. *Jairam*, 22 B 68 referred to.

Appeal from the decree of the District Judge, Gonda, dated the 14th June 1912, modifying that of the Subordinate Judge, Gonda, dated the 7th March 1912.

Babu *Bisheshwar Nath*, for the Appellant.

Babus *Basdev Lal* and *Gopal Sahai*, for the Respondents.

JUDGMENT.—This is an appeal of a plaintiff, Manik Ram, who sued in the Court of first instance for possession of a three-annas share in *Mahal* Aggayya Ram situated in the village of Behari Munfi. The plaintiff also claimed Rs. 300 mesne profits. The claim was based on a mortgage executed in favour of the predecessor-in-interest of the plaintiff on the 22nd of February 1905 by one Ram Padarath, who was defendant No. 11

MANIK RAM *v.* RAM AUTAR.

in the case. By the mortgage in question a three-annas share in four *mahals* was mortgaged with possession to secure a loan of Rs. 1,400. The interest which was mortgaged was an under-proprietary interest in these *mahals*. The present suit relates only to one of these *Mahals*, Aggayya Ram, the allegation of the plaintiff being that the defendants had ousted him from possession of his share in this latter *mahal*. It appears further that a few years ago the superior proprietor of the village, one Murtaza Husain, brought a suit against the under-proprietors for arrears of rent. In execution of that decree a portion of the land of *Mahal* Aggayya Ram was put up to auction and sold to the defendants Nos. 6, 8, 9 and 10. The area so sold amounted to 4.93 acres. The Court of first instance decreed the plaintiff's claim for this three-annas share, but held that the plaintiff was not entitled to any decree for possession in respect of the 4·93 acres which had been sold in execution of the above decree. It also gave the plaintiff a decree for Rs. 193 for mesne profits. The decision was taken in appeal to the Court of the District Judge, who reduced the amount of mesne profits awarded but upheld the decree of the Court of first instance in other respects. In particular, the lower Appellate Court held that the plaintiff was not entitled to a decree for possession over the 4·93 acres above referred to. The matter for decision in appeal here is whether or not the plaintiff was entitled to get possession over that area. The ground upon which the judgment of the lower Court is based was this. The learned Judge found that in the suit which had been brought by Murtaza Husain against the under-proprietors for recovery of arrears of rent this mortgagee, Manik Ram, was impleaded as a party. He was, it appears, even previous to the date of this mortgage, a co-sharer in this under-proprietary holding. The Judge was of opinion that as Manik Ram at the time when this portion of *Mahal* Aggayya Ram was brought to sale in execution of decree failed to have his lien as a mortgagee notified, he was not entitled to succeed as against the auction-purchasers. It was conceded that the mortgage executed in the plaintiff's favour had been proved and that in fact the mortgage on which he relied was still subsisting. In appeal here it is contended that the Court below] was wrong in refusing the claim for possession as regards the 4.93 acres. It is said that there was no duty upon Manik Ram to have his lien as mortgagee notified and that the fact of mortgage being established, he is entitled to have possession by virtue of the mortgage even as against the purchasers at the auction-sale. It is said in the second ground of appeal that the plaintiff-appellant being a mortgagee in possession, his lien as a mortgagee could not be legally notified in the sale-proclamation and that it was not necessary for him to take any proceedings for that purpose. In this connection the learned Counsel for the appellant relied on the terms of Order XXI, rule 62, which lays down that where the Court is satisfied that the property is subject to a mortgage or charge in favour of some person not in possession and thinks fit to continue the attachment, it may do so subject to such mortgage or charge. On the other hand, there is Order XXI, rule 66, of the Code which lays down rules which are to be observed where property is ordered to be sold by public auction in execution of decree. This rule lays down that proclamation of sale is to be drawn up after notice to the decree-holder and the judgment-debtor and it also provides that the proclamation is to state as fairly and accurately as possible any incumbrance to which the property is liable. I must presume that the procedure laid down by this rule was duly followed in connection with the sale which took place in execution of the decree and I must, therefore, take it that the proclamation for sale was prepared after notice had been given to all the judgment-debtors, one of whom was the appellant here, Manik Ram. If Manik Ram had the opportunity of putting forward his claim as a mortgagee in respect of any of the property which was intended to be sold and if, he deliberately failed to avail himself of that opportunity, I think that as against auction-purchasers a clear case of estoppel is made out against him. By his omission to claim any right as a mortgagee in respect of this property, he must be taken to have induced the intending purchasers to believe that the property was being sold free of any incumbrance.

Where a person stands by and allows another to advance or spend money on pro-

perty over which he has a charge or incumbrance, he may be estopped by his conduct or acquiescence and in the present case, I think, the learned Judge of the Court below rightly applied this principle. In the ruling reported in *Ramchandra Vithuram* v. *Jairam* (1) it was held in the case of a decree-holder that if he omitted to disclose his lien previous to the sale, he was estopped from setting it up afterwards as against the person who purchased in execution. Their Lordships held that under section 237 of the old Code read with section 287 the duty lay upon the decree-holder to disclose his lien in applying for execution. In the same way, I think, it may be taken that under the provisions of Order XXI, rule 66, if there is a duty on the decree-holder, there is also a duty on the judgment-debtor to put forward any claim which he has by way of incumbrance. Apart from that, however, I do not think that the doctrine of estoppel can be said to rest absolutely upon any notice of duty on the part of the person sought to be estopped. The rule as laid down in section 115 of the Evidence Act is that where one person has, by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representatives shall be allowed in any suit or proceeding between himself and such person or his representatives to deny the truth of that thing. It is not necessary, I think, that the omission referred to in this section should be an omission to perform a duty which is prescribed by law. It is sufficient in my opinion to raise an estoppel if it is shown, as in the present case, that a person who has an interest in the property sought to be sold in execution of the decree and who has had an opportunity of having that interest proclaimed before the property is brought to sale, has deliberately omitted to ask the Court to have it notified for the information of the intending purchasers. It would be in the highest degree inequitable to allow a person in this position to turn round afterwards as against the purchaser and defeat the interest which the latter has acquired, by setting up a previous interest of his own.

(1) 22 B. 680.

It is said in the third ground of appeal that the auction-purchasers must have been aware of the plaintiff-appellant's mortgage, because the plaintiff-appellant was made a party to the suit for arrears of rent in his character as mortgagee. This statement does not appear to be borne out by the copy of the execution-proceedings which has been placed before me. It would seem that Manik Ram was impleaded merely as a co-sharer and not in his capacity as a mortgagee in possession. I find that the case was rightly decided in the Court below and I dismiss this appeal with costs.

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 268 OF 1913.

August 19, 1914.

Present:—Mr. Justice Beaman and Mr. Justice Hayward.

VENKAJI NARAYAN KULKARNI AND OTHERS—DEFENDANTS—APPELLANTS

versus

GOPAL RAMCHANDRA DESHPANDE—PLAINTIFF—RESPONDENT.

Mortgage—Rajinama *by mortgagor and complementary* kabuliat *by mortgagee*—*Transfer of equity of redemption.*

A *rajinama* executed by a mortgagor in favour of his mortgagee relinquishing occupancy-rights in the mortgaged land and a complementary *kabuliat* given by the mortgagee operate to transfer the equity of redemption from the mortgagor to the mortgagee.

Second appeal from the decision of the District Judge of Belgaum, in Appeal No. 51 of 1912, reversing that of the Subordinate Judge, second Class, of Athni, in Civil Suit No. 365 of 1912.

Mr. *Coyajee* (with him Mr. *G. K. Parekh*) for the Appellant.

Mr. *G. S. Rao*, for the Respondent.

JUDGMENT.—The plaintiff in this suit mortgaged the land to the defendants in 1876, and in 1879 he passed a *rajinama* relinquishing all his occupancy-rights in the said land in favour of the defendants. The defendants at the same time gave the complementary *kabuliat*. The trial Judge

held, that this transaction amounted to a relinquishment of the equity of redemption by the mortgagor in favour of the mortgagees. The learned Judge of first appeal has held that it did not. In his opinion the only effect of the *razinama* and *kabuliat* under the Act of 1865 was to confer upon the mortgagees the privilege, as the learned Judge calls it, of paying the Government assessment. We find it a little difficult to understand in what light this could have appeared to the learned Judge a privilege for which any person would be anxious to pay good consideration. However that may be, on the facts found by the learned Judge of first appeal, the case is clearly covered by authority. The judgment of this Appeal Court in *Dagon* v. *Sakharam* (1), following *Vishnu Sakharam Phatak* v. *Kashinath Bapu Shankar* (2) and *Tarachand Pirchand* v. *Lakshman Bhawani* (3), appears to us to have settled the law beyond controversy upon the only question we are asked to answer. In our opinion the *razinama* and the *kabuliat* of the year 1879 effectually extinguish the plaintiff's equity of redemption. We must, therefore, now reverse the decree of the lower Appellate Court and restore that of the Subordinate Judge with all costs upon the respondent throughout.

Appeal allowed.

(1) 27 Ind Cas. 594, 16 Bom. L R 719 *note*.
(2) 11 B. 174.
(3) 1 B 91.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 860 OF 1912.

December 16, 1914.

Present.—Mr. Justice N. Chatterjea and Mr. Justice Greaves.

KRISHNA LAL CHOUDHURI AND OTHERS —PLAINTIFFS—APPELLANTS

versus

SALIM MAHOMED CHOWDHURY— DEFENDANT—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), ss 67, 193, *Sch. III, Art* 2, *cl* (b)—*Lease, construction of*—*Fishery right, suit for*—*Limitation*—*Fishery, money payable for, whether rent*

Where a lease merely gives a right to fish in a *jalkar*, the fact that the lessee is not to claim reduction of the *jama* on the ground of drought or inundation does not necessarily shew that any right to the soil is also conferred.

A suit to recover money due under such a lease comes under section 193 of the Bengal Tenancy Act and is barred if not brought within the special period provided by Schedule III, Article 2, clause (*b*), of the Act

The money payable in respect of a fishery is not rent within the meaning of the Bengal Tenancy Act, and as such, interest at the rate stipulated in the lease is recoverable on the amount

Section 67 of the Bengal Tenancy Act relating to interest affects the contract between the parties, and the restriction on the liability of the tenants to pay interest at the rate of 12½ per cent. per annum is a matter of substantive right, and does not apply to suits.

Second appeal from a decision of the District Judge, Rajshahi, dated the 14th January 1912, affirming that of the Munsif, first Court, Malda, dated 31st August 1911.

Babu *Brojolal Chuckerbutty* and *Jogesh Chandra Bose*, for the Appellants.

JUDGMENT.—This appeal arises out of a suit for recovery of money payable under a registered *kabuliat* in respect of a *jalkar* for the years 1312 to the *Poush* instalment of 1317 B. S.

The Courts below have disallowed the claim for the years 1312 and 1313, B S., on the ground the claim for those years is barred by the special limitation provided by Schedule III, Article 2, clause (*b*), of the Bengal Tenancy Act. If the special limitation does not apply to the suit, the claim for the years 1312 and 1313 would be in time under Article 116 of the general Limitation Act.

Now section 193 of the Bengal Tenancy Act lays down that the provisions of the Act applicable to suits for recovery of arrears of rent, shall, as far as may be, apply to suits for the recovery of anything payable or deliverable in respect of any rights of pasturage, forest rights, rights over fisheries and the like. Section 184 of the Act provides that the suits specified in Schedule III shall be instituted within the time prescribed in that Schedule, and Schedule III, article 2 (*b*), prescribes a period of three years within which a suit for recovery of arrears of rent is to be instituted.

It is contended on behalf of the appellants that the lease in the present case not merely confers a right over a fishery within the meaning of section 193 of the Bengal Tenancy Act, but also creates an interest in land and that as such does not come within the purview of the Bengal Tenancy Act. A

jalkar does not necessarily imply any right to the soil [see *David* v. *Girish Chandra Guha* (1) and *Radha Mohan Mundal* v. *Neel Madhub Mundul*(2)] and we are of opinion that the lease in the present case does not confer any right to land. It merely gives a right to fish in a *jalkar* belonging to the plaintiffs' *zemindari*. The fact that the lessee was not to claim reduction of the *jama* (rent) on the ground of drought or inundation does not necessarily show that any right to the soil was conferred. The name of the *jalkar mara nadi* (dried-up river) and the reference to the fishing period in the lease indicate that the *jalkar* was not full of water at all seasons of the year. The tenant took the risks of inundation and failure of rains and the agreement was that he would not be entitled to claim any reduction on those grounds. Then the stipulations that the lessee would not exceed the boundaries and would be bound to give information to the Police and to the lessor, if any murder was committed within the boundaries of the *jalkar*, are not inconsistent with the lease being a fishery lease, as the *zemindar* after letting out the *jalkar* would no longer keep any watch over the *jalkar*.

It is contended that cesses cannot be charged on a *jalkar* unconnected with any right to the soil, and the fact that the tenant agreed to pay cesses shows that a right to land was conferred by the lease. But the mere fact that the tenant agreed to pay a charge, which he might not be legally compelled to pay, cannot alter the nature of the tenancy. Nor is it by itself sufficient to indicate that any right was created in land.

Reliance is placed on the case of *Mahananda Chakravarti* v. *Mongala Kootani* (3), in which importance was attached to the condition that the lessee was to continue liable for the rent even in case of drought and non-rearing of fish. But in that case, there was a lease of a tank in which fish has to be reared, and which cannot be done if there is a drought. The lease did not specify the rights to be exercised by the lessee in the tank. In the present case the *jalkar* appears to be a river which in the rainy season is full of water and in which fish has not to be reared, and the only right conferred on the lessee is the right of catching fish. The question is one of construction, and must depend upon the terms of the particular lease.

Upon a consideration of all the terms of the lease, we are of opinion that the lease merely conferred a right of fishing and no right to land was conferred.

That being so, the case comes under section 193 of the Bengal Tenancy Act, and the arrears for 1312 and 1313 B. S. have been rightly held by the Courts below to be barred by limitation, under Schedule III, Article 2, clause (*b*), of the Bengal Tenancy Act.

The next question is whether the Court below was wrong in allowing interest only at the rate of 12½ per cent. per annum on the arrears, instead of at the rate of Rs. 2 per cent. per month as stipulated in the *kabuliat*.

Section 67 of the Bengal Tenancy Act, no doubt, provides that an arrear of rent shall bear interest at the rate of 12½ per cent, but it is contended that money payable in respect of a fishery is not 'rent' within the meaning of the Act, as 'rent,' according to section 3, clause 5, of the Act means whatever is payable or deliverable in money or kind by a tenant to his landlord on account of the use or occupation of the land held by the tenant.

We think this contention must prevail. We have found that the lease of the *jalkar* does not create any interest in *land*. That being so, the money reserved in the *kabuliat* is not 'rent' within the meaning of section 67 of the Act. In *Shib Prasad Choudhuri* v. *Vakai Pati* (4) there is an observation that there is nothing in the definition of the word 'rent' in the Bengal Tenancy Act which excludes fishery rent. But the attention of the learned Judges apparently was not drawn to the fact that the word 'rent' in that section has reference to anything payable for use or occupation of *land* held by the tenant. If what is payable in respect of any rights over fisheries had been 'rent' within the meaning of the Act, Section 193 would not have laid down that the provisions of the Act applicable to suits for the recovery of arrears of 'rent' shall, as far as may be, apply to suits for the recovery of *anything payable or deliverable* in respect of fishery rights and in that case section 193

(1) 9 C. 183; 11 C. L. R. 305.
(2) 24 W. R. 200.
(3) 31 C. 987; 8 C. W. N. 804.
(4) 33 C. 601.

would have been wholly unnecessary. A similar view was taken in the case of *Abdulla Sarkar* v. *Ashraf Ali Mondal*(5), where the learned Judges were of opinion that money payable in respect of forest rights is not 'rent' within the meaning of section 3 (5) of the Act

The learned Subordinate Judge refers to the second clause of section 3 (5), where it is laid down that in section 67 (and certain other sections) of the Act, 'rent' includes also money recoverable under any enactment for the time being in force as if it was rent. But the word 'any enactment' obviously refers to any enactment other than the Bengal Tenancy Act; otherwise section 193 would have been included among the other sections mentioned therein. They have reference to cases where the money, though not 'rent', is by any enactment recoverable as if it was rent; for instance, cesses under section 47 of the Cess Act (Bengal Act IX of 1880) or drainage charges (payable by a tenant to his landlord) under section 44 of the Drainage Act (Bengal Act VI of 1880). Section 193 of the Bengal Tenancy Act does not make money payable in respect of a fishery recoverable as if it was rent. That section merely lays down that the provisions of the Act applicable to suits for recovery of rent shall apply, *as far as may be*, to anything payable in respect of fishery rights. We are accordingly of opinion that money payable in respect of a fishery is not 'rent' within the meaning of the Act.

Then the question arises whether the provision of section 67 of the Act relating to interest on arrears of rent is a provision *applicable to suits for recovery of rent*. If it is so, the provision would apply to money payable in respect of fishery rights, having regard to the provisions of section 193 of the Bengal Tenancy Act. But 'provisions of the Act applicable to suits' have reference to the procedure laid down in the Act relating to suits, and do not include the provisions of the Act regulating the rights and liabilities of landlords and tenants. The provisions of section 67 relating to interest affect the contract between the parties, and the restriction of the liability of tenants to pay interest at the rate of 12½ per cent. per annum is a matter of substantive right and cannot be called a provision applicable to suits. The Court, it is true, cannot award interest at a rate higher than 12½ per cent if a suit is brought for recovery of rent, but that is because the Act has restricted the liability of the tenant as to the amount of interest payable.

We are accordingly of opinion that the plaintiff is entitled to interest at the rate stipulated in the *kabuliat*.

The decree of the lower Appellate Court will be modified accordingly and the parties will be entitled to proportionate costs in all the Courts.

Decree modified.

(5) 7 C. L. J. 152.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 890 OF 1913.

February 4, 1915.

Present:—Mr. Justice Shadi Lal.

KISHNA MAL—DEFENDANT—APPELLANT

versus

MUHAMMAD BAKHSH—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Conditional sale—No independent covenant for payment of interest—Post diem *interest allowed.*

Where a mortgage-deed contained a stipulation to the effect that in case of failure of payment of the principal and interest in 17 months, the deed would take effect as a sale out and out from the date of the expiry of the above-mentioned period and the terms of the deed did not show that the covenant for payment of interest was an independent one, on a suit for possession by redemption:

Held, (1) that interest should not be allowed to the mortgagee for the full period from the date of the mortgage up to the date of the suit, there being no independent covenant for the payment of interest after the period fixed for redemption;

Bulanda v. *Fateh Din*, 25 Ind. Cas. 504; 57 P. R. 1914; 256 P. L. R. 1914, followed.

(2) that the stipulated rate of interest could not be allowed for the period for which *post diem* interest at the rate of 9 per cent. per annum had been granted by the lower Appellate Court.

Jawahir Mal v. *Raja Shah*, 95 P. R. 1902; 21 P. L. R. 1903, referred to.

Second appeal from the decree of the Divisonal Judge, Gujranwala Division, dated the 15th April 1913, reversing that of the District Judge, Multan, dated the 21st December 1911.

Mr. *Ganpat Rai*, for the Appellant.

Dr. *Muhammad Iqbal*, for the Respondents.

JUDGMENT.—The dispute, between the parties, in this appeal relates to the amount of interest which the plaintiff must pay to the mortgagee before redeeming the property mortgaged. The learned Divisional Judge disagreeing with the Court of first instance, has held that the stipulation for payment of interest at 15 per cent. per annum is confined to the period of the mortgage and that the mortgagee is entitled only to *post diem* interest for six years at 9 per cent. per annum. I have heard Mr. Ganpat Rai for the appellant and Mr Muhammad Iqbal for the respondent, and am of opinion that this finding of the Divisional Judge is correct.

The mortgage is one by way of conditional sale, and the parties to it stipulated that in case of failure of payment of the principal and interest in 17 months, the deed would take effect as a sale out and out from the date of the expiry of the above mentioned period. The terms of the deed do not show that the covenant for payment of interest was an independent one, or that the parties contemplated that it should remain in operation after the expiry of the period of the mortgage. The Counsel for the parties have cited before me a number of rulings, but it seems to me that a case of this kind must be decided upon the particular terms of the deed, and that judgments which proceed on different sets of facts cannot have any particular bearing upon a case in which the terms of the deed are different. There is, however, a judgment of this Court reported as *Bulanda* v. *Fateh Din* (1) which is in many respects similar to the present case, and in that case it was held that there was no independent covenant as to the payment of interest after the period fixed for redemption. The lower Appellate Court was, therefore, fully justified in refusing the prayer of the defendant for interest for the full period from the date of the mortgage up to the date of the suit.

The learned Counsel for the appellant has further contended that the stipulated rate of interest should be allowed for the period of six years, for which the lower Appellate Court has granted *post diem* interest to the mortgagee. On that point I see no reason to interfere with the discretion of the lower Appellate Court. I may observe that the rate of 9 per cent. fixed by the Court is in accordance with the decision in *Jawahir Mal* v. *Raja Shah* (2).

As regards the prayer for interest after the institution of this suit, I notice that it was not specifically urged in the Courts below. The matter is a discretionary one, and in second appeal I do not see any reason to accede to this prayer.

It appears that the learned Divisional Judge intended to allow the mortgagee interest at the stipulated rate for the period of the mortgage. He has, however, omitted to include it in the amount, upon the payment of which the suit for redemption has been decreed. Mr. Muhammad Iqbal for the respondent admits that this is an oversight on the part of the Judge and that it should be rectified. Counsel for both parties are agreed that interest for 17 months amounts to Rs. 51.

I accordingly accept the appeal so far as to enhance the amount fixed by the Divisional Judge by Rs. 51, that is to say, a decree for redemption in favour of the plaintiff is passed on payment of Rs. 715-6-0 *plus* Rs. 51, total Rs. 766-6-0, within one month from this date. If the payment is not so made, the conditions laid down in the decree of the District Judge shall hold good. I direct that the parties bear their own costs in this Court.

Appeal partly accepted.

(1) 25 Ind. Cas. 504; 57 P. R. 1914; 256 P. L. R. 1914.

(2) 95 P. R. 1902; 21 P. R. L. 1903.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 415 OF 1913.

January 20, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

NERODEBARANI DEVI—APPLICANT—APPELLANT

versus

CHAMATKARINI DEVYA—OPPOSITE PARTY—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXIX, rr. 1, 7—Injunction—Probate and Administration Act (V of 1881), ss 34, 55, scope of—Appointment of Administrator pendente lite—Injunction, power of

NERODEBARANI DEVI v. CHAMATKARINI DEVYA.

Probate Court to grant—English Law and Indian Law, distinction between.

A proceeding for Probate of a Will or for Letters of Administration is not a suit in which property is in dispute.

The only question in controversy in a proceeding in the Probate Court is that of representation of the estate of the deceased, and no question of title thereto, that is, the title of the deceased or of the conflicting titles alleged by the parties to the proceeding can be investigated by the Court

Yeshwant Bhagwant v. *Shankar Ram Chandra*, 17 B. 388, *In the matter of the Will of Dawubai Haji Khan*, 18 B. 237; *In the goods of Moore*, (1888) 13 P. D. 36; 57 L. J. P. 87; 58 L.T. 386, 36 W. R. 576; 52 J. P 200, referred to.

Arunmoyi Dasi v *Mohendra Nath Wadadar*, 20 C. 888, *Jagannath* v. *Ranjit Singh*, 25 C. 354, *Ochararam Nanabhai Haridas* v *Dolatram*, 28 B. 644; 6 Bom. L. R 696, followed.

The terms of section 25, sub-section 8, of the Judicature Act of 1873 are wider than the language used by the Legislature in this country in rule 1 of Order XXXIX of the Civil Procedure Code.

It cannot be said that a Court of Probate is not competent, because it is a Court of Probate, to grant an injunction in any circumstances.

Where injunction is necessary, the proper procedure to follow is for the aggrieved party to apply to the Court for the appointment of an Administrator *pendente lite* under section 34 of the Probate and Administration Act, as an Administrator *pendente lite* appointed under section 34 takes charge of the entire estate, both moveable and immoveable, of the deceased.

On an application being made under section 34, the Court may, if necessary, grant an injunction either in the exercise of its inherent power or under rule 7 of Order XXXIX of the Code.

Appeal against the order of the District Judge, Nadia, dated the 1st of August 1913.

Babu *Narendra Kumar Bose*, for the Appellant.

Babu *Baranashibashi Mukherjee*, for the Respondent.

JUDGMENT.—This appeal is directed against an order by which the Court below has refused to grant an injunction in a proceeding for Letters of Administration of the estate of one Broja Nath Dobey. The appellant, Nirodbarani Debi, and the respondent, Chamat Karini Debi, are daughters of the deceased. Shortly after the death of Broja Nath Dobey, Nirodbarani applied for Letters of Administration to his estate. Thereafter Chamat Karini made an application for probate of a Will alleged to have been executed in her favour by her father. There were thus two counter-cases before the Court and the question of the genuineness and validity of the Will had to be determined in the first instance. Before the cases came on for trial, the appellant, Nirodbarani, who had asked for Letters of Administration, applied to the Court for an injunction to restrain her sister from alienating the properties of which she was in possession. The Court refused the injunction on the ground that rule 1 of Order XXXIX of the Code of Civil Procedure had no application to a proceeding for Letters of Administration under the Probate and Administration Act of 1881. The substantial question for consideration in the appeal consequently is whether the injunction has been rightly refused.

On behalf of the appellant, it has been contended that under section 83 of the Probate and Administration Act, the provisions of the Code of Civil Procedure are applicable to contentious cases, because that section provides that the proceeding shall take as nearly as possible the form of a suit according to the provisions of the Code of Civil Procedure, in which the petitioner for Probate or Letters of Administration, as the case may be, shall be the plaintiff, and the person who may have appeared to oppose the grant shall be the defendant. Reference has also been made to section 55 of the Probate and Administration Act, which provides that the proceedings of the Court of the District Judge in relation to the grant of Probate and Letters of Administration shall, except as otherwise provided, be regulated, so far as the circumstances of the case will admit, by the Code of Civil Procedure. In support of the contention that the provisions of the Civil Procedure Code are applicable to Probate proceedings, reliance has also been placed on the cases of *Yeshwant Bhagwant* v. *Shankar Ramchandra* (1) and *In the matter of the Will of Dawubai Haji Khan* (2) in which a Receiver was appointed in proceedings for the grant of Letters of Administration, *Watkins* v. *Brent* (3) and *Rendall* v. *Rendall* (4) in which Receivers were appointed during the pendency of Probate

(1) 17 B. 388.
(2) 18 B. 237.
(3) (1835) 1 Myl & Cr. 97; 5 L. J. Ch. 49; 7 Sim. 512; 40 E. R 318; 43 R. R. 149.
(4) (841) 1 Hare 152; 11 L. J. Ch. 66 Eng. Rep. 986.

proceedings, and *Nicholas* v. *Dracachis* (5) and *In the goods of Moore* (6) where injunctions were granted during the pendency of a Probate proceeding. Our attention has not been invited to any case in the Indian Courts in which an injunction has been granted under circumstances similar to those of the case before us.

The decision of the question raised must depend primarily upon the terms of Order XXXIX, rule 1, of the Code of Civil Procedure, assuming that the provisions of that rule are applicable to proceedings under the Probate and Administration Act by virtue of section 55 thereof. It is essential for the application of rule 1 of Order XXXIX that the property in dispute in the suit is in danger of being wasted, damaged or alienated by a party or wrongfully sold in execution of a decree. Consequently the applicant for an injunction must satisfy the Court that the proceeding is a suit in which there is property in dispute and that the property is in danger of being wasted, damaged or alienated. The question consequently arises, whether a proceeding for Probate of a Will or for Letters of Administration may rightly be held to be a suit in which property is in dispute. In our opinion, the answer must be in the negative. It has been repeatedly held, as appears from the cases of *Arunmoyi Dasi* v. *Mohendra Nath Wadadar* (7), *Jagannath* v. *Ranjit Singh* (8), *Birj Nath* v. *Chandar Mohan Banerjee* (9) and *Ochavaram Nanabhai Haridas* v. *Dolatram* (10), that the only question in controversy in a proceeding in the Probate Court is that of representation of the estate of the deceased, and no question of title thereto, that is, the title of the deceased or of the conflicting titles alleged by the parties to the Probate proceeding can be investigated by the Court. Consequently it would be, in our opinion, an undue straining of the language to hold that a Probate proceeding is a suit in which there is property in dispute. The circumstance that in England an injunction has been granted in a Probate proceeding is of no assistance to the appellant, because the terms of section 25, sub-section 8, of the Judicature Act of 1873 are wider than the language used by the Legislature in this country in rule 1 of Order XXXIX. We are clearly of opinion that the application made to the Court below by the present appellant was misconceived.

But we do not lay down the proposition that the Court is not competent, because it is a Court of Probate, to grant an injunction in any circumstances. In England, injunctions have been granted in cases of this description under rule 3 of Order 50 of the Rules of the Supreme Court. There is a corresponding provision in the Code of Civil Procedure embodied in rule 7 of Order XXXIX. The proper procedure to follow in cases of this description is for the aggrieved party to apply to the Court for the appointment of an Administrator *pendente lite*, under section 34 of the Probate and Administration Act. It is not necessary for our present purpose to examine the scope of section 218 of the Indian Succession Act (which is reproduced in the Probate and Administration Act as section 34) and of section 239 of the Indian Succession Act (to which there is nothing corresponding in the Probate and Administration Act). It is possible that the scopes of the two sections are different in this way, namely, the former section contemplates an application by a party to the proceeding after the commencement thereof and gives the person appointed as Administrator *pendente lite*. power to deal with the estate, subject to the restrictions mentioned, whereas section 239 contemplates the possibility of an application by a stranger to the proceeding, an application before the commencement of the proceeding, and deals only with the question of the custody and preservation of the property. As we have said, the proper course to pursue in a case of this description is to make an application under section 34 of the Probate and Administration Act, and, in this view, it is unnecessary to consider whether the provisions of the Code relating to the appointment of a Receiver are applicable to cases of this description. In England, Receivers are appointed in the course of Probate proceedings in respect of immoveable

(5) (1875) 1 P. D. 72; 45 L. J. P. 45; 24 W. R. 461
(6) (1888) 13 P. D. 86; 57 L. J. P. 87; 58 L. T. 386; 36 W. R. 576, 52 J. P. 200.
(7) 20 C. 888
(8) 25 C. 354.
(9) 19 A. 458; A. W. N. (1897) 106.
(10) 28 B. 644, 6 Bom. L. R. 696.

properties, while Administrators *pendente lite* are appointed in respect of moveable properties of the deceased. In this country the Legislature has made a single provision by which an Administrator *pendente lite* appointed under section 34 takes charge of the entire estate of the deceased. When an application has been made under section 34, it may be necessary for the Court to grant an injunction either in the exercise of its inherent power or under rule 7 of Order XXXIX of the Code. For instance, it may be brought to the notice of the Court that a party in possession is about to deal with the moveable properties, and unless an injunction is granted, the appointment even of an Administrator *pendente lite* may become fruitless. The Court, under such circumstances, has ample authority, either under statutory powers or in the exercise of its inherent jurisdiction, to make a temporary order, so as not to defeat the ultimate order which the Court is competent to make.

In the case before us the appellant did not make an application under section 34 of the Probate and Administration Act, though that was her obvious remedy. The only question for consideration now is, whether we should affirm the order of the District Judge and leave it open to him to deal with an application under section 34 or we should in this proceeding make an order in that behalf. In our opinion the latter course should be adopted, as the respondent has expressed an intention to deal with the moveable properties in her hands for the payment of debts. There may also be debts to be realised. In any event, on the facts stated in the affidavit it is manifest that the estate stands in need of immediate administration.

The result is that we allow this appeal, set aside the order of the District Judge and direct him to appoint forthwith an Administrator *pendente lite* under section 34 of the Probate and Administration Act. There will be no order for costs either in this Court or in the Court below.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 582 OF 1913.

November 11, 1914.

Present:—Mr. Justice Scott-Smith.

JAWAHIR SINGH—PLAINTIFF—APPELLANT

versus

NAURANG SINGH—DEFENDANT—RESPONDENT.

Appeal—Second—Definite finding of fact—A share-holder in possession of more shamilat than his share—Failure to get deed of sale registered—Punjab Courts Act (III of 1914), s. 41.

A finding of fact though not very clear but sufficiently definite cannot be interfered with in second appeal.

The mere fact of a share-holder cultivating more than his admitted share in the *shamilat* is no inference of his having purchased a further share, specially when he has failed for a long time to get his deed of sale registered or his title recorded in the Revenue Record.

Second appeal from the decree of the Divisional Judge of the Sialkot Division, dated the 6th of December 1912, reversing that of the Munsif, first Class, Sialkot, dated the 28th of September 1911, dismissing the suit.

Mr. *Gulshan Rai*, for the Appellant.

Mr. *Nand Lal*, for the Respondent.

JUDGMENT.—This second appeal was admitted on the ground that the lower Appellate Court had not recorded a very clear finding whether plaintiff-appellant bought a share in the *shamilat* from Lal Singh.

Mr. Nand Lal for respondent raises the preliminary objection that the finding is sufficiently definite and that, therefore, no second appeal lies.

The learned Divisional Judge does not say in clear terms, "I hold that the alleged sale is not proved", but upon futher consideration of his judgment, and after hearing Counsel, I think it is clear that what he means was that plaintiff had to prove the facts entitling him to a declaration, and that he had not done this sufficiently, that it was possible he might have bought the share in the *shamilat*, but the claim could not be decreed upon a mere possibility

I have read the *patwari's* evidence and it is clear from it that the mere fact that plaintiff has been cultivating more than his admitted share in the *shamilat*, would not warrant the inference that he had become entitled to a further share,

On the other hand, his long silence and his omission to get his deed registered or his title recorded in the Revenue Record warrant an inference unfavourable to him

I am, therefore, unable to hold that the decision of the lower Appellate Court is contrary to law and I dismiss the appeal with costs.

Appeal dismissed.

LOWER BURMA CHIEF COURT.
SECOND CIVIL APPEAL No. 157 OF 1913.
December 21, 1914.
Present:—Mr. Justice Ormond.
MA NAN THE AND OTHERS—DEFENDANTS—APPELLANTS
versus
MI HME MA YE AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Possession, suit for—Mortgage by ostensible owner—Benefit to estate—Muhammadan Law.

According to Muhammadan Law as between sisters and nephews, sisters are the sole heirs and, therefore, nephews have no right to mortgage the property, unless they act as sisters' agents.

A loan for the nephews' defence in a suit for possession by the sister-in-law is not for the benefit of the estate, as neither party has any right to the possession of the estate.

Mr. *Bijapurkar*, for the Appellants.

Mr. *D. N. Palit*, for the Respondents.

JUDGMENT.—The plaintiffs sued for possession of land. The land originally belonged to one Guya, a Muhammadan who died in August 1909, leaving two sisters, who are the plaintiffs in this case, and two nephews. In April 1910 the two nephews mortgaged this land to Shwe Nyun and gave him possession. Shwe Nyun was the original defendant in this suit who died pending this appeal. The sisters and nephews lived in the same house. In June 1911, the plaintiffs sued the nephews to recover the inheritance. Mr. Bijapurkar for the defendants-appellants contends that the nephews were able to give a good title to the mortgagee as being the ostensible owners, that is to say, by reason of their being in possession of the land. The sisters were admittedly the sole heirs of the deceased Guya and the nephews had no title to dispose of the land and it is not shown that the nephews acted as agents for the sisters. Secondly, it is contended that the mortgage is good because the money was raised for the

protection of the estate. The money was borrowed to pay for the nephews' defence in a suit instituted by a sister-in-law of the deceased Guya who having no title whatever to the land sued to dispossess the nephews. That could not be a benefit to the estate as neither the sister-in-law nor the nephews had any right to be in possession. Unless the nephews had some authority to act on behalf of some of the heirs, they would have no authority to raise loans for the benefit of the estate.

This appeal must be dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.
CIVIL REVISION PETITION No. 282 OF 1913.
November 5, 1914.
Present:—Mr. Justice Shah Din.
CHELA RAM—DEFENDANT—PETITIONER
versus
MENGH RAJ—PLAINTIFF—RESPONDENT.

Costs—Power of Appellate Court to allow costs disallowed by Subordinate Court.

In awarding costs the usual rule is that costs should be allowed to the successful party, and where no good ground exists for not following the rule the higher Court should rectify the error.

Petition, under section 70 of Act IV of 1912 for revision of the order of the Additional Divisional Judge of Multan at Lahore, dated the 21st November 1912, reversing that of the District Judge, Multan, dated the 22nd January 1912, decreeing plaintiff's suit.

Messrs. *Badr-ud-Din Koreshi* and *Roshan Lal*, for the Petitioner.

Mr. *Nand Lal*, for the Respondent.

JUDGMENT.—After hearing Counsel on both sides, I think that the Divisional Judge has given good reasons for reversing the decree of the District Judge as regards costs. The sole reason recorded by the District Judge for disallowing costs to the plaintiff was that Chela Ram, defendant, had gifted his share to his wife and son who were subsequently added as defendants, but this was not a good ground for departing from the usual rule of allowing costs to the successful party. The District Judge not having exercised his discretion in a sound manner, the Divisional Judge was justified in reversing his order and in allowing costs to the

plaintiff. I dismiss the revision, but in the circumstances of the case leave the parties to pay their own costs in this Court.

Petition dismissed.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 90 OF 1914.

November 21, 1914.

Present:—Mr. Justice Rafique.

MR. C. SIMPSON—DEFENDANT—APPLICANT

versus

MRS. E. BACHMAN—PLAINTIFF—RESPONDENT.

Husband and wife—Liability of husband for misappropriation by his wife.

A husband is not liable for the acts of misappropriation committed by his wife during the course of her service which he had allowed her to take up.

Civil revision against the decision of the Small Cause Court Judge, Dehra Dun, dated 6th April 1914.

Mr. *Nihal Chand*, for the Applicant.

Mr. *M. L. Agarwala*, for the Opposite Party.

JUDGMENT.—This is an application in revision from a decree of the Small Cause Court Judge of Dehra Dun. Mrs. Bachman, the respondent, had employed Mrs. Simpson, the wife of the appellant, as housekeeper to manage the boardinghouse belonging to Mrs. Bachman. In August 1913, Mrs. Simpson severed her connection with the boarding-house. Mrs. Bachman sued her and her husband for the recovery of Rs. 346-7-0, on the allegation that Rs. 50 had been advanced to Mrs. Simpson with the consent of her husband which had not been re-paid, and the balance had been misappropriated by Mrs. Simpson during the time that she acted as housekeeper.

The claim was resisted by both the defendants. The husband denied his liability on the ground that he was not liable for any acts of misappropriation of his wife. The learned Judge of the Small Cause Court decreed the claim against both the defendants. He held that the husband was liable because he had allowed his wife to act as housekeeper to Mrs. Bachman. Mr. Simpson comes up in revision to this Court and contends that he is not liable for the sums misappropriated

by his wife in spite of his having allowed her to take up the service of Mrs. Bachman as housekeeper. I think that the contention for the applicant must prevail. The husband cannot be made liable for acts of misappropriation of his wife simply because he has allowed her to take up service, *vide* the Law of the Domestic Relations by William Pinder Eversley, third Edition, page 282, last paragraph. With regard to a portion of the claim I find that the applicant had undertaken to re-pay it *viz.*, Rs. 50, which had been advanced to his wife, *vide* Exhibit 4. The application, therefore, prevails with regard to Rs. 296-7-0. I modify the decree of the Court below by dismissing the claim of the plaintiff to the extent of Rs. 296-7-0 as against Mr. Simpson, defendant No. 2. Costs of this application are allowed to the applicant.

Decree modified.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2249 OF 1913.

December 17, 1914.

Present:—Mr. Justice Shah Din.

ALLAH DAD—PLAINTIFF—APPELLANT

versus

MEHRA AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. VII, r. 7—Suit based on one sale—Decree on subsequent sale of a part, whether can be allowed.

Where a person claims possession of the entire property on the strength of a sale which had been cancelled by the consent of both parties, but it is found as a fact that there was in his favour a subsequent sale of a part of that property upon which he has not based his claim, it is desirable in order to prevent further litigation to grant him a decree for that part only, instead of dismissing the suit and directing him to sue again on the basis of the subsequent sale.

Second appeal from the decree of the Divisional Judge of the Jhelum Division, dated the 27th May 1913, reversing that of the Munsif, first Class, Gujrat, dated the 9th December 1912, decreeing the claim in part.

Mr. *Nand Lal*, for the Appellant.

Mr. *Taj-ud-Din*, for the Respondents.

JUDGMENT.—The facts are fully given in the judgment of the Divisional Judge. He finds as a fact that after cancelling the original sale of 25 *kanals* 10 *marlas* in favour of the plaintiff-appellant, the defendant-respondent Mehra, son of Samandar, who was owner of the land, re-sold the said land in

three lots to three different vendees, *viz.*, the plaintiff-appellant and the other two respondents, Maula Dad and Mehra, sons of Imam Bakhsh, who held possession of the land as mortgagees. By this new arrangement 9 *kanals* 7 *marlas* were sold to the plaintiff, the rest going to the mortgagees. The plaintiff claimed possession of the entire land, 25 *kanals* 10 *marlas*, on the strength of the original sale and the Munsif decreed in his favour possession of 9 *kanals* 7 *marlas*, on the ground that under the arrangement referred to above and in substitution for the original sale, the area just mentioned had been sold to the plaintiff. The Divisional Judge found in agreement with the Munsif that the sale of 9 *kanals* 7 *marlas* was made by the defendant Mehra, son of Samandar, in favour of the plaintiff, but has dismissed the plaintiff's suit, holding that as the original sale on which the plaintiff's suit was based had been cancelled, his present claim must be disallowed and he must be left to sue on the basis of the subsequent sale. I cannot agree in this view, which means encouraging unnecessary litigation. As the second sale in respect of 9 *kanals* 7 *marlas* has been held by both the Courts to have been validly made by the owner thereof, plaintiff, a decree given in his favour by the Munsif in respect of that area was perfectly correct and should have been maintained by the Divisional Judge.

I accept this appeal and setting aside the decree of the Divisional Judge, restore that of the Munsif with costs throughout.

Appeal accepted.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1612 OF 1913.

January 19, 1915.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

BHAGWAN DAYAL AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

PARAM SUKH DASS—DEFENDANT—RESPONDENT.

Ex parte decree against minor—Minor not properly represented—Irregularity—Minor, right of, to get decree set aside—Officer of Court appointed as guardian ad litem*—Expenses, provision for.*

A suit was brought against a certain person and his minor nephews. The uncle refused to be the guardian of the minors alleging that they lived with their mother. The Court appointed the *Amin* as the guardian *ad litem* of the minors, without giving any notice to the minors or to their mother in whose care they were. The *Amin* did not make any defence. An *ex parte* decree was made as against the minors. An application was made to set aside the *ex parte* decree on behalf of the minors by their mother. The application was refused. Subsequently a suit was filed for a declaration that the decree was null and void as against the minors.

Held, that the minors not being properly represented in the suit and the *ex parte* decree having been passed without notice to them or their natural guardian, they were entitled to the declaration which they sought in the suit.

Walian v. *Banke Behari Pershad Singh*, 30 C. 1021 (P. C.); 30 I. A. 182; 7 C. W. N. 774; 5 Bom. L. R. 822, *Munshi Munna Lal* v. *Ghulam Abbas*, 6 Ind. Cas. 788, 32 A. 287, 12 Bom. L. R. 439, 11 C. L. J. 557; 14 C. W. N. 794; 8 M. L. T. 57; 13 C. C. 123; 20 M. L. J. 591; 37 I. A. 77 (P. C.), referred to.

Semble—The appointment of an officer of the Court as guardian *ad litem* of minors in a suit without requiring the party at whose instance he is appointed to deposit the necessary funds to enable the guardian to defend the case, is little more than a farce.

Second appeal from the decision of the Subordinate Judge of Aligarh, dated the 2nd September 1913.

Mr. *Umashanker Bajpai*, for the Appellants.

Dr. *S. C. Banerji*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit in which the plaintiffs claimed a declaration that a decree obtained against them *ex parte* on the 30th of August 1911 was null and void as against them. The decree in question was a decree obtained on foot of a mortgage alleged to have been executed by the father of the plaintiffs and their uncle, Raghubir Sahai. The facts are as follows. The plaintiffs were at the time of the institution of the mortgage suit, and still are, minors. The plaintiffs in the previous suit sought to implead them as defendants through the said Raghubir Sahai as their guardian *ad litem*. Raghubir Sahai refused to be the guardian *ad litem* and informed the Court that the minors lived with their mother, and not with him. Eventually the Court appointed the *Amin* as the guardian *ad litem* of the minors. This order was made without any notice having been given to the minors, or to their mother in whose care they were. There was no appointed or natural guardian other than the mother. It is not pretended that the Court required the plaintiff to deposit any sum of money to enable the Court *Amin* to employ a Pleader, or to make any inquiry as to the minors' defence. Nor is it pretended that the Court *Amin* did in fact take any step to defend the case or to inquire

whether there was a defence. An *ex parte* decree was granted on the 30th of August 1911. An attempt was made on behalf of the minors through their mother to have the case restored, but this application was refused. The present suit was then instituted.

Both the Courts below have dismissed the suit and the plaintiffs come here in second appeal. There can be no doubt that there was great irregularity in the proceedings prior to the granting of the *ex parte* decree. The provisions of Order XXXII, rule 3, were not observed. The Courts below, however, were of opinion that the decree was not void and could not be set aside on account of the irregularity. They refer to the cases of *Walian v. Banke Behari Pershad Singh* (1) and *Munshi Munna Lal* v. *Ghulam Abbas* (2). We think the Courts below were wrong. Assuming that the decree is not nullity, that in itself would not be a sufficient ground for dismissing the plaintiffs' suit. The Court ought to have considered whether the plaintiffs were prejudiced by the irregularity; if the minors had no opportunity of putting forward a defence to the suit, or in other words, if they were not represented in the Court below, they would be prejudiced. It seems to us that the appointment of an officer of the Court as guardian *ad litem* of minors without requiring the party at whose instance he is appointed to deposit the necessary funds to enable the guardian to defend the case, is little more than a farce. If, however, in the present case the order had been made with notice to the mother she might have objected to the appointment of the *Amin*, or at least have given him instructions as to the defence of the minors. There is no real hardship in requiring the party to deposit money to enable the Court official to enquire and get instructions on behalf of minors. If the party is successful in the litigation, the funds so deposited can be subsequently recovered. In the case of *Walian* v. *Banke Behari Pershad Singh* (1), the minors had been sued and had appeared throughout the proceedings with their mother as guardian *ad litem*. The irregularity in the case was the absence from the record of a formal order appointing the mother guardian *ad litem*. The mother was the person who would naturally have been appointed guardian had an application been made. And by appearing in the proceedings she showed that she had no objection to being guardian. The decree was granted in the year 1881 and the suit challenging its validity was not instituted until January 1895. Their Lordships held that the minors were "substantially" sued in the former suit. Their Lordships quote from the judgment of the High Court the following words: "It is necessary that the Court should see that a proper guardian be appointed to protect their interest. Section 443 of the Code is imperative on this point." Their Lordships then say: "In this statement of the law their Lordships entirely concur; and they desire to impress upon all the Courts in India the importance of following strictly the rules laid down in the section referred to". After this statement it seems to us impossible to contend that minors cannot have a decree declared not binding on them under circumstances like the present, where the appointment of the guardian was not only irregular but where in fact a decree was made without even notice to the minors. In *Munshi Munna Lal* v. *Ghulam Abas* (2) the only irregularity was the absence of the affidavit specified in section 457 of the Code of Civil Procedure of 1882. This case was even a weaker one than the case above referred to. The minors were clearly and substantially represented and had every opportunity of putting forward their defence. It is contended by the learned Advocate on behalf of the respondent that the only remedy the minors had was to apply to have the *ex parte* decree set aside under the provisions of order IX, rule 13, of the Code of Civil Procedure. This rule enables a defendant who has not been served with the summons, or was prevented by some sufficient cause from appearing when the suit was called on for hearing, to have an *ex parte* decree set aside. It is argued that the defendant against whom an *ex parte* decree has been made, who neglects to avail himself of the provisions of this rule, cannot afterwards bring an independent suit. This may be so. But this is not the

(1) 30 C. 1021; 30 I. A. 182; 7 C. W. N. 774; 5 Bom. L. R. 822.

(2) 6 Ind. Cas. 788; 32 A. 287; 12 Bom. L. R. 43 11 C. L. J. 557; 14 C. W. N. 794, 8 M. L. T. 57; 13 C. C. 134; 20 M. L. J. 591; 37 I. A. 77 (P. C.).

case here. If the minors were parties to the suit, the only person who could make an application to have the *ex parte* decree set aside would be the Court *Amin* who was their irregularly appointed guardian *ad litem*. No such application was made by him. In our opinion we have to see whether the irregularity in the present case prejudiced or may have prejudiced the minors. Holding as we do that the minors were never properly represented and that the decree was made without notice to them or their natural guardian, we think that they are entitled to the declaration sought in the present suit.

We accordingly allow the appeal, set aside the decrees of both the Courts below and decree the plaintiffs' claim with costs in all Courts including in this Court fees on the higher scale.

Appeal allowed.

PUNJAB CHIEF COURT.

CIVIL REFERENCE No. 55 OF 1914.

January 8, 1915.

Present:—Mr. Justice Rattigan and Mr. Justice Shadi Lal.

MESSRS. MEUGENS AND OTHERS—PETITIONERS

versus

SUTLEJ FLOUR MILLS, FEROZEPORE—RESPONDENTS.

Punjab Courts Act (III of 1914), s. 38—Court of District Judge, power of — Original and Appellate jurisdiction—Enactments regulating procedure—Interpretation.

It was the intention of the Legislature to substitute in the Punjab, for all general purposes, the present Court of the District Judge for the former Court of the Divisional Judge as a Court of Appeal from decrees or orders of Subordinate Judges and Munsifs; but the Court of the present District Judge is essentially a new Court and not merely the successor or transferee of the business of the Court of the former Divisional Judge, within the meaning of section 150 of the Civil Procedure Code.

Distinctive features of the present Court of the District Judge and the former Court of the Divisional Judge explained and illustrated.

Where, therefore, on the 18th July 1914, the then District Judge of Lahore passed certain orders in liquidation proceedings connected with the winding-up of certain banks and the Official Liquidators filed appeals under section 169 of the Indian Companies Act, 1882, on the 29th July 1914, in the Court of the Divisional Judge, Lahore, and while the appeals were still pending the new Punjab Courts Act came into force and abolished the Court of the Divisional Judge, on a reference whether the present District Judge of Lahore was competent to hear and determine the appeals:

Held, that as the appeals in question were preferred from orders passed by a District Judge, the Court which had jurisdiction to hear and determine them was the Chief Court and not the present District Judge.

Acts of the Legislature which regulate procedure, though in general retrospective in their effect, must not be interpreted so as to affect prejudicially the vested rights of the parties to a suit.

Case referred by the District Judge, Lahore, with his No. 1369, dated the 9th December 1914, for orders of the Chief Court of the Punjab, under section 113, Civil Procedure Code.

Mr. *Herbert* and Lala *Madan Gopal*, for the Petitioners.

Lala *Durga Das* and Mr. *Mukerjee*, for the Respondents.

ORDER.—Under section 113 of the Civil Procedure Code the District Judge of Lahore has stated the following case for the opinion of this Court. On the 18th of July 1914, the then "District Judge" of Lahore passed certain orders in liquidation proceedings connected with the winding-up of the "People's Bank, Limited" and the "Amritsar Bank, Limited" and from these orders the Official Liquidators filed appeals under section 169 of the Indian Companies Act, 1882, on the 29th July 1914, in the Court of the Divisional Judge of Lahore.

On the 1st of August 1914, while the said appeals were still pending, the Punjab Courts Act (Punjab Act III of 1914) came into force, and under the provisions of section 18 of that Act the Courts in the Punjab now consist of :—

(*a*) the Chief Court;
(*b*) the Courts of Small Causes established under the provisions of Act IX of 1887;
(*c*) the Court of the District Judge;
(*d*) the Court of the Additional Judge;
(*e*) the Court of the Subordinate Judge; and
(*f*) the Court of the Munsif.

The result of this legislation is that the Court of the Divisional Judge, which was established under Act XVIII of 1884 and to which appeals in cases under the Indian Companies Act, 1882, in which the amount

involved did not exceed Rs. 5,000, had been held by this Court to lie [see *Basheshar Nath* v. *Kanhya Lal* (1)], has ceased to exist. The new Act provides (section 38) that appeals from a decree of a District Judge or Additional Judge exercising original jurisdiction shall lie to the Chief Court, and the question before us is whether the present District Judge of Lahore is competent to hear and determine an appeal which was preferred to the former Divisional Judge from orders passed by the then District Judge under the Indian Companies Act, 1882.

The question is one of importance and of no little difficulty, and though directly relating to an appeal under section 169 of Act VI of 1882, indirectly affects the general jurisdiction of the District Judge as regards all appeals pending in the Court of the Divisional Judge at the time when the new Act came into force. We have, therefore, taken time to consider the question carefully before giving our answer to the present reference, especially as the matter is *res integra* and covered by no authority directly in point. As a result, the conclusions at which we have arrived are as follows: *viz.* :—

(*i*) that it was the intention of the Legislature to substitute, for all general purposes, the present Court of the District Judge for the former Court of the Divisional Judge as a Court of Appeal from decrees or orders of Subordinate Judges and Munsifs; but,

(*ii*) that the Court of the present District Judge is essentially a new Court and not merely the successor or transferee of the business of the Court of the former Divisional Judge, within the meaning of section 150 of the Civil Procedure Code.

That these propositions are correct is, we think, apparent from a comparison of the provisions of section 39 of Act XVIII of 1884 with those of section 39 of the present Act, and broadly speaking, we may say that the appellate jurisdiction of the two Courts is the same. But, apart from questions of local limits of jurisdiction, there are essential points of difference between their respective jurisdictions. Under section 22 of Act XVIII of 1884 the Divisional and District Courts both had original jurisdiction in civil suits, but under section 23 the District Judge's Court was to be deemed the principal Civil Court of original jurisdiction. Section 24 of the present Act constitutes the District Judge's Court the principal Civil Court of original jurisdiction. It is thus *pro tanto* a Court essentially distinct from the Court of the former Divisional Judge.

Again, appeals from decrees or orders of a District Judge in original suits where the value did not exceed Rs. 5,000 lay, under Act XVIII of 1884, to the Court of the Divisional Judge. Under section 38 of the present Act, appeals from all decrees or orders of a District Judge lie to the Chief Court. And, finally, the Divisional Judge had no jurisdiction under Act XVIII of 1884 to hear appeals from decrees of Munsifs in small causes the value of which did not exceed Rs. 500, or in unclassed suits the value of which did not exceed Rs. 100, and such appeals, when allowed by law, lay to the District Judge. Under the present Act all such appeals, when allowed by law, lie to the District Judge.

Having regard, then, to these very essential differences, we cannot say that the present District Judge is the successor of the former Divisional Judge or that the new Act has merely effected a change in nomenclature. The present District Judge's Court is, in fact, a new creation and its jurisdiction is in some respects similar to, in others more extensive and in others again more restricted than, the jurisdiction of the former Court of the Divisional Judge.

Keeping this fact in mind, we have now to decide whether it is competent to a District Judge to hear and determine appeals which were preferred to the Divisional Judge at a time when the Court of the latter was still in existence. This question gave rise to no difficulty when under the provisions of Act XVIII of 1884, the Courts of Deputy Commissioners and Commissioners were re-placed by Courts of District and Divisional Judges, as express provision was made by section 68 of that Act to meet the case of pending proceedings (see Chief Court's Book, Circular No. XIII—2519 of 1884 pages 14—18 of

(1) 22 Ind. Cas. 250; 34 P. R. 1913, 45 P. L. R. 1914.

MESSRS. MEUGENS v. SUTLEJ FLOUR MILLS, FAROZEPORE.

the Punjab Record, 1884, "Chief Court Circulars"). In this connection and before proceeding, we may observe that we have not overlooked the provisions of section 24 (1) (*b*) of the Civil Procedure Code and section 48 of the Punjab Courts Act, 1914, which gives this Court the power to transfer any suit, appeal or other proceeding pending in any Court subordinate to it for trial and disposal to any other Court subordinate to it. We have, however, grave doubt whether an appeal that was on the 31st July 1914 pending in the Court of a Divisional Judge can be said, after that Court has ceased to exist, to be pending in a Court subordinate to the Chief Court, and in any event so far as this particular reference is concerned, the Court of a District Judge would not be competent under the present Punjab Courts Act to hear and dispose of an appeal from the Court of a District Judge.

The question must, in our opinion, be decided with reference to general principles of law, and more especially to those embodied in section 4 of the General Clauses Act (Punjab Act I of 1898). It is a well-recognized canon of construction that acts of the Legislature which regulate procedure, though in general retrospective in their effect, must not be interpreted so as to affect prejudicially the vested rights of the parties to a suit and that a right of appeal which has accrued is such vested right [see *Vedavalli Narasiah* v. *Mangamma* (2), *Deoki Nandan* v. *Harnam Das* (3)]. Then, section 4 of the Punjab General Clauses Act, 1898, provides as follows:—

"4. Where this Act or any Punjab Act repeals any enactment, then, unless a different intention appears, the repeal shall not

"(*a*) revive anything not in force or existing at the time at which the repeal takes effect; or

"(*b*) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

"(*c*) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

"(*d*) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

"(*e*) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the Repealing Act had not been passed."

There is nothing in the Punjab Courts Act, 1914, indicative of an intention on the part of the Legislature to affect (1) the previous operation of the repealed Acts so far as pending appeals are concerned, or (2) rights acquired or accrued under such Acts, or (3)* legal proceedings or remedies in respect of any such rights. We must assume, therefore, that any such "legal proceeding or remedy" should be continued or enforced as if the Repealing Act had not been passed. The sole difficulty lies in deciding as to the Tribunal in which such proceedings are to be continued or such remedy enforced. This is a real difficulty, but after full consideration of the arguments addressed to us, we are of opinion that the intention of the Legislature must have been that the Tribunal competent to dispose of such legal proceedings and to enforce such remedies is the Tribunal which could have been competent to dispose of them if the appeals had been instituted after the present Punjab Courts Act had come into force. Upon this view of the case we must, in the present case, hold that as the appeals in question were preferred from orders passed by a District Judge, the Court which has jurisdiction to hear and determine them is, under section 38 of that Act, the Chief Court and not the present District Judge. We reply accordingly to the reference under consideration, and we direct the District Judge to return the appeals to the

(2) 27 M. 538; 14 M. L. J. 340.
(3) 16 Ind. Cas 983; 122 P. R. 1912; 256 P. W. R. 1912; 13 P. L. R. 1912 Supp.

*This expression includes pending appeals (see *Deb Narain Dutt* v. *Narendra Krishna*, 16 C. 267, *Hurrosundari Dabi* v. *Bhojohari Das Manji*, 13 C. 86; *Sarghus* v. *Majidan*, 15 C. 107; *Thakur Prasad* v. *Ahsan Ali*, 1 A. 668; *Ranjit Singh* v. *Meherban Koeri*; 3 C. 602, 2 C. L. R. 391.)

respective appellants in order that the latter may, if so advised, present them to this Court for determination.

Reference answered.

CALCUTTA HIGH COURT.

CIVIL RULE No. 919 OF 1914.

December 21, 1914.

Present:—Mr. Justice N. Chatterjea and Mr. Justice Greaves.

PEARY CHOUDHURY—OBJECTOR—PETITIONER

versus

SONOORY DASS—APPLICANT—OPPOSITE PARTY.

Fraudulent decree, setting aside of—Court, power of—Inherent jurisdiction—Remedy—Review—Civil Procedure Code (Act V of 1908) s. 151, O. XLI, r. 19.

A Court has not only power but it is its duty to set aside a decree obtained by fraud practised upon the Court, when it is apprised of it.

Where a decree-holder gets a consent decree fraudulently passed in his favour by suppressing the service of summons and by getting a false and fraudulent *vakalatnamah* and a petition of compromise filed, the decree can be set aside on review and the fact that it is set aside under a wrong section is no ground of interference by a High Court.

A Court has inherent jurisdiction to correct its own procedure where it has been misled.

Unnoda Dabee v. *Stevenson*, 22 W. R. 290, followed.

Gulab Koer v. *Badshah Bahadur*, 2 Ind. Cas. 129; 13 C. W. N. 1197; 10 C. L. J. 420, distinguished.

Basangouda Hanmantgouda v. *Churchgirigouda Yogangouda*, 5 Ind. Cas. 968; 34 B. 408; 12 Bom. L. R. 228, referred to.

Rule against an order of the District Judge, Monghyr, dated the 24th July 1914.

Moulvi *Khursed Hossain*, for the Petitioner.

Babu *Karunamoy Bose*, for the Opposite Party.

JUDGMENT.—The opposite party in this Rule made an application to the Court below to set aside a decree passed by consent in an appeal to which he was the respondent. It is found by the learned District Judge that the appellant, the petitioner in this Court, got the service of the notice of the appeal suppressed and had a false and fraudulent *vakalatnama* and a petition of compromise filed, and that the opposite party came to know about the compromise decree only after process in execution of the decree was taken out. The learned Judge accordingly set aside the compromise decree and ordered that the appeal be heard. The petitioner thereupon obtained this Rule, and it is contended on his behalf that a decree by consent can be set aside only by a regular suit and that at any rate the decree could not be set aside upon an application under Order XLI, rule 19, of the Civil Procedure Code.

Reliance is placed upon the case of *Gulab Koer* v. *Badshah Bahadur* (1), in which the questions whether a decree by consent can be set aside by an application for review or by way of motion, or whether a regular suit is the only, at any rate, the most appropriate remedy, have been elaborately discussed. It is unnecessary, however, to consider the broad questions or the authorities discussed in that case. In the present case, according to the finding of the Judge, there was no consent given by the opposite party to the decree: he did not appear in the appeal at all, and in fact had no notice of the appeal and had nothing to do with the *vakalatnama* or the petition of compromise It is, therefore, not a case where a party gives his consent and afterwards seeks to impeach it on the ground that his consent was obtained by fraud. In *Gulab Koer's* case (1) the learned Judge, in distinguishing the case of *Unnoda Dabee* v. *Stevenson* (2) (where the Judicial Committee of the Privy Council held that it was competent to the Court to set aside on review a decree against an infant who was not represented before the Court and on whose behalf there was no assent to the compromise by any competent person), observed "This case is manifestly distinguishable, on the ground that it was in essence an application by a person to vacate a decree which was made in her absence and without her consent. She asked to be relieved from the effects of a decree to which in substance she was not a party—a condition of things entirely different from what we find in the class of cases where a person who is a party to a suit assents to a consent-decree which he subsequently seeks to impeach on the ground that his assent was obtained by fraud."

The decree in the present case, therefore, could be set aside on review. It is pointed out, however, that the decree has been set aside upon an application under Order XLI, rule 19. That rule relates to setting aside an order of dismissal of an appeal for default, and can have no application to the

(1) 2 Ind. Cas. 129, 13 C. W. N. 1197; 10 C. L. J. 420.
(2) 22 W. R. 290.

present case. It appears that the application to set aside the decree was originally made under Order XLVII, rule 1 (the review section), but by a subsequent petition was amended so as to be an application under Order XLI, rule 19, of the Civil Procedure Code. If, however, the Court had the power to set aside the decree, we should not interfere merely because it wast set aside under a wrong section, and as for the contention that the proper Court-fee payable upon an application for review had not been paid, it could be met by our ordering (under section 12 of the Court Fees Act) the opposite party to pay the necessary Court-fee, if we were of opinion that the Court had no power to set aside the decree except by an application for review of judgment. We are of opinion, however, that under the circumstances found by the learned District Judge the Court had an inherent jurisdiction to set aside the decree. Not only has the Court power, but it is its duty to set aside a decree obtained by fraud practised upon the Court, when apprised of it. We agree with the following observations made in a case in the Bombay High Court, in which a decree by consent was set aside in a summary manner upon an application by the defendant:—" What the defendant says is that there was a suit against him, and that the suit was declared to have ended by reason of a decree passed with his consent. He never consented, and the result has been that there has been fraud committed upon the Court. The Court was persuaded to sign a decree to which the defendant had never consented and that upon the representation that he had consented to it. Therefore, once the Court is asked to go back upon its own procedure, it is not a question whether there is any section in the Civil Procedure Code to warrant the action of the Court amending its proceedings. It is an inherent power of every Court to correct its own proceedings where it has been misled." [See *Basangouda Hanmantgouda* v. *Churchigirigouda Yogangouda* (3)].

We are accordingly of opinion that the order of the Court below, though passed under a wrong section, should not be set aside.

The learned Pleader for the petitioner invited us to hold that the findings of the learned Judge are incorrect, but we cannot in revision go behind the findings arrived at. As for the contention that the petitioner may be prejudiced if any proceedings are taken against him upon the findings arrived at by the Judge, all that we need say is that there will be a fresh and independent enquiry if any such proceedings are taken against him.

The Rule must be discharged with costs, one gold *mohur*.

Rule discharged.

(3) 5 Ind. Cas. 968; 34 B. 406; 12 Bom. L. R. 223.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 59 OF 1914.

November 21, 1914.

Present:—Mr. Justice Rafique.

INDAR MAL—PLAINTIFF—APPLICANT

versus

BUDHA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 29—Suit for dissolution of partnership and accounts—Jurisdiction—Material irregularity—Revision.

A Judge acts with material irregularity if he misapprehends the nature of the plaintiff's claim and the provisions of Article 29 of Act IX of 1887, and in such a case the High Court has jurisdiction to entertain an application for revision.

A suit for partnership accounts with an allegation that the partnership has been dissolved and containing also an alternative prayer for the dissolution of the partnership if it has not been dissolved, is triable by a Munsif and not by a Small Cause Court.

Civil revision against an order of the District Judge of Agra.

Mr. *M. L. Agarwala*, for the Applicant.

Mr. *S. K. Dar*, for the Respondents.

JUDGMENT.—This is an application in revision under section 115 of the Civil Procedure Code. The facts which have led to the making of this application are as follows:—

The plaintiff-applicant filed a suit in the Court of the Judge of Small Causes at Agra for the recovery of Rs. 177-9-7 on partnership account. The plaint was returned by the learned Judge of Small Cause Court for presentation to proper Court, on the ground that under Article 29, clause (*b*), of Act IX of 1887 such a suit was not maintainable in his Court. The plaint was then presented

by the plaintiff-applicant to the Munsif of Agra. One of the pleas urged by the defendants in their written statement was that the plaintiff should sue for dissolution of partnership. The plaintiff amended his plaint by adding a paragraph to it, to the effect that partnership between him and the defendants had been dissolved on the 15th of March 1910, and asked for an additional relief, namely, that in case the Court found that the partnership had not been dissolved, a decree for dissolution of partnership be passed. After amendment of the plaint the Munsif rejected it, holding that he had no jurisiction to entertain the suit as it was cognizable by a Court of Small Causes. On appeal the learned District Judge agreed with the first Court and upheld its order. The plaintiff has come up in revision under section 115 of the Civil Procedure Code and contends that the Munsif had jurisdiction to entertain the suit.

A preliminary objection is taken on behalf of the respondents to the effect that no revision lies. It is said that the learned District Judge had jurisdiction to entertain and hear the appeal and the mere fact that he came to an erroneous decision according to the plaintiff-applicant, does not entitle the latter to come up in revision here. I do not think that the objection of the respondents is sound. The want of jurisdiction is not the only ground upon which an aggrieved party may apply for revision. The plaintiff-applicant does not deny that the learned Judge had jurisdiction to entertain and hear the appeal, but says that he exercised his jurisdiction with material irregularity inasmuch as he misapprehended the nature of the plaintiff's claim and the provisions of Article 29 of Act IX of 1887.

I have read the plaint carefully and it appears to me that the amendment made by the plaintiff in the Court of the Munsif did not render the claim exclusively triable by the Small Cause Court or oust the jurisdiction of the Munsif. It is true that the amended paragraph of the plaint contains the allegation of the dissolution of partnership on a certain date, but it is nowhere stated that a balance of partnership accounts was struck by the parties or their agents on or after the dissolution of partnership. The claim still remains for an account of partnership transactions, or for dissolution of partnership and for an account of partnership transactions. In either case the claim is one which should be heard by a regular Court, and not by a Small Cause Court. The learned Judge seems to have taken the claim to be for the balance of partnership accounts which has been struck by the parties or their agents, as mentioned in Article 29 (c) of Act IX of 1887. The language of the plaint shows clearly that the claim was not for the recovery of the balance of partnership accounts struck by the parties or their agents. In my opinion the suit of the plaintiff is within the jurisdiction of the Munsif and should be entertained by him. As the order of the learned Judge was made under a misapprehension of the nature of the claim of the plaintiff-applicant it is liable to revision. The preliminary objection for the respondents fails and the application is allowed. The order of the Court below is set aside and the Munsif will receive the plaint and try the case according to law. Costs of this application are allowed to the applicant.

Application allowed.

PUNJAB CHIEF COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 95 OF 1914.

November 16, 1914.

Present:—Mr. Justice Scott-Smith.

GURANDITTA MAL—JUDGMENT-DEBTOR—APPELLANT

versus

J. RUSTOMJI—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 72—Execution of decree—Decree for sale of land—Reference to Collector—Executing Court, power of.

A Court executing a decree for sale of mortgaged land sent it to a Collector to sell the mortgaged land. He directed a Sub-Divisional Officer to carry out the sale. The latter officer proposed temporary alienation of the property. The Court was of opinion that it was bound to sell the property and no reference could be made under section 72 of the Civil Procedure Code. On appeal the view taken by the Court was held to be erroneous. The execution Court then referred the case to the Collector under section 72 of the Civil Procedure Code. On appeal it was contended that the order was *ultra vires*.

Held, that the contention was untenable.

GURANDITTA MAL v. J. RUSTOMJI.

Miscellaneous first appeal from an order of the District Judge, Lahore, dated the 16th October 1913, referring the case to the Collector for intervention.

Mr. *Broadway* and Bhagat *Gobind Das*, for the Appellant.

The Hon'ble Mr. *Muhammad Shafi*, K. B., and Mr. *K. J. Rustomji* and Lala *Dharpat Rai*, for the Respondent.

JUDGMENT.—This appeal is from an order of the District Judge, Lahore, passed in execution proceedings.

The decree in question was passed in favour of the respondent upon a compromise, dated the 27th of April 1909. The decree was for money and its interpretation has already been the subject of an appeal to a Division Bench of this Court (Case No. 754 of 1911), decided on the 3rd of April 1913. In that order it was held that the District Judge was not right in holding that, in view of the terms of the decree, he was bound to sell the mortgaged property in execution and that he was precluded from accepting the recommendations of the Collector under section 72, Civil Procedure Code, for its satisfaction within a reasonable period by a temporary alienation of the land belonging to the judgment-debtor. When the case went back to the District Judge, he referred it to the Collector under section 72, Civil Procedure Code. From this order the judgment-debtor appeals.

His contention is that previously the case was referred to the Collector and that proposals were made by the Revenue Authorities for satisfaction of the decree by a temporary alienation of the land, and that the Court should act upon this recommendation, and that there was no necessity to again refer the case to the Collector. What happened was that on the 9th of December 1910, the District Judge ordered the sale of the attached land and sent the papers to the Collector of the Lahore District in order that the sale should be carried out. The Collector ordered the Sub-Divisional Officer, Kasur, to carry out the sale. That officer, however, instead of selling the land made proposals for realization of the decree by a temporary alienation, and returned the papers direct to the District Judge. The latter by his order, dated the 7th of April 1911, held that, as the decree provided that the decree-money should be realized by sale of the attached property, there could be no reference to the Collector under section 72, Civil Procedure Code, and the land should be sold. From this order the judgment-debtor appealed to this Court, Civil Appeal No. 754 of 1911, with the result already stated.

Mr. Shafi for the respondent-decree-holder contends that the Sub-Divisional Officer, Kasur, was not the Collector and had no power to arrange for the realization of the decree by a temporary alienation of the land. "Collector" is defined in the General Clauses Act, section 3 (10), as meaning the Chief Officer in charge of the revenue administration of a district. The same definition is given in the Punjab General Clauses Act. There is no definition of Collector in the Civil Procedure Code and we must, therefore, take the definition given in the General Clauses Act. By Collector in section 72 of the Code is, therefore, meant the Deputy Commissioner of the District. The Sub-Divisional Officer, Kasur, cannot be considered the Collector; when the District Judge sent the case to the Collector on the 9th of December 1910, he did so in order that the land might be sold. He made no reference at that time under section 72, Civil Procedure Code. The Collector merely delegated his power of sale to the Sub-Divisional Officer. He did not and probably could not delegate to that officer any power to arrange for the satisfaction of the decree by a temporary alienation of the land. I must, therefore, hold that the District Judge was not bound by the previous recommendations of the Sub-Divisional Officer, Kasur, and there is no reason for interference with the order appealed from.

The appeal is, therefore, dismissed, but I leave the parties to bear their own costs.

Appeal dismissed.

MAUNG SHWE PO *v.* MAUNG BEIN.

LOWER BURMA CHIEF COURT.

CIVIL REFERENCE No. 7 OF 1914.

December 7, 1914.

Present:—Sir Charles Fox, KT., Chief Judge, Mr. Justice Twomey and Mr. Justice Hartnoll.

MAUNG SHWE PO AND ANOTHER—DEFENDANTS—APPELLANTS

versus

MAUNG BEIN AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Burmese Buddhist Law—Widower's power of disposing his property—Auratha *son's right*—*Purchaser, rights and liabilities of.*

Where a Burmese Buddhist and his wife jointly acquire certain property and the wife dies leaving a son of the marriage and the husband marries again without partitioning the property with that son, the son is entitled only to a fourth share of the property as an *auratha* son and the father can dispose absolutely of the three-fourths of the property and a purchaser of the whole property takes the property subject to the *auratha* son's fourth share, unless the son's right to claim is barred by limitation.

Maung Seik Kaung v. *Maung Po Nyein*, 1 L.B.R. 23; *Sa So* v. *Mi Han*, U. B. R. (1892-96) II, 171; *Mg. Hmu* v. *Po Thin*, 1 L. B. R. 50; *Ma On* v. *Shwe O*, S. J. L. B. 378; *Mi Saw Myin* v. *Mi Shwe Thin*, 15 Ind. Cas. 919; U. B. R. (1912) I, 125, referred to.

FACTS appear fully from the following Order of Reference made by Robinson, J.

Plaintiffs sued Maung Shwe Po, alleging that by a registered deed of sale dated the 10th April 1908, he had sold them his land containing then 48'98 acres and now 54'81 acres and that he had now begun ploughing a part of the land. He asked for a perpetual injunction. Defendant replied that the land had belonged to him and his wife jointly. She died ten years ago leaving one son. The land was mortgaged in 1905 to a Chetty. In 1908 the Chetty was returning to India and wanted his money, so he got plaintiffs to pay the prinicpal for him, he giving them a mortgage by conditional sale in return. On 10th April 1908 he executed the document put forward, having been led to believe it was in accordance with their agreement. He and his son remained in possession paying plaintiffs their interest. He also pleaded that his son was interested to the extent of a half share and should be made a party.

Then plaintiff filed an amended plaint, adding the son San E. as defendant and changing his prayer to one for possession and partition if defendant No. 2 be found to be entitled to any share.

Written statements were put in; defendant No. 1 pleaded as before but added that the land was worth Rs. 5,000, that he had paid plaintiff all the interest and some principal, in all Rs. 3,105, that defendant No. 2 was interested in a half share and that the amended plaint should be rejected as setting up a claim of a substantially different character.

Defendant No. 2 pleaded that his father could alienate only one half.

I should have pointed out that the amended plaint was filed in consequence of an order, dated the 23rd September 1911, in which the Sub-Divisional Judge held that he could not grant a perpetual injunction, but that instead of dismissing the suit straight off it would be better to direct plaintiff to amend and sue for possession.

On the amended pleadings a large number of issues were drawn. The first Court held by an order, dated the 24th November 1911, that the suit should not be dismissed on the ground that the amendment made it one of a substantially different character. On the merits he found the deed of the 19th April 1908 had been executed owing to misrepresentation by plaintiff and that plaintiff was really a mortgagee. He found Rs. 875 was still due and gave plaintiff a decree for that amount and that if it was paid by the 12th May 19 2, plaintiff should reconvey the land to defendants, failing which defendant should be barred from redeeming.

The learned Divisional Judge held that the evidence did not establish misrepresentation, that it was more probable that defendant knew what he was executing but thought, as plaintiff did, that nevertheless he could redeem, that they could not go behind the deed and show it was meant to be a mortgage and not a sale and that the sale was good to the extent of three-quarters.

The points that I have to decide are:—

(1) whether amendment should have been allowed ?

(2) was there misrepresentation ?

(3) if not, was the sale good to the extent of half or three-quarters of the land ?

Under our present Code of Civil Procedure amendment is a matter of discretion and though as a general proposition it may be said that if the amendment results in changing the claim to one of a substantially different character, the Court would wisely

MAUNG SHWE PO v. MAUNG BEIN.

exercise its discretion by not allowing it, I do not think it should ever be regarded as a hard and fast rule. It is true that in the present suit there is such a change, but it was carefully considered and the amendment was made under the orders of the Court. It was again considered and an Appellate Court does not lightly interfere with a discretion carefully exercised where no injury has resulted. There has been no injury in the present case, and the result has been to bring the parties to issue on the real points of dispute and has permitted a final disposal of their differences. I see no reason for interfering now.

As to misrepresentation, it is to be noted that in the amended plaint the principal due to the Chetty is said to be Rs. 1,400, and Shwe Po says also in his evidence that plaintiff paid Rs. 2,000 but why does not appear. seeing he was to pay only the principal due. Kyauk Pa, plaintiff No. 2, paid the Chetty Rs. 2,000, and got back the mortgage. This was fifteen days before the deed of sale was executed. Shwe Po says he was asked to sign the deed outside the Sub-Registrar's office. He asked Kyauk Pa if it was written in accordance with the original promise and if he would accept two and a half per cent. interest. He says he did not know that U Bein's (plaintiff No. 1) name was entered nor that there was no mention of interest until he was sued. He says he worked the land in 1270 and 1271 and paid Rs. 540 as interest for each year. In cross-examination he says Kyauk Pa only paid the Chetty Rs. 2,000, *i. e.*, Rs. 1,400 principal and Rs. 600 interest, on condition he got the deed which was to provide that if he could not repay, the land was to become Kyauk Pa's. Further that no time for payment was fixed and that so long as he paid the interest, the right to redeem remained. He denies that he read the deed or that he had it read to him by any one. He admits that *pyesas* were issued in Kayuk Pa's name, but he kept quiet. He took no receipts for payments he made as he trusted Kyauk Pa.

The onus of proving misrepresentation lies heavily on defendant. I cannot overlook the very doubtful character of his evidence. He distinctly stated that the agreement between him and Kyauk Pa was that the latter was to pay the principal and defendant himself the interest. This he changes in his evidence. This may be, of course, but due to his instructions having been mistaken, but if Kyauk Pa was to pay off the mortgage and merely take the Chetty's place, there was no questoion of a sale. Yet it is clear from defendant's own evidence that Kyauk Pa demanded a sale. He says in describing the conversation that Kyauk Pa in answer to the suggestion that he should step into the Chetty's shoes said: "no, by a sale I mean a mortgage and sale, by which I mean that I could redeem my land at any time on payment of the principal and interest." The evidence is agreed that Kyauk Pa at once demanded a sale outright, but he forthwith gave way and agreed to defendant having a right to re-purchase. I am satisfied that it was intended that the document should evidence a sale, though it is quite possible that defendant asked to be allowed to buy his land back and this may have been granted. This, however, is a different thing to proving that the document was deliberately drawn up as a sale, when the agreement was that it was to effect a mortgage by conditional sale. It would, in accordance with the custom and practice, be drawn up as an out and out sale. Defendant can read and might have read it, had he chosen and if he did not, he took the risk. I am not satisfied that there was any misrepresentation and I agree with the learned Divisional Judge that it is quite likely that they may have thought a right of re purchase still remained. This being so, it is not open to defendant to go behind the deed and prove it was intended to be something other than it was. This is admitted.

There remains the question whether the sale is good in respect of half or three-quarters of the land; it does not seem to have been questioned by either party that it cannot be good so far as San E's share of one-fourth is concerned. He was the only son of Shwe Po's first marriage. It is not suggested that he agreed to the sale or that he knew anything about it, though it may be questioned whether he did not.

The learned Divisional Judge has merely referred to certain authorities quoted in a written argument filed before him and holds

it is good to the extent of three-quarters. The property was the joint property of Shwe Po and his wife, Ma Tok. She died leaving one son San E. Since the ruling in *Ma On* v. *Shwé O.* (1) it appears to have always been held in Lower Burma that on the death of one party to a marriage, the survivor has an absolute power of disposal over half the joint property and has a life-interest only in the other half, with a power of selling it to meet the necessities of the family subject to the eldest child's right to claim a quarter share. [See *Ma Nyo* v. *Ma Yauk* (2) and *Ma Po* v. *Ma Thin Yin* (3)].

In Upper Burma, however, a different rule is held to be the law. It is there held that on the death of the husband his widow succeeds to the estate, with the exception of certain specified property and one-fourth of the estate which go to the eldest son and of certain specified property which goes to the eldest daughter, that with the exception of this portion the widow is at liberty to spend the whole of the estate if she chooses to, and not merely for necessities. Further, that the texts of the Dhammathats, on which the doctrine that the widow can only spend the estate for necessities is based, refer to the spending of the specified property set apart for the eldest daughter and not to the spending of the bulk of the estate. *Mi Saw Myin* v. *Mi Shwe Thin* (4). In the case it is pointed out that in *Ma On* v. *Shwe O* (1) the opinion of Mr. Jardine in *Nga Shwe Yo* v. *Mi San Byu* (5) was followed, but the special Court overlooked the fact that Mr. Jardine has resiled to a great extent from that opinion in *Maung Po Lat* v. *Mi Po Le* (6.)

The authorities are quoted in Maung Tha Gywe's Treatise on Buddhist Law Volume II, pages 36 onwards and I need not cite them all here. The question is one of great importance. The rulings in *Ma On* v. *Shwe O* (1) and *Nga Shwe Yo* v. *Mi San Byu* (5) have always been followed without question since they were issued, except for the remarks in *Mg. Po Lat* v. *Mi Po Le* (6) which have not so far as I can find been noticed. I, therefore, refer for a decision of a Bench the following questions :—

In respect of property jointly owned by a Burmese Buddhist husband and wife on the death of the husband, has the widow an absolute disposing power over her half share of the property only or over three-fourths of the whole property, (*a*) where there is only one child of the marriage living, and (*b*) where there are several children ?

The former question only really arises in this case, but it will be necessary to consider the whole question in order to arrive at a decision. I refer the latter branch also subject to the decision of the Bench as to whether it can be referred.

Mr. *R. N. Burjorjee*, for the Appellants.

Mr. *Gimcalla*, for the Respondents.

JUDGMENT.

TWOMEY, J.—The question referred by Mr. Justice Robinson in this case is as follows :—

"In respect of property jointly owned by a Burmese Buddhist husband and wife on the death of the husband, has the widow an absolute disposing power over her half share of the property only or over three-fourths of the whole property, (*a*) where there is only one child of the marriage living, and (*b*) where there are several children ?"

The land in suit was acquired by the 1st defendant, Shwe Po, and his wife, Ma Tok as their joint property. They had issue, one son, the second defendant, San E. Ma Tok died about 10 years before the suit was filed.

Subsequently, Shwe Po married a second wife, Ma Nyein U. There was no partition of the property with the son, San E. After the second marriage, Shwe Po sold the land without the consent of San E.

It is clear that the question referred by the learned Judge does not arise, as this is not a case of a widow's estate at all. By consent, the reference has been amended as follows :—

A, a Burmese Buddhist, and his wife, *B*, jointly acquire certain property. There is an issue of a marriage, one son, *C*. *B* dies. *A* marries again without partitioning the

(1) S. J. L. B. 878.
(2) 4 L. B. R. 256.
(3) 4 L. B. R. 287; 14 Bur. L. R. 250.
(4) 15 Ind. Cas. 910; U. B. R. (1913) 125.
(5) S. J. L. B. 108.
(6) S. J. L. B. 212.

property with his son *C*. To what extent can *A* dispose absolutely of the property?

It is clear that as regards one half of the property at least, the widower has an absolute right of disposal. This is admittedly settled law both in Upper and Lower Burma.

The son could certainly have claimed a one-fourth share on his father's second marriage. [See authorities cited in *Seik Maung Kaung* v. *Maung Po Nyein* (7).] He could apparently claim this share at any time within twelve years of the marriage (Article 123, Schedule I, of the Limitation Act) and this period had not expired at the time of the sale. From the time of the marriage he had an immediate right to get one-fourth of the undivided family property, and it seems reasonable to hold that the purchaser having bought the land within twelve years of the marriage took it subject to this right. The purchaser presumably knew or could easily have ascertained the fact that Shwe Po had a son by a former marriage who had not got yet his quarter share. Moreover the respondent did not appeal against the Divisional Court's decree, which in effect disallowed the sale as regards the son's quarter share.

The only question is whether it should be disallowed also as regards another quarter, *i.e.*, the residue after deducting the son's quarter and the half share over which the father admittedly had full disposing power.

It has been held in Upper Burma [see *Sa So* v. *Mi Han* (8)] that when an only son who is also an only child has taken his one-fourth share as *auratha*, the widow has absolute disposing power over the remaining three-fourths of the estate. This is in conformity with the view taken in the Lower Burma case *Mg Hmu* v. *Po Thin* (9), where it was held that the eldest son after taking his one-fourth share has no right to a further partition nor any right in the remainder of the estate (except a right of pre-emption in case of sale by other co-heirs.)

Does it make any difference that the son had not exercised his right before the land was sold? Is he nevertheless to be limited to the one-fourth share which he could have got by claiming partition before the sale? It is true that it was family property when the father sold it, but the whole title was in him subject only to the *auratha's* right. By not making an immediate claim to the one-fourth share the son might get a larger share (by partition with his step-mother and step-brothers, if any) when the estate fell in on his father's death. But in that case he would take the ordinary risk of an expectant heir and could only share in whatever residue happened to be left on his father's death.

Arguments have been addressed to us as to the application of the rule laid down by the Special Court in *Ma On* v. *Shwe O* (1), that as regards one half of the joint property of herself and her deceased husband a widow has only a life-interest with a power of sale in case of necessity. It is faintly contended that the same rule should be applied by analogy to the case of a widower with an only son.

The sale in the present case is admittedly voidable as regards one-fourth, because it was sold burdened with the *auratha's* right. Is it also voidable as regards any remaining part of the three-fourths on the ground that the sale was not a sale for necessity? It is clearly not voidable as regards half out of three-fourths, for that half was admittedly the father's own to deal with as he pleased. As regards the remaining one-fourth, whatever might be the case if there were more than one child of Maung Shwe Po's first marriage, there is, so far as I can find, no authority for holding that a father with a single son is under any such restriction. Assuming that the rule laid down in *Ma On* v. *Shwe O* (1) is well founded, I can see no reason for applying it in such a case as this. The only son is safeguarded as regards one-fourth of the estate and that is all that he could get in his father's life-time He can only so claim it within the period of limitation. There are no younger children whose interests have to be considered. If the rule laid down in *Ma On* v. *Shwe O* (1) has any reason to support it, it is only that this protection is desirable in the interests of the younger children who cannot claim partition till both parents are dead. But it would be unreasonable to extend it to the case of an only son who deliberately refrains from

(7) 1 L. B. R. 23.
(8) U. B. R. (1892-96) II, 17.
(9) 1 L. B. R. 50.

claiming his due share in his father's life-time and takes his chance of obtaining a larger fractional share in the residue after his father's death.

The correctness of the rule laid down in *Ma On* v. *Shwe O* (1) has been seriously disputed in the arguments of Counsel, and it has been brought to our notice that the Dhammathats on which the rule is based have lately been interpreted by the Judicial Commissioner, Upper Burma, in a different sense. But holding that the rule in question has no application to the present reference, I think that we are not in a position now to deal with the conflict of authority or to re-consider the judgment of the Special Court.

I would answer the (amended) reference by saying that the widower *A* in the circumstances stated can dispose absolutely of three-fourths of the property.

FOX, C.J.—I agree in Mr. Justice Twomey's answer to the amended question consented to by the Advocates.

I have nothing further to add.

Ten gold *mohurs* allowed as Advocate's fee in the reference.

These costs will follow the result of the case.

HARTNOLL, J.—The reference as made by Mr. Justice Robinson does not fit the facts of the present case and is in addition unnecessarily wide. It has, therefore, been amended as set out by Mr. Justice Twomey, whose judgment I have had the privilege of reading.

At the hearing of the reference the main argument raised was that the decision in the case of *Ma On* v. *Shwe O* (1) was erroneous and that the decision in the case of *Mi Saw Myin* v. *Mi Shwe Thin* (4) should be followed. My learned colleague, Mr. Justice Twomey, considers that in this reference the case of *Ma On* v. *Shwe O* (1) is not in point in that in the present case no younger children were left. When the first wife, Ma Tok, died only one son, San E, was left. I agree with this view. The case of *Maung Seik Kaung* v. *Maung Po Nyein* (7) decided that on the death of the mother, if the father marries again the eldest son can claim a fourth share of the general joint estate of the parents, and with this decision I agree. In the present case, therefore, when Mg. Shwe Po married again, San E had the right to claim a fourth share in the joint property of his parents. He was not in the position of a younger child who cannot claim a share in the inheritance until the death of both parents. He had the right to claim this one-fourth share during the period allowed by the Law of Limitation and if during such a period the respondents purchased the land from Mg. Shwe Po, they would take it subject to San E's right to claim his share. No issue has been fixed and decided as to whether the respondents purchased during such period, though it seems probable that they did; but assuming that the purchase took place after such period of limitation, what is the position? As Mg. San E had allowed the period of limitation to pass, he could not claim his one-fourth share and so it became irrecoverable and lapsed in his father's estate. He could claim nothing further until his father died and then he would claim not as an heir entitled to inherit a portion of the estate consequent on his mother's death, but as an heir to his father's estate. In his case, claiming as an heir of his mother in his father's life-time, there is no provision of Buddhist Law to apply, such as was found to exist in the case of *Ma On* v. *Shwe O* (1) in favour of younger children and so nothing to prevent his father disposing of his lapsed share *in toto*.

The Divisional Judge has held the sale to be good to the extent of three-quarters and in any case in the view I take it was good to such an extent.

I would answer the reference as amended by my learned colleague, Mr. Justice Twomey, by saying:—

"In any view of the circumstances the sale was good as regards three-quarters of the land; if the period of limitation had lapsed during which San E could claim his share, the sale would be good as regards the whole of the land."

The last part of the answer is not necessary, as respondents have not appealed against the dismissal of their claim to one-fourth of the land.

Reference answered.

PUNJAB CHIEF COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 109 OF 1914.

November 16, 1914.

Present:—Mr. Justice Scott-Smith.

J. RUSTOMJI—DECREE-HOLDER—APPELLANT

versus

GURANDITTA MAL—JUDGMENT-DEBTOR—RESPONDENT.

Execution of decree—Mortgage-decree—Declaratory decree—Mortgagee's rights to possession of mortgaged property declared—Cause of action—Fresh suit.

Where a Court passes a decree for money to be realized by sale of the mortgaged property and possession of the property is not decreed, but it is noted that the plaintiff shall be competent to enter in possession of the mortgaged property and to retain possession thereof till such time as the sale thereof takes place and the decree is finally confirmed by the Court, the decree-holder is not entitled to obtain possession by executing the decree, though he may have a cause of action to sue for possession of the property.

Miscellaneous first appeal from an order of the District Judge, Lahore, dated the 16th October 1913, refusing to give the decree-holder possession of the land mortgaged.

Mr. *K. J. Rustomji* and Lala *Dhanpat Rai*, for the Appellant.

Bhagat *Gobind Das*, for the Respondent.

JUDGMENT.—This appeal is closely connected with Civil appeal No. 95 of 1914* and is from the District Judge's order refusing to give the decree-holder possession of the land mortgaged. It is urged, rather in a half-hearted manner, that the decree allows the plaintiff to take possession of the land; a perusal of the decree, however, shows that possession of the land was not decreed to the plaintiff. The decree was for a specified sum of money and laid down that the plaintiff shall be at liberty to realize the said amount by attachment and sale of the property mortgaged. The decree then went on as follows:—

"It being noted that plaintiff shall be competent to enter in possession of the mortgaged property, save the house in Jauri Mori, and to retain possession thereof till such time as the sale thereof takes place and is finally confirmed by the Court, provided that the plaintiff do give credit to the defendant," and so on. The decree-holder may under this decree have a cause of action to sue for possession of the mortgaged property, but he cannot get possession by execution. The matter is quite clear.

The appeal is dismissed.

Appeal dismissed.

*See 27 Ind. Cas. 630.—*Ed.*

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 46 OF 1914.

November 26, 1914.

Present:—Justice Sir George Knox, Kt.

THE SINGER MANUFACTURING COMPANY—PLAINTIFF—APPELLANT

versus

MRS. E. FELYUN AND OTHERS—DEFENDANTS—OPPOSITE PARTY.

Limitation Act (IX of 1908), Sch. I, Art. 49—Hire and purchase system—Sewing machine purchased on instalment system—Suit for return of machine—Non-payment of instalments—Limitation.

The mere non-payment of rent for a sewing machine taken on the hire and purchase system would not amount to wrongful taking or wrongful detention of the machine within the meaning of Article 49 of the Limitation Act. There must be some overt act or demand for the machine by the hirer and refusal by the purchaser.

Gopal Chandra Bose v. *Surendra Nath Dutt*, 12 C. W. N 1010, *Gopalasami Iyer* v. *Subramania Sastri*, 12 Ind. Cas. 207; (1911) 2 M. W. N. 190, 10 M. L. T. 572; 22 M. L. J. 152; 35 M. 636, referred to.

Ram Singh v. *Salig Ram*, 28 A. 84; A. W. N. (1905) 193, 2 A. L. J. 711, distinguished.

Civil revision from a decree of the Judge, Small Cause Court, Allahabad.

FACTS.—On 27th January 1908, defendants 2nd party took a sewing machine on hire-purchase system from the Singer Sewing Machine Company, Limited, on Rs. 80 promising to pay the money by instalments of Rs. 5 per month. The defendants did not pay the instalment from June 1908 and hence the suit was brought for recovery of rent and for delivery of the machine or for its price. The defendants pleaded that the suit was barred by limitation. The Small Cause Court Judge held that the cause of action accrued when the defendants failed to pay rent and so dismissed the suit as barred by limitation.

The plaintiff applied in revision to the High Court.

Mr. *Pearey Lal Banerjea*, for the Appellant:—The learned Judge erred in holding that the suit is time-barred. He entirely misunderstood the relation between the parties. The defendants hired the machine and were in possession on behalf of the plaint-

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iff. Their possession cannot be wrongful until he does some overt act of wrongful taking or until the Company made a demand and they refused to pay the rent or to deliver the machine. Until then, time cannot begin to run against the Company. The simple fact of non-payment cannot make their detention of the machine or the taking of it wrongful.

I rely on *Gopal Chandra Bose* v. *Surendra Nath Dutt* (1), *Gopalasami Iyer* v. *Subramania Sastri* (2), *Shumboo Chunder Mullick* v. *Pran Kristo Mullick* (3).

The lower Court's order is calculated to cause grave injustice and I submit that this Court should interfere and set aside the order.

Mr. *Simeon*, for the Opposite Party:—The defendants were bound to pay the rent regularly. Under clause (*d*) of the agreement entered into between the parties, the owner could terminate the hiring and re-take possession any moment. The non-payment by the defendants injured the right of the plaintiff at once and he should have brought the suit within the time allowed by law under Articles 48, 49 and 50 of the Limitation Act. His failure to do so has clearly barred his rights and his suit was rightly dismissed.

Moreover this application should not be entertained. The lower Court has jurisdiction to decide the case in any way it liked and an error of law is no ground for revision. There is no question of jurisdiction involved and, therefore, no application lies.

I rely on *Ram Singh* v. *Salig Ram* (4).

JUDGMENT.—This is an application for revision of an order passed by the Judge of the Small Cause Court, Allahabad. The case as laid before the Small Cause Court Judge briefly is that on the 27th of January 1908 the defendants, who are the second party in this Court, took a machine from the Singer Manufacturing Company on what is known as the hire and purchase system. The value of the machine is said to be Rs. 80 and in the plaint it is alleged that Rs. 20 has been paid and the balance, which was under the agreement between the parties to be recovered by monthly instalments of Rs. 5, has not been paid. The last date on which it is said payment of this monthly instalment was made, is put as April 1908. The relief prayed for by the plaintiff was that a decree be passed against the defendants for Rs. 40, rent running from 27th November 1912 to 27th July 1913, and for delivery of the machine or for its value together with costs and future interest. In the reply it was contended that the suit was barred by limitation. There were other pleas, but they are unnecessary for the purpose of this application. The Court below having found that the case was within its jurisdiction went on to hold that the claim was barred by limitation. The Articles which the Court below considered were Articles barring this claim are Articles 48, 49 and 50 of the Limitation Act. Holding that the suit was barred the Court below dismissed it. This Court is asked to interfere on the ground that the Court below has entirely failed to appreciate the relation existing between the plaintiff and the defendants who had hired the machine and who are in possession of it on behalf of the plaintiff. It is difficult to understand the reasoning adopted by the learned Judge of the Court below. In his judgment he says that under clause (*d*) of the agreement entered into between the parties, the owner could terminate the hiring and retake possession of the machine and accessories He holds that the cause of action accrued when the hirer failed to pay in any month in advance. This failure first took place according to the learned Judge in June 1908 and the suit became barred under Article 49 of the Limitation Act with effect from 27th June 1911. I think the learned Judge has entirely overlooked the conditions of the transaction with regard to this machine. There could not have been any wrongful taking or wrongful detention until there had been some overt act of wrongful taking or some demand made by the Company and refusal by the defendants. The mere non-payment of rent would not amount to wrongful taking or wrongful detention. The act of the defendants would appear to fall if it falls at all under this Article, under wrongful detention and that

(1) 12 C. W. N. 1010.
(2) 12 Ind. Cas. 207; 35 M. 636; (1911) 2 M. W. N. 190. 9 M. L. T. 572; 22 M. L. J. 152.
(3) 14 W. R. 322.
(4) 28 A. 84; A. W. N. (1905) 193; 2 A. L. J. 711.

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act would only begin on the date when a demand for the machine had been made by the Company and refusal by the defend ants to deliver it had been set up. This is the view which I take. I am fortified in this conclusion by the view taken under similar circumstances by the Calcutta High Court in *Gopal Chandra Bose* v. *Surendra Nath Dutt* (1). The learned Judges in that case held that the decision on a point of this kind should be in accordance with the decision in *Wilkinson* v. *Verity* (5). The Madras High Court took the same view in *Gopalsami Ayyar* v. *Subramania Sastri* (2). They refused to consider the contention raised in that case that mere silence of the defendant amounted to refusal. This case goes further than the present case. By the opposite side I was referred to *Ram Singh* v. *Salig Ram* (4). That case really deals with the question of jurisdiction and when a decision in a Small Cause Court case should or should not be interfered with by this Court, and not with limitation. I have no doubt that the decision arrived at by the learned Judge of the Small Cause Court is wrong and cannot be supported. I, therefore, think that this is a case in which I should interfere with the decision of the Court below. That decision being upon a preliminary point, I set it aside and return the case to that Court with the direction to re-enter it on the file of pending cases and to dispose of it according to law. The 2nd party will pay the costs of the applicant so far as this revision is concerned.

Decision set aside; Case returned.

(5) 6 C. P. 206, 40 L. J. C. P. 141, 24 L. T. 32, 19 W. R. 604.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 92 OF 1914.

November 16, 1914.

Present:—Mr. Justice Scott-Smith.

J. RUSTOMJI—DECREE-HOLDER—PETITIONER

versus

GURANDITTA MAL—JUDGMENT-DEBTOR—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 152—Revision—Amendment of decree—Application filed after long time, whether allowed.

An application to amend decree made a long time after the decree was passed, cannot be granted unless sufficient reasons are shown for it.

Petition, under section 70 of Act XVIII of 1884, as amended by Act IV of 1912, for revision of the order of the District Judge, Lahore, dated the 17th November 1913, rejecting the application for amendment of the decree.

Mr. *K. J. Rustomji* and Lala *Dhanpat Rai*, for the Petitioner.

Bhagat *Gobind Das*, for the Respondent.

JUDGMENT.—This Civil Revision is closely connected with Civil Appeals Nos. 95* and 109† of 1914, disposed of by orders of to-day's date. This is an application for revision of the order of the District Judge rejecting an application for amendment of the decree. There is absolutely no reason why the decree should be amended after such a length of time, and I decline to interfere on the revision side.

Revision rejected.

*See 27 Ind. Cas. 630.
†See 27 Ind. Cas. 637.

MA KYA NYA v. MG. TUN HLA.

Revision—Amendment of decree—Application filed after long time, whether allowed.

An application to amend decree made a long time after the decree was passed, cannot be granted unless sufficient reasons are shown for it.

Petition, under section 70 of Act XVIII of 1884, as amended by Act IV of 1912, for revision of the order of the District Judge, Lahore, dated the 17th November 1913, rejecting the application for amendment of the decree.

Mr. *K. J. Rustomji* and Lala *Dhanpat Rai*, for the Petitioner.

Bhagat *Gobind Das*, for the Respondent.

JUDGMENT.—This Civil Revision is closely connected with Civil Appeals Nos. 95* and 109† of 1914, disposed of by orders of to-day's date. This is an application for revision of the order of the District Judge rejecting an application for amendment of the decree. There is absolutely no reason why the decree should be amended after such a length of time, and I decline to interfere on the revision side.

Revision rejected.

*See 27 Ind. Cas. 630.
†See 27 Ind. Cas. 637.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 122 OF 1913.

November 27, 1914.

Present:—Mr. Justice Parlett.

MA KYA NYA—APPELLANT

versus

MG. TUN HLA AND ANOTHER—RESPONDENTS.

Limitation Act (IX of 1908), s. 5—Appeal filed late by Advocate—Laches—Sufficient cause

Where the appellant sent the costs and fees to his Advocates' firm by money order in the name of one of the members of the firm who happened then to be absent, and where despite the knowledge that the required costs and fees had been despatched, the Advocate present in the firm did not advance the Court-fees to present the appeal in time, the laches cannot be excused specially when the appellant could have sent the copies and the money far earlier than he did.

Mr. *Ba Dun* for the Appellant.

Mr. *Rahman*, for the Respondents.

JUDGMENT.—A preliminary objection has been taken that this appeal is barred by limitation. It is admittedly so barred by two days. The decree appealed from is dated 21st February 1913 and the parties were present that day and heard judgment

pronounced. A copy was not applied for till 27th March and was furnished on 29th March. The papers, however, did not reach appellant's Advocates till 12th May, though they might easily have reached him at least a month earlier. On 21st May a telegraphic money order for the amount of the costs and fees for the appeal reached the Advocate's office, but as the member of the firm in whose name the order was, was absent, payment was not received. It is not even stated that the postal authorities declined to pay the money to another member of the firm, and even if they did so, the money order could have been re-directed and telegraphed to the town where the addressee was at that time known to be. No such course was taken, and despite their knowledge that the costs and fees had been in fact despatched to them, the Advocate's firm do not appear to have been prepared to advance the Court-fee, amounting to Rs. 18-12 in order to present the appeal in time. In view of the laches displayed in this case, I cannot hold that sufficient cause has been shown for not preferring the appeal in time. It is dismissed with costs, Advocate's fee two gold *mohurs*.

Appeal dismissed.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 1088 OF 1913.

November 9, 1914.

Present:—Mr. Justice Shah Din.

Musammat MISRI—DEFENDANT—PETITIONER

versus

Musammat CHAULI—PLAINTIFF—RESPONDENT.

Revision—(*Civil*—*Interlocutory order.*

In the absence of special circumstances the Chief Court would decline to revise an interlocutory order passed by a subordinate Court.

Petition, under section 70 of Act XVIII of 1884, as amended by Act IV of 1912, for revision of the order of the District Judge, Ambala, dated the 24th June 1913, overruling the objection of the defendant-petitioner.

Lala *Dhanpat Rai*, for the Petitioner.

Mr. *Sunder Das*, for the Respondent.

JUDGMENT.—The respondent's Counsel urges as a preliminary objection that the

order of the District Judge which is sought to be revised by the defendant, *Musammat* Misri, is an interlocutory order relating to one of the issues arising out of the pleadings of the parties, and that even if the order in question is wrong this Court should not interfere with it on the revision side. I think this objection has great force. There are no exceptional circumstances in this case such as might justify interference by this Court on revision at this stage of the proceedings in the suit between the parties, and I decline to exercise my revisional jurisdiction in favour of the defendant.

I dismiss the revision with costs.

Revision dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2181 OF 1913.

January 5, 1915.

Present:—Mr. Justice N. Chatterjea and Mr. Justice Greaves.

MAHABIR MISSER AND OTHERS—PLAINTIFFS—APPELLANTS

versus

NANDA KISHORE MISSER AND OTHERS—DEFENDANTS—RESPONDENTS.

Compromise, agreement of—Some terms not relating to suit—Decree incorporating whole agreement, whether admissible in evidence—Agreement, whether requires registration—Evidence—Admissibility of such agreement—Adverse possession, nature of possession necessary to create—Res judicata—*Compromise decree not relating to suit whether operates as* res judicata.

A decree recording an agreement as one of the terms of a compromise though not relating to the suit, is a judicial record of the agreement of the parties and is admissible in evidence.

Therefore such an agreement recorded in a decree, does not require registration and is admissible in evidence without registration.

Possession in order to be adverse must be adequate in continuity, in publicity and in extent.

The only act of "tethering of cattle, and throwing cow-dungs on the land" unaccompanied with the assertion of any adverse right, does not necessarily denote that a claim of ownership to the land was thereby asserted.

Quære:—Whether a compromise decree can operate as *res judicata* upon any matter other than that relating to the suit?

Second appeal from a decision of the Sub-Judge of Mozafferpore, dated the 19th May 1913, reversing that of the Munsif of Motihari, dated the 9th October 1912.

MAHABIR MISSER v. NANDA KISHORE MISSER.

Babu *Sib Chandra Pali*, for the Appellant.

JUDGMENT.—Two questions have been raised in this appeal. The *first* is, whether a certain compromise decree in a previous suit between the parties operates as *res judicata* or, at any rate, is evidence of an agreement between the parties with reference to the land in suit, and the *second*, whether the suit is barred by limitation.

The present suit is for recovery of possession of 2 *cottas* and odd of *parti* (waste) land, which was recorded as plaintiff's *brit* (rent-free) land in the Record of Rights. The Court of first instance decreed the suit, but the lower Appellate Court reversed that decree, and the plaintiffs have appealed to this Court.

It appears that there was a previous suit between the parties about another piece of land (3 *cottas* in area), which ended in a compromise. The terms of the compromise were set out in a petition which, after stating that each party will remain in possession of one-half of the 3 *cottas* in dispute in that suit, ran as follows: "Be it noted that the *brit* lands shall remain in possession of each of the parties in the same way as they stand entered in the survey *khatian*..... A decree may be passed in this suit in favour of the plaintiffs in respect of 1 *cotta* 10 *dhoors* of land as per (following) boundaries." The whole of the petition of compromise including the above was recited in the decree and the order was: "It is ordered that the suit be decreed as per terms of the petition of compromise."

The learned Subordinate Judge was of opinion that the recital about the *brit* lands did not appear to be an agreement, but a "mere notice of the intention of the parties," and that the recital was too vague to refer to plot No. 845 (the plot to which the land in suit is alleged to appertain). But plot No. 845 is one of the *brit* plots entered in the survey *khatian*, and we are of opinion that the clause "the *brit* lands shall remain in possession of each of the parties in the same way as they stand entered in the survey *khatian*" amounted to an agreement between the parties, and an agreement about all the *brit* lands entered in the survey *khatian*, including plot No. 845 which was one of the plots entered therein. The learned Subordinate Judge was further of opinion that even if it was an agreement, it was outside the scope of the suit, and being unregistered, was inadmissible in evidence. It is contended on behalf of the appellant that the compromise decree operates as *res judicata* and, at any rate, is evidence of the agreement.

We are of opinion that it does not operate as *res judicata*. Order XXIII, rule 3, provides that when a suit has been adjusted wholly or in part by any lawful agreement or compromise, the Court shall order such agreement or compromise to be recorded and shall pass a decree in accordance therewith, so far as it relates to the suit.

It is true all the terms of the compromise were recited in the decree, but the compromise, in so far as it related to the suit, was with respect to the 3 *cottas* (the subject-matter in dispute in that suit), and the Court was expressly asked to pass a decree in the suit in favour of the plaintiff in respect of 1 *cotta* 10 *dhoors* of land, being a moiety of the land in suit, and the order of the Court that the suit be decreed as per terms of the petition of compromise evidently had reference to the prayer made in the petition, *viz.*, that a decree might be passed with respect to one-half of the land in suit.

It is contended, however, that the agreement about the *brit* lands formed the consideration for the compromise, and that, therefore, the decree operated as *res judicata* with regard to it also. But even if it did form consideration for the compromise, the Court was never asked to pass a decree with respect to any matter other than the land in dispute in that suit. There was no decree as regards the *brit* lands, and the decree cannot, therefore, operate as *res judicata* with regard to the *brit* lands. In this view it is unnecessary to consider the authorities upon the question whether a compromise decree can operate as *res judicata* upon any matter other than that relating to the suit, upon which there is some conflict of judicial opinion.

But although the decree does not operate as *res judicata*, we think the agreement recited in the decree is admissible in evidence, though not registered. In the case of *Pranal Anni* v. *Lakshmi Anni* (1), the Judicial Committee of the Privy Council observed as follows: "If the parties, after agreeing to settle

(1) 22 M. 506; 26 I. A. 101; 3 C. W. N. 485.

the suit of 1885 on the footing that they were each to take a half share of the lands involved in the suit, and also a half share of the lands now in dispute, had informed the learned Judge that these were the terms of the compromise, and had invited him, by reason of such compromise, to dispose of the conclusions of the suit of 1885, their Lordships see no reason to doubt that the order of the learned Judge, if it had referred to or narrated these terms of compromise, would have been judicial evidence, available to the appellant, that the respondents had agreed to transfer her the moiety of land now in dispute". In that case although the *razinamah* which was submitted to the Court referred by way of remark to the arrangement arrived at between the parties with respect to the lands not forming the subject-matter of the suit, the Court in its order referred only to the lands in dispute in that suit.

In the present case the decree states, "on perusing the petition of compromise to the effect," and then recites all the terms of the compromise including those relating to the *brit* lands. The order of the Court *viz.*, that the suit "be decreed as per terms of the petition of compromise," must be taken to *refer* to all the terms, including those relating to the *brit* lands, although it must be taken to *have given effect* to the terms of the compromise only in so far as they related to the suit, as the only decree which the Court was asked to pass was with respect to the lands in dispute in that suit. But all the terms including those relating to the *brit* lands were submitted to the Court, and were perused by it, and the order of the Court must be taken to have *referred* to or *narrated* the agreement relating to the *brit* lands. In any case the agreement relating to the *brit* lands was recorded in the decree. Under Order XXIII, rule 3, of the Code of Civil Procedure, the Court is to *record* the agreement of compromise, and to pass a decree in accordance therewith in so far as it relates to the suit. A decree, therefore, recording an agreement as one of the terms of the compromise, though not relating to the suit, is a legal record of the agreement between the parties and as such available to the appellant as evidence. We are accordingly of opinion that the agreement recited in the decree does not require registration and is admissible in evidence. The learned Subordinate Judge should have, therefore, considered it as a piece of evidence in the case.

The second contention relates to the question of limitation. The learned Subordinate Judge has found that the lands were *parti* (waste). That being so, we do not appreciate what he means by saying "such being the character of the lands, the plaintiffs could have shown that they exercised dominion over the lands in dispute before the *Bhado* of 1318 F. S., when the defendants are said to have got into them." The only acts of possession exercised by the defendants as found by the Subordinate Judge are "tethering of cattle, and throwing cow-dungs on the land." But such acts, if unaccompanied with the assertion of any adverse right, would not necessarily denote that a claim of ownership to the land was thereby asserted, and as observed by the Judicial Committee in the case of *Radhamoni Debi* v. *Collector of Khulna* (2) possession in order to be adverse must be adequate in continuity, in publicity and in extent. The learned Subordinate Judge does not appear to have considered these matters in deciding the question of limitation.

We are of opinion that the case should go back for a hearing of the appeal. The decree of the lower Appellate Court is accordingly set aside and the case remanded to that Court for a re-hearing of the appeal in accordance with the above remarks. Costs to abide the result.

Case remanded.

(2) 27 C. 943; 27 I. A. 136; 4 C. W. N. 597; 2 Bom. L. R. 592.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 372 OF 1914.

November 20, 1914.

Present:—Mr. Justice Scott-Smith.

MUHAMMAD HASAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

YUSAF AND OTHERS—PLAINTIFFS—RESPONDENTS.

Punjab Pre-emption Act (II of 1905), s. 12 (a)—Pre-emption—Occupancy holding—Rival claimants—Landlord—Deceased tenant's heirs—Res judicata—*Same parties.*

MUHAMMAD HASAN *v.* YUSAF.

A decision is not *res judicata* when the parties to the litigation are not the same.

The heirs of an occupancy tenant have a preferential right of pre-emption to the landlord in respect of sale of the occupancy holding.

Second appeal from the decree of the Divisional Judge, Jhelum, dated the 11th of December 1913, varying that of the Munsif, first Class, Jhelum, dated the 2nd of April 1913, decreeing claim in part payment of Rs. 240.

Mr. *Badr-ud-Din Kureshi*, for the Appellants.

Bawa *Sewaram Singh*, for Mr. *Nand Lal*, for the Respondents.

JUDGMENT.—This Appeal and appeal No. 505 are from the same decree of the lower Appellate Court and may conveniently be disposed of together.

The suit by Yusaf, plaintiff-respondent, was for possession, by pre-emption, of 46 *kanals* and 15 5/9 *marlas* of land, the occupancy rights of which were sold by *Musammat* Imam Bibi, daughter of the last male holder.

She sold 49 *kanals* 10 *marlas*, but between 2 and 3 *kanals* of this have been purchased by one of the landlords, so plaintiff did not include that in his claim.

The purchaser Diwan Chand was opposed in getting possession by Muhammad Hassan and other defendants-appellants in appeal No. 572 and the resulting suit was compromised by their taking over the land and paying Diwan Chand Rs. 300, the sale price agreed upon in *Musammat* Imam Bibi's sale to him.

Subsequently Muhammad Hassan, etc., sold 3 plots, area 7 *kanals* and 14 5/9 *marlas*, to Shams-ud-Din, appellant in appeal No. 505, who is one of the landlords.

The first Court decreed plaintiff's claim to the balance of the land after deducting the portion sold to Shams-ud-Din.

The lower Appellate Court in appeal decreed plaintiff's claim in full.

Shams-ud-Din has appealed for the 3 plots bought by him from Muhammad Hassan, etc., and his appeal is not contested by Yusaf, plaintiff-respondent's Counsel.

For Muhammad Hassan, etc., it is urged *inter alia* that the lower Appellate Court was wrong in holding that the decision in the previous case between them and *Musammat* Imam Bibi, in which it was held that they had not proved that the common ancestor of themselves and Chugatta occupied the land, operated as *res judicata*, and that, therefore, they could not prove that they had a superior right to the plaintiff under section 12 (*a*) of the Pre-emption Act of 1905. I am clear that that decision does not operate as *res judicata*, for the parties are not the same, though no doubt it is relevant under section 13 of the Evidence Act.

The first Court held that Yusaf had a superior right of pre-emption, as he was a proprietor in the village whilst Muhammad Hassan, etc., were non-proprietors.

The fact that he is a proprietor would not give Yusaf a superior right to Muhammad Hassan, etc., if they could prove that they were heirs to the tenancy under section 59 of the Tenancy Act.

They certainly have not proved this on the present record, but Mr. Kureshi says the issues were not so clear as to make them understand that this was what they had to prove.

The first issue deals with Yusaf's right of pre-emption and I think it possible, that Muhammad Hassan, etc., may have been misled. The land appears to be valuable and I think it is only fair to give these appellants an opportunity of proving that the common ancestor of themselves and Chugatta occupied the land.

The issue is whether the common ancestor of Muhammad Hassan, Muhammad Din and Ismail and of Chugatta occupied the whole or any part of the land. If a part, then how much, *onus* on Muhammad Hassan, etc.

Remanded under Order XLI, rule 25, Civil Procedure Code, to the Court of first instance, which will submit its finding through the lower Appellate Court, which will state its own opinion. Three months allowed for return, after which a date will be given for objections and hearing in this Court.

Case remanded

BALMER LAWRIE & CO. v. JADU NATH BANERJEE.

CALCUTTA HIGH COURT.
CIVIL RULE No. 132 OF 1914.
April 6, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

BALMER LAWRIE & Co.—PETITIONER
versus
JADU NATH BANERJEE—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), ss. 47, 73—Execution proceedings—Rateable distribution—Rival decree-holders—Order refusing rateable distribution—Decree—Appeal.

An order made under section 73 of the Code of Civil Procedure rejecting an application for rateable distribution of the assets between two rival decree-holders, which does not affect or interest the judgment-debtor, is an order in execution proceedings, but is not a decree unless all the conditions enumerated in section 47 are present. No appeal, therefore, lies from such an order.

Jagadish v. *Kirpa Nath*, 1 Ind. Cas. 783; 36 C. 130, referred to.

It is essential for the application of section 73 of the Code of Civil Procedure that the decrees should have been passed against the same judgment-debtor.

Jagadish v. *Kirpa Nath*, 1 Ind. Cas 783; 36 C. 130, followed.

Sorabji Coovarji v. *Kala Raghunath*, 12 Ind. Cas. 911; 13 Bom. L. R. 1193, 36 B. 156, distinguished.

Civil Rule against an order of the Subordinate Judge of 24-Parganas, dated January 27th 1914.

Babu *Sajani Kanta Sinha*, for the Petitioner.

Babu *Biraj Mohan Majumdar*, for the Opposite Party.

JUDGMENT.—This Rule is directed against an order by which the Subordinate Judge has refused an application for rateable distribution under section 73 of the Code of Civil Procedure of 1908. The opposite party obtained a decree for money against his judgment-debtor, by name Dasarathi Mukherjee, while the petitioner obtained a decree for money against D. Mukherjee & Company, a firm of which Dasarathi Mukherjee was a partner. At the instance of the decree-holder, opposite party, the Municipal Corporation of Calcutta, which held two Government securities and a sum of money payable to Dasarathi Mukherjee, placed the properties at the disposal of the lower Court for satisfaction of the decree held by him. During the pendency of a proceeding for rateable distribution as between the opposite party and the other execution creditors of Dasarathi Mukherjee, at whose instance the properties in the custody of the Corporation had been attached through the Calcutta Small Cause Court, the present petitioner, on the 15th January 1914, made an application for rateable distribution. This application has been refused by the Subordinate Judge on the ground that it was made after the receipt of the assets by the Court. The question for consideration is, whether this order has been rightly made.

A preliminary objection has been taken to the Rule, on the ground that the order of the Subordinate Judge was in essence made under section 47 of the Code and was appealable as a decree. In support of this view, reference has been made to the case of *Sorabji Coovarji* v. *Kala Raghunath* (1). That case, however, is clearly distinguishable. There the decree-holders had attached the property of their common judgment-debtor. Other execution-creditors of the judgment-debtor applied for rateable distribution of the assets which might be realised by sale of the property. The judgment-debtor brought into Court a sum sufficient to satisfy the two decree-holders at whose instance the property had been attached. Thereupon the other decree-holder applied for rateable distribution of the sum so deposited, and the Court, without notice to the judgment-debtor, allowed this application. The result was that there was not a sufficient sum left to the credit of the decree-holders, at whose instance the attachment had been effected, to satisfy their dues, and the Court accordingly directed that the property attached be sold in order that their decrees might be satisfied in full. The judgment-debtor appealed against this order, on the ground that no rateable distribution was permissible under the law in respect of the money brought by him into Court, and that as the sum deposited was sufficient to satisfy the decree held by the two execution-creditors who had taken out processes of attachment, their decrees must be deemed in law to have been satisfied, so that there was no execution proceeding left in which an order for rateable distribution might be made. An objection that the appeal was incompetent as the question raised was not within the scope of section 47, was overruled on the ground that the question

(1) 12 Ind. Cas. 911; 36 B. 156, 13 Bom. L. R. 1193.

did arise between parties to the decree. It is not necessary for our present purpose to decide whether, in circumstances like these, the question which arose not merely between the rival decree-holders, but also between the judgment-debtor on the one hand and the decree-holders on the other, could be deemed to fall within the scope of section 47. But it is plain that, in the case before us, the question which calls for decision is not within the scope of that section. This is not a question which arises between the parties to the suit in which the decree under execution was passed; it is, on the other hand, a question between two rival decree-holders, which does not affect or interest the judgment-debtor. An order made under section 73 is an order in execution proceedings, but is not a decree unless all the conditions enumerated in section 47 are present: *Jagadish* v. *Kirpa Nath* (2). We must consequently hold that the order of the Subordinate Judge is not appealable and overrule the preliminary objection.

As regards the merits, it is plain that the petitioner is not entitled to succeed. Section 73 provides that where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realisation, shall be rateably distributed among all such persons. It is essential for the application of the section that the decrees should have been passed against the same judgment-debtor. This has been made clear beyond possibility of dispute by the introduction of the word "passed," which did not find a place in section 295 of the Code of 1882. But, as already stated, the decree held by the opposite party, in execution of which the properties have been brought into Court, was passed against Dasarthi Mukherjee, while the decree held by the petitioner was obtained against the firm of which Dasarthi Mukherjee was a partner, and is not shown to be capable of execution against him individually. Consequently, the two decrees cannot be deemed to have been passed against the same judgment-debtor, and it is thus needless to consider whether *Ganesh Das* v. *Shiva Lakshman* (3) has been affected by section 73 of the Code of 1908 which reproduces section 295 of the Code of 1882, in an altered form. In this view, it is also unnecessary to discuss the question, whether the application for rateable distribution by the petitioners was made before the assets had been received by the Court below.

The result is that the Rule is discharged with costs to the decree-holder (and not to the judgment-debtor) opposite party.

Rule discharged.

(2) 1 Ind. Cas. 783; 36 C. 130.

(3) 30 C. 583; 7 C. W. N. 414.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 173 OF 1914.

November 18, 1914.

Present:—Mr. Justice Shah Din.

SHIB RAM—DEFENDANT—APPELLANT

versus

HAMIR SINGH—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Second appeal—Concurrent findings—Question of legal necessity.

Where on the question of legal necessity for a sale the Courts below had come to a concurrent decision, the Chief Court declined to interfere in second appeal.

Second appeal from the decree of the Divisional Judge, Ludhiana Division, dated the 28th October 1913, affirming that of the Munsif, first Class, Ludhiana, dated the 31st March 1913, decreeing the claim

Pandit *Rambhaj Datta*, for the Appellant.

Mr. *N. C. Mehra* and Sardar *Attar Singh*, for the Respondents.

JUDGMENT.—The plea of limitation raised by the appellant's Pleader at the preliminary hearing on the 27th February 1914 has now been given up, as the record shows that the suit was instituted on the 20th June 1912, and not on the 17th December 1912, as was assumed in the admitting order of the learned Judge in chambers.

As regards the merits of the case it has been found as a fact by both the Courts below that the land in suit is the ancestral property of the plaintiff and the vendor, and I cannot interfere with that finding in second appeal. Next it is contended that the validity of the previous mortgages in favour of

the vendee cannot be impugned in this suit, because any suit to contest their validity instituted more than twelve years after the dates on which those mortgages were effected would be barred by limitation under the Punjab Limitation Act and *Khiali Ram* v. *Gulab Khan* (1) is cited in support of this contention; that decision is, however, clearly distinguishable from the present case upon its own facts and the point has not been seriously pressed by the appellant's Pleader.

As to the question of legal necessity for the sale, the Courts below have come to a concurrent decision, and I am not prepared to interfere with their concurrent finding. I maintain the decree of the Divisional Judge and dismiss both the appeal and the cross-objections. The parties will pay their own costs in this Court.

Appeal dismissed.

(1) 11 Ind. Cas. 392; 33 P. R. 1911; 190 P. L. R. 1911.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL FROM ORDER No. 107 OF 1914.

November 24, 1914.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

RAMJI AND OTHERS—DEFENDANTS—APPELLANTS

versus

KOMAN DAS—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLIII, r. 1—Order—Application for appointment of Receiver—Provisional grant of application, interpretation of—Order, whether appealable.

Where on an application for appointment of a Receiver the Court made an order in these words: "I allow the application provisionally and call on parties to put in applications showing their claims regarding the person and power of the Receiver, and the income, if any, that is to be paid by him to the objectors"

Held, that as the order does not amount to appointment of a Receiver, no appeal lies against the order.

First appeal from an order of the Subordinate Judge of Muttra.

The Hon'ble Dr. *Sunder Lal*, for the Appellants.

Mr. *Gulzari Lal*, for the Respondent.

JUDGMENT.—This is an appeal against an order which is said to be an order appointing a Receiver, and, therefore, appealable under Order XLIII, rule 1, clause (*s*). What the Subordinate Judge says is this:—"I allow the application provisionally and call on parties to put in applications showing their claims regarding the person and power of the Receiver and the income, if any, that is to be paid by him to the objectors." It seems to us that the Subordinate Judge came to the conclusion that it was a case in which a Receiver should be appointed, but he did not find himself in a position to definitely appoint a Receiver without further information. The language used is no doubt peculiar; but it seems to us impossible to say that the Subordinate Judge has in fact appointed a Receiver. His language amounts to no more than an expression of opinion that a Receiver should be appointed and a statement that he proposes to appoint one. We hold that no appeal lies against the order. We, therefore, dismiss this appeal and we direct that the costs of this appeal be costs in the cause.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2344 OF 1913.

November 11, 1914.

Present:—Mr. Justice Shah Din.

AHMAD KHAN—DEFENDANT—APPELLANT

versus

Musammat BAKHTAWAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Second appeal—Appeal—Point not taken in original Court or in Appellate Court, whether allowed to be raised in second appeal.

Ordinarily a point not taken in the original Court cannot be advanced in appeal, and similarly a contention not raised either in the first appeal or in the memorandum of appeal cannot be allowed to be argued in second appeal.

Second appeal from the decree of the Divisional Judge, Lahore Division, dated the 4th October 1913, affirming that of the Subordinate Judge, First Class, Lahore, dated the 21st June 1910, decreeing the claim.

Mr. *Oertel* and Malik *Muhammad Hussain*, for the Appellant.

Lala *Dhanpat Rai*, for Amir Din, Respondent.

JUDGMENT.—The facts of this case are clearly and accurately stated in the judgment of the learned Divisional Judge. The first point urged by Mr. Oertel on behalf of the appellant is that *Musammat* Begam was entitled only to one-half of the land in dispute, and not the whole of it, and that the lower Appellate Court was, therefore, in error in passing a decree for the whole land in favour of *Musammat* Begam's alleged vendee, Amir Din. As the Divisional Judge observes, this point, though raised in his Court, was not taken in the Court of first instance, and the appellant could not, therefore, be allowed to take it for the first time in appeal. The Divisional Judge was perfectly right in taking that view of the case as regards the question under consideration; but assuming that the appellant can advance this contention, I agree with the Divisional Judge that it is wholly untenable. This Court in its judgment, dated the 31st of October 1905, and later in its order, dated the 26th of March 1906, passed upon an application for review of its judgment, dated the 31st of October 1905, which was filed by the present appellant, decided in express terms that on the death of *Musammat* Fajjan, her daughter, *Musammat* Begam, shall succeed to the *whole* of the land in dispute on payment of Rs. 300 to the present appellant. On the re-marriage of *Musammat* Fajjan, when the succession opened out, *Musammat* Begam was the sole heir to the land in suit, *Musammat* Bakhtawar, the second surviving daughter of *Musammat* Fajjan, having already consented to the sale of the land by her mother to the present appellant; and in accordance with the decision of this Court referred to above, which amounts to *res judicata* between the parties and their representatives-in-interest, *Musammat* Begam's vendee is clearly entitled to claim the entire land from the appellant on payment of Rs. 300. Apart from the operation of the rule of *res judicata*, I am clearly of opinion that *Musammat* Begam was entitled to the whole land upon the re-marriage of her mother, inasmuch as by her consent to the sale by *Musammat* Fajjan in favour of the present appellant, *Musammat* Bakhtawar excluded herself from the inheritance once for all and *Musammat* Begam was the sole heir to the land when her mother's re-marriage took place.

The second point taken by Mr. Oertel is that the appellant, as the successor-in-title to *Musammat* Fajjan and *Musammat* Bakhtawar, has a right to claim from the respondent, Amir Din, that portion of the consideration for the sale of the land in suit made by *Musammat* Begam in his favour, which had not been paid by him to *Musammat* Begam before her death. This is an entirely new contention, which was not so much as even hinted at in the lower Appellate Court and which is not raised in the written memorandum of appeal. I, therefore, decline to entertain it. No other contention has been advanced in support of the appeal.

The appeal fails and is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

FIRST CIVIL APPEALS FROM ORDERS NOS. 156 AND 157 OF 1914, WITH CIVIL RULE NO. 410 OF 1914.

May 4, 1914.

Present:—Mr. Justice Holmwood and Mr. Justice Chapman.

IN No. 156 WITH RULE No. 410

BROJENDRA KISHORE ROY CHOWDHURY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Syad ABDUS SOBHAN CHOWDHURY AND OTHERS—DEFENDANTS—RESPONDENTS.

IN No. 157

Syad ABDUS SOBHAN CHOWDHURY AND ANOTHER—DEFENDANTS NOS. 2 AND 3—APPELLANTS

versus

BROJENDRA KISHORE ROY CHOWDHURY AND OTHERS—PLAINTIFFS AND OTHERS—DEFENDANTS—RESPONDENTS.

Injunction, temporary, grant of, when allowed—Hat, right of holding on fixed days—Interference, when restrained.

Under colour of a temporary injunction a Court cannot be asked to give the relief which forms the cause of action in the suit.

But where the defendants put forward a claim of right which is incompatible with the right upon which the plaintiffs sue and where it appears probable that the claim is sought to be exercised in a wholly unnecessary manner upon motives of spite and ill-feeling, the Court will interfere by way of injunction.

A party is entitled to hold a *hat* in his own village on any day he likes subject to his committing no offence against public tranquility, but where by holding a *hat* on particular days he violates the legal rights of the other party to hold his *hat* on those days, he will be restrained from holding his *hat* on such days.

Appeals against the orders of the Subordinate Judge of Bogra, dated the 25th of March 1914.

IN No. 156 WITH RULE No. 410.

Messrs. *Caspers* and *Remfry*, Counsel, and Dr. *Rash Behary Ghose* and Babu *Ramani Mohan Chatterjee*, for the Appellants.

Mr. *B. Chakravarti*, Counsel, and Babus *Sarat Chandra Roy Chowdhury* and Dr. *Naresh Chandra Sen Gupta*, for the Respondents.

IN No. 157.

Mr. *B. K. Chakravarti*, Counsel, and Babu *Sarat Chandra Roy Chowdhury*, for the Appellants.

Messrs. *Caspers* and *Remfry*, Counsel, and Babu *Ramani Mohan Chatterjee*, for the Respondents.

JUDGMENT.

HOLMWOOD, J.—We think that the Rule should be made absolute on the ground on which it was issued and both the appeal partially and the cross-appeal wholly dismissed, and both parties will bear their own costs.

Speaking for myself, while I entirely agree with the authorities cited to us on behalf of the respondents in the Rule and the main Appeal No. 156 that the Court cannot be asked to give the relief which forms the cause of action in the suit under colour of temporary injunction, and that so much of the plaintiffs' appeal as practically asks for such a relief cannot be allowed, I am clearly of opinion that the *ratio decidendi* in this matter should be the likelihood of a disturbance of the plaintiff's right in his own village and the existence of ill-feeling between the parties owing to the unfortunate difference between the Hindus and the Mahomedans caused by the conduct of the first defendant, the so-called Darbesh, who has not appeared and who is still in contempt of the Courts.

The temporary injunction has already been issued by the Subordinate Judge restraining the defendants from in any way interfering or intermeddling with or disturbing the plaintiffs in the enjoyment of their *hat* and in particular from procuring, causing or inducing (1) all traders, dealers and others desirous of attending the plaintiffs' *hat* and selling their goods there to cease to do so; (2) all or any owners of carts and other conveyances to cease to convey the goods of such traders, dealers and others to the plaintiffs' *hat*; (3) all traders, dealers and others to boycot the plaintiffs' *hat*; (4) all or any customers desirous of attending the plaintiffs' *hat* to cease to attend; and (5) from publishing any defamatory statement as aforesaid and from posting elephants and armed men in the roads or paths or approaches to the plaintiffs' *hat*.

In the appeal or counter-Appeal No. 157 it is sought to be argued that even these restraints should be removed as undue interference with the defendants' right to complete in trade with the plaintiffs; and the well-known case of the *Mogul Steamship Company* v. *McGregor Grow & Co.* (1) has been cited to us. It appears to me that there is a great distinction between the case of an open port where competition has free sway and two neighbouring properties in which each party has the sole right and cannot be allowed to interfere with the other. The acts which have been restrained by the Subordinate Judge are all acts of active interference with the plaintiff's right to hold his *hat* and are not necessary to secure an enjoyment by the defendants of their right to establish a *hat* provided they do not trespass on their neighbour's right. This finding is sufficient to make the defendants' Appeal No. 157 fail.

The only point remaining to be considered is the right of the defendants to hold their *hat* on Thursdays and Sundays which are the established days of the plaintiffs' *hat*. This is covered by the Rule and the *ad interim* injunction which we issued on

(1) (1892) A. C. 25; 61 L. J. Q. B. 295; 66 L. T. 1; 40 W. R. 337; 7 Asp. M. C. 120; 56 J. P. 101.

the 3rd April. There can be no doubt as to the defendants' right to hold a *hat* in their own village on any day they like, subject to their committing no offence against the public tranquillity, *Nanda Kumar Singh* v. *Emperor* (2). The state of feeling between the parties is a matter to be considered both as to the probability of such disturbance and to the intention of the defendants to produce injuries to the plaintiffs' right before the plaintiffs' right to interfere with them is established; and it cannot be said that the injunction to the defendants not to hold their *hat* on Thursdays and Sundays will operate oppressively or inequitably or be contrary to rules of justice; nor can it be said that the damages which the plaintiffs sued for in this case will be all they can obtain if their suit be successful. It may not be established before us that there is actual intention on the part of the defendants to violate the plaintiffs' legal right to hold their *hat* in their own village. But they put forward a claim of right to do the act complained of, namely, to hold their *hat* on Thursdays and Sundays and they insist upon it; and that act, if done, will in my opinion inevitably, that is, in all reasonable probability, be a violation of the plaintiffs' legal right to hold their *hat* on those days as they have always done [see *Hanes* v. *Taylor* (3)].

It has been urged that the defendants have other *hats* in other places on other days of the week and that their sole reason for holding their new *hat* in close proximity to the plaintiffs' on those days is that no other days are available, having regard to the annuities of those other *hats*. We need only say that no evidence has been put before us that any *hat* likely to compete with the defendants' Kalai *hat* is held in any neighbouring village on any particular day of the week; and that the ill-feeling in connection with the Darbesh who acts under the alleged protection of the defendants and their servants, though that is denied by the defendants, the extraordinary procedure of the defendants in levying no tolls whatever in their *hat*, and the unnecessary fixing of the rival *hat* days on the same days as the plaintiffs' *hat* are sufficient evidence, without our in any way committing ourselves to the finding that the defendants had no right to do any of these things, that the claim of right put forward and insisted upon by the defendants is not based on *bona fide* competition in trade, but is actuated by the unfortunate ill-feeling which has arisen between the parties and this ill-feeling may give rise to the threatened trespass on the plaintiffs' legal right and may cause irreparable damage thereto if the defendants are not restrained from holding their *hat* on the same days as the plaintiffs' old established neighbouring *hat*. "It is notorious," says Sir Richard Couch, C.J., in *Bykuntram Shaha Roy* v. *Meajan* (4), "that in this country rival *hauts* are frequent sources of riot and affray; and there is something in the nature of such *hauts*, namely, the assemblage of large crowds of men on both sides, which may be said to have a certain tendency to lead to a breach of the peace," and when the existence of bitter feeling aroused by quarrel between the Hindus and Mahomedans over the Darbesh, who is considered sacred by one of the parties, is shown us in this case, I think that it is the duty of the Civil Court to exercise at least such power of restraint pending the litigation between the parties, as the Magistrate can exercise for a period of two months when there is imminent risk of breach of the peace; and in saying this I wish to carefully guard myself from any suggestion that the apprehension of a breach of the peace is in itself any ground for the issue of injunction by a Civil Court. There must, as we have already indicated, be something more. But in the present case a continued series of breaches of the peace would have an irreparably disastrous effect on the civil rights of the parties in respect of the subject of litigation. If the defendants put forward a claim of right which is incompatible with the right upon which the plaintiffs sue, and if, as appears probable, that claim is sought to be exercised in a wholly unnecessary manner upon motives of spite and ill-feeling, the Court will interfere by way of injunction. I, therefore, have no hesitation in extending

(2) 11 C. W. N. 1128; 6 Cr. L. J. 321.
(3) (1847) 2 Phillimore 209.
(4) 18 W. R. Cr. 47; 10 B. L. R. (F. B.) 484.

the temporary injunction issued by the Subordinate Judge so as to bring it in conformity with the Rule, which is made absolute without costs—and as the appeals have been disposed of at the same time the injunction must have effect until the decision of the suit. In this sense the appeal of the plaintiffs will partially succeed as we see the Rule was only issued pending the decision of the appeal.

CHAPMAN, J.—I agree. The allegations in the plaint are (1) that the defendants have conspired to injure the plaintiffs by ruining the plaintiffs' *hat*; (2) that the defendants' *hat* is a nuisance which has caused damage to the plaintiffs and (3) that the creation of the defendants' *hat* is an infringement of the plaintiffs' ancient right to hold their *hat* in that locality. The case thus involves points of law of unusual difficulty, the determination of which will in any event depend upon a very careful sifting of the evidence which is offered. I desire to avoid any suggestion that I have formed even a *prima facie* opinion. It is enough for the present purpose to say that there is, upon the pleadings, a substantial case calling for judicial investigation.

I am also satisfied that the plaintiffs' *hat* is being seriously interfered with by the holding of the defendants' *hat* on the same days of the week. I cannot conceive that an injunction restraining the defendants from holding their *hat* on those days of the week would be so harmful to them as the refusal of such an injunction would be to the plaintiffs. On the contrary, my present opinion is that the issue of such an injunction will not cause any loss to speak of to the defendants, while there is reason to apprehend that the continuance of the defendants' *hat* on Thursdays and Sundays will completely ruin the plaintiffs' *hat*.

It is clear, therefore, that there should be injunction *pendente lite* of the character indicated.

I also agree that the defendants' appeal against injunction granted by the learned Subordinate Judge be dismissed.

Appeals dismissed,
Rule made absolute.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1203 OF 1911.

October 21, 1914.

Present:—Mr. Justice Shah Din and Mr. Justice Scott-Smith.

MUHAMMAD ALI AND OTHERS—DEFENDANTS—APPELLANTS

versus

SHAM LAL AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Partnership for fixed term—Dissolution before expiry of term, whether allowed—Contract, breach of—Compensation for breach—Partner, liability of.

The parties to the suit entered into a partnership in a contract which the defendants had obtained from the Municipal Committee, Delhi, for erecting stands on the central portion (*patri*) of the Chandni Chauk Street, Delhi, for spectators to watch the elephant procession in connection with the Coronation Darbar of 1903. On the 2nd December 1902, the defendants sent a registered notice to the plaintiff to the effect that as he had up to that date made no preparations to perform his part of the contract, the partnership between the parties was dissolved, and thereafter the defendants got the work of erecting stands done by their own workmen without reference to the plaintiff and appropriated the whole of the income that accrued from the sale of tickets. The plaintiff sued for rendition of accounts and his share of profits and also claimed compensation for a certain number of chairs which he had got made.

Held, that the plaintiff was not entitled to the compensation, for he had not carried out his part of the contract and the defendants could not be expected to wait indefinitely; but that he was entitled to his share of the net profits of the partnership as the partnership could not be legally put an end to by the defendants.

Second appeal from the decree of the Divisional Judge, Delhi Division, dated the 31st July 1911, modifying that of the Subordinate Judge, first Class, Delhi, dated the 29th November 1909, decreeing the claim.

Messrs. *Broadway*, *B. Beran Petman* and *Obedulla*, for the Appellants.

Rai Bahadur Pandit *Shee Narain*, for the Respondents.

JUDGMENT.—This appeal has arisen out of a suit brought by the plaintiff-respondent Sham Lal against the defendants-appellants, who are proprietors of the firm of Ibrahimji Sulemanji and Sons of Karachi, for rendition of accounts and for a 7/16th share of the profits of a partnership alleged to have been entered into between the parties by a written agreement, dated the 11th of November 1902. The defendants

MUHAMMAD ALI v. SHAM LAL.

had obtained from the Municipal Committee of Delhi a contract for erecting stands on the central portion (*patri*) of the Chandni Chauk Street, Delhi, for spectators to watch the elephant procession on the occasion of the Coronation Darbar of 1903. On the 2nd December 1902 the defendants sent a registered notice to the plaintiff to the effect that as he had up to that date made no preparations to perform his part of the contract in the way of providing benches, chairs, &c., according to the terms of the agreement of the 11th November 1902, the partnership between the parties was dissolved. To this notice the plaintiff sent a reply, dated the 10th of December 1902, through his Pleader saying in effect that the contract of partnership could not be put to an end by the defendants, as the contract was for a fixed term, and that the plaintiff was prepared to supply benches, &c., according to the patterns sanctioned by the Municipal Committee within five days, *i.e.*, up to the 15th December 1902. To this letter the defendants replied on the 13th December 1902, giving the plaintiff up to the 15th December to provide the necessary number of benches, &c., for use on the Chandni Chauk *patri* on the procession day and also asking him to pay to them (the defendants) the cost of the benches, &c., which they had already got prepared in anticipation of the plaintiff failing to perform the contract as agreed upon. The plaintiff did not supply any benches, &c., to the defendants up to the 15th December, but sent to them another notice on that date to the effect that they had misunderstood his Pleader's letter of the 10th December. Thereafter the defendants got the work of erecting stands on the Chandni Chauk *patri* done by their own workmen without reference to the plaintiff, and treating the contract of partnership as at an end appropriated the whole of the income that accrued from the sale of tickets to the spectators. On the 15th April 1904, the plaintiff sent a registered letter to the defendants demanding Rs. 20,000 as damages on account of breach of the contract of partnership as contained in the agreement of the 11th November 1902; and as the defendants took no notice of the plaintiff's claim, he instituted against them on the 11th November 1905 the present suit for rendition of accounts and for a seven-anna share in the profits of partnership.

A preliminary decree for dissolution of partnership and rendition of accounts was passed in plaintiff's favour by the Subordinate Judge, Delhi, on the 26th July 1907, and the defendants' appeal from that decree was dismissed by the Divisional Judge on the 11th May 1908. Both the Courts held that the contract of partnership between the parties contained in the agreement of the 11th of November 1902 had not been dissolved, inasmuch as the partnership being for a fixed term the plaintiff could not be expelled by the defendants during such term for any cause whatever. The Divisional Judge's decree was acquiesced in by the defendants. The Subordinate Judge appointed a Commissioner to examine the account-books of the defendants and to report the result to the Court. After receipt of the Commissioner's report the parties were allowed to file objections to it. Upon those objections six issues were framed by the Subordinate Judge, which are set out at page 10 of the paper-book, and the parties then adduced their respective evidence in connection with those issues. The fourth issue, which has been the subject of argument before us, as will be noticed presently, ran as follows:—

"If the accounts (of the defendants) are found to be irregular and incorrect, how much has been realized by the defendants from the sale of spectators' tickets on the occasion of the Delhi Durbar Procession on 29th December 1902?"

The net result of the Subordinate Judge's findings was that the accounts filed by the defendants were held to have been irregularly kept and incorrect and therefore as being of no evidential value against the plaintiff. The accounts being held to be unreliable, every presumption was made against the defendants, and upon a critical examination of the other evidence adduced by them regarding the income and the expenditure connected with the contract taken by the defendants from the Municipal Committee, the Subordinate Judge came to the conclusion that the gross income was Rs. 29,946, the plaintiff's share in it being Rs. 13,101-6-0, and the total net expenditure was Rs. 8,849-14-9. The net amount due to the plaintiff was thus Rs. 4,251-7-3, on which the

Subordinate Judge allowed Rs. 630 as interest at annas 0-5-0 per cent. per mensem for four years, total Rs. 4,881-7-3. A decree for this amount was passed with costs in favour of the plaintiff against the defendants.

Both parties filed cross-appeals in the Divisional Court, and the learned Divisional Judge (Mr. A. E. Martineau) remanded the case to the Subordinate Judge for enquiry and findings on the following issues:—

1. Did plaintiff have benches prepared for the Chandni Chauk *patri* in accordance with the contract and did he suffer loss in consequence and, if so, how much?

2. What is the expenditure likely to have been incurred in performing the business of the partnership?

The Divisional Judge remanded the case for further enquiry on the above points, (1) because the plaintiff had contended that he had benches made for the Chandni Chauk *patri* in pursuance of the agreement of the 11th November 1902 and that he had suffered loss in consequence of the defendants having wrongfully put an end to the partnership and refused to take his benches, and (2) because the Subordinate Judge, having held that the defendants' accounts were unreliable, was wrong in allowing the expenditure shown in those accounts after deducting certain items, which it was held should not be debited against the plaintiff. On behalf of the defendants it was urged before the Divisional Judge that they should be allowed on remand to produce rebutting evidence on the 4th issue, which evidence, according to them, had been improperly shut out by the Subordinate Judge. The Divisional Judge was of opinion that the defendants were not entitled to produce rebutting evidence on the said issue, but for certain reasons given by him he refrained from deciding the point finally.

In his return to the order of remand the Subordinate Judge held (1) that the plaintiff had 1,300 benches prepared for the Chandni Chauk *patri* at a cost of Rs. 2,600 in accordance with the agreement of the 11th November 1902, that after the Coronation Darbar was over those benches were of little use and could not have been sold for more than Rs. 1,300 and that the plaintiff had, therefore, suffered a loss to the extent of that amount and (2) that the expenditure incurred by the defendants in carrying out the partnership business was Rs. 6,000.

On receipt of the return to the order of remand the whole case was very fully argued before the Divisional Judge, Mr. J. P. Thomson who, after dealing exhaustively with all the points raised by the Counsel for the plaintiff and for the defendants respectively, dismissed the defendants' appeal and accepting that of the plaintiff gave him a decree for Rs. 14,000, together with interest on that amount at the rate of Rs. 5 per cent. per annum from the 1st January 1903 to the date of decree, total Rs. 20,338. The learned Judge also allowed interest at Rs. 5 per cent. per annum on Rs. 14,000 from the date of decree to the date of realisation.

From the decree of the Divisional Judge the defendants have preferred a further appeal to this Court. The written memorandum of appeal printed at pages 1 and 2 of the paper-book was filed in this Court on the 17th October 1911; the appeal came on for hearing before two successive Division Benches on the 26th February 1914 and 30th June 1914 respectively, but it could not be heard on those dates and the hearing was, therefore, adjourned.

About a month after the second adjournment, Mr. Obedulla on behalf of the appellants filed additional grounds of appeal in which he has raised certain points which were not taken in the original memorandum of appeal. At the hearing before us the learned Advocate for the respondent objected to those additional grounds being entertained at that stage of the proceedings and we ruled that the objection was well founded.

Some of the additional grounds go to the root of the whole case and impugn the validity of the preliminary decree passed by the Subordinate Judge and confirmed by the Divisional Judge; and as in the original memorandum of appeal no objection whatever was raised to the preliminary decree, it is too late in the day for the appellants to contest its validity. The other additional grounds taken are of a similar character and we could not possibly see our way to allow the defendants' Counsel to argue them at this stage.

Of the grounds contained in the written memorandum of appeal the first has been given up as untenable; and the second

ground has, in our opinion, no force. The respondent apparently assigned his decree to one Nandan Parshad (who has been impleaded as respondent No. 2 in this appeal) by a registered deed, dated the 7th October 1903, and the assignment was duly attested by the Subordinate Judge on the 15th March 1910 (page 23 of the paper-book). The leave of the Court, as contemplated by Order XXII, rule 10, Civil Procedure Code, has not been given for the continuance of the suit by the assignee, Nandan Parshad, and that being the case, the respondent had a *locus standi* to prosecute his appeal in the lower Appellate Court. We accordingly overrule the second ground of appeal. Grounds Nos. 3, 4 and 5 may be dealt with together. As we have seen above the question whether the appellants were entitled to produce rebutting evidence on the 4th issue as framed by the Subordinate Judge (see page 10 of the paper-book) was left undecided by Mr. Martineau; but his successor, Mr. Thompson, has, upon careful consideration of the statements of the appellants' Counsel, Mr. Rang Lal, in the Subordinate Judge's Court and of the orders passed by the Subordinate Judge regarding the production of evidence by the appellants at various stages of the proceedings in the suit, come to the conclusion that the appellants had had ample opportunity of producing all the evidence they could produce on the 4th issue, that up to the 7th November 1909 their Counsel had no desire to produce any such rebutting evidence and that the application made by their Counsel on the 16th November 1909, on which date the case was fixed for argument, was made too late. After hearing the appellants' learned Counsel on this point, we think that Mr. Rang Lal's statement, dated the 1st October 1909, before the Subordinate Judge is conclusive against the appellants. On that date Mr. Rang Lal said:—

"We wish to give evidence on this point only that the accounts are correctly kept according to the custom of Gujerat. We do not wish to produce any other evidence."

This statement clearly shows that Mr. Rang Lal desired to have an opportunity to adduce evidence only regarding the correctness of the appellants' account-books according to the *Gujerati* method of keeping accounts and that he had closed his evidence on all other points. The appellants were bound to adduce their whole evidence on the 4th issue inasmuch as, if their accounts were held to be not regularly kept, it was for them to show, apart from the entries in their account-books, how much income had been realized by them from the sale of spectators' tickets; the *onus* of the 4th issue did not lie on the respondent and it is wrong to say that after the respondent had finished his evidence on all the issues, the appellants were entitled to adduce rebutting evidence on the latter part of the said issue No. 4. The matter has been discussed by the Subordinate Judge at pages 10 and 11 and by the Divisional Judge (Mr. Thompson) at pages 26 and 27 of the printed paper-book, and we agree in the view of the Divisional Judge that the Subordinate Judge was justified in refusing to allow the appellants to adduce further evidence on the 4th issue after they had closed their evidence. This disposes of the 3rd, 4th and 5th grounds of appeal.

There is much force in the 6th ground of appeal, and after hearing arguments on this ground we think that the lower Appellate Court was wrong in giving credit to the respondent for the value of the benches alleged to have been made by him in pursuance of the agreement of the 11th November 1902. The Courts below passed a preliminary decree in favour of the respondent for dissolution of partnership and rendition of accounts, on the ground that the partnership between the parties being for a fixed term the respondent could not be expelled by the appellants during such term for any cause whatever. The effect of this finding is that the respondent is entitled to demand from the appellants an account for the partnership and to claim a seven-anna share in the profits thereof. But it is clear from the circumstances of the case, as set forth in the beginning of this judgment, that the respondent did not make a reasonable and *bona fide* effort to perform his part of the contract and that the appellants were, therefore, obliged to complete their contract with the Municipal Committee by employing their own workmen to prepare stands and

benches, etc., for the Procession Day. The appellants were not bound to wait till the Procession Day and see if the respondent would supply the necessary benches and stands, etc., and as the respondent did not carry out his part of the contract by the 15th December 1902, as he had undertaken to do in his registered letter of the 10th December 1902, the appellants were justified in acting as they did in the way of providing the necessary seating accommodation for spectators on the Chandni Chouk *patri*. In these circumstances as the contract of partnership could not legally be put an end to by the appellants (and the lower Courts' finding on this point has been accepted as correct by the appellants), all that the respondent can reasonably ask the Court to hold is that he is entitled to his share of the net profits of the partnership which have been received by the appellants. The appellants are not legally liable to the respondent for the loss, if any, which he has incurred in endeavouring to carry out his part of the contract in a manner which was not justified by the terms of the agreement between the parties. We, therefore, hold that the Courts below have erred in allowing Rs. 1,300 to the respondent in respect of the price of 1,300 benches which the respondent is held to have made for the Procession Day.

There remains the question whether the Divisional Judge is right in allowing Rs. 14,000 to the respondent as his share of the profits of the partnership. This question has been discussed at great length by the learned Judge at pages 28 to 31 of the printed paper-book; and after giving every weight to his findings on the various points connected with this question which have been dealt with by him, we are of opinion that he is not right in the conclusions at which he has arrived on those points. To begin with, we may say at once that we agree with the Divisional Judge in holding the appellants' account-books as unreliable. Mr. Kirkpatrick, who was appellants' Counsel in the Divisional Court, conceded that the appellants' accounts had not been regularly kept and therefore could not be relied on, and acting upon that admission the Divisional Judge has ignored the appellants' accounts in discussing the question of the income and expenditure of the partnership business in question. This was a perfectly reasonable course to adopt, and having looked at the appellants' accounts ourselves, we are not at all prepared to accept the contention of the appellants' Counsel that his clients' accounts are reliable and that the Divisional Judge was wrong in discrediting them. Putting aside the appellants' accounts, however, we think that the Divisional Judge has gone too far, in the peculiar circumstances of this case, in making every presumption against the appellants as to the number of benches and chairs provided by the appellants, as to the value of the tickets sold by them, and as to the number of seats occupied by spectators on the Chandni Chouk *patri* on the Procession Day of the Darbar. Taking the length of the *patri* on which the stands were erected to be 2,963 feet, and allowing an average space of about 17 inches per spectator and of 1½ feet for a going-way for every 50 feet of the *patri* length, the Divisional Judge has held that in the seven rows of benches 14,210 seats were occupied by the spectators. According to him, the price charged by the appellants for the spectators' tickets must be presumed to have been Rs. 3 per seat on the two front rows and Rs. 2 per seat on the five back rows; and upon that basis the takings would be Rs. 20,300 for the five back rows and Rs. 12,180 for the two front rows of benches. The Divisional Judge has further held that presumably there were 1,750 chairs occupied by spectators, and not 1,250 as admitted by the appellants; and the price of a ticket for a chair being Rs. 5 the takings would be Rs. 8,750. Thus the total number of seats, according to the Divisional Judge, was 15,960, and the total receipts amounted to Rs. 41,230. The plaintiff's seven-anna share would thus be Rs. 18,038. So much for the gross income.

As regards the expenditure incurred by the appellants on the business, the Divisional Judge, after critically examining the findings recorded by the Subordinate Judge in his final judgement and in his return to the order of remand, has held that the expenditure incurred by the appellants in preparing benches, stands, etc., including the miscellaneous charges such as cartage,

etc., was not more than Rs. 6,000. To this sum of Rs. 6,000 he has added Rs. 875 as the hire of 1,750 chairs at annas 8 per chair and also Rs. 700 which he considers the appellants must have paid to third parties as commission fee on the sale of tickets. From the total amount thus arrived at he has deducted the value of the benches and stands after the Darbar which he has held to be ¼ of the cost price; and he has come to the finding that in round figures Rs. 5,000 was the net expenditure incurred by the appellants on the business in question. He has further allowed the respondent Rs. 1,300 by way of loss in respect of the 1,300 benches held to have been prepared by him for the Procession Day, which item has, as we have already held, been allowed on erroneous grounds. The net result is that the Divisional Judge has held the respondent's share of the profits of the partnership to be Rs. 14,000.

After considering the whole matter very carefully, we think that while it is reasonable to allow 70 persons for every 100 feet of the *patri* length on which the stands were erected, the allowance of 1½ feet for a gangway for every 50 feet is too little, and we allow 3 feet for each gangway. Further, there is evidence to show that the tickets for seats on benches were not sold at the uniform rate of Rs. 3 per seat for the first two rows and of Rs. 2 per seat for the remaining five rows. According to the notice published by the Municipal Committee on the 21st October 1902, the Chandni Chauk *patri* on which the stands were to be erected was divided into four sections, the first and the fourth sections measuring 1,654 feet in length and the second and the third sections being 1,310 feet long. In this notice the maximum charge for a seat in the first and fourth sections was put down at Rs. 2 and that for a seat in the second and third sections at Rs. 3. In our opinion it would be reasonable to allow in the first and fourth sections Rs. 2 per seat for the three front rows of benches and Re. 1 per seat for the four back rows. As regards the second and third sections, Rs. 3 per seat should be allowed for the two front rows and Rs. 2 for the five back rows. Working upon this basis, we arrive at the following results :—

(1) In the first and fourth sections, of which the length is 1,654 feet, the seating accommodation after making allowance for gangways, would be 1,092 seats in each row; and assuming that every seat was occupied, as in the circumstances of the case we must presume, the takings for the two sections in question would be Rs. 10,920.

(2) Similarly the seating accommodation in the second and third sections would be 866 seats in each row, and the takings at the rates specified above would be Rs. 13,856. The total takings for all the seven rows of benches in the Chandni Chauk would thus be Rs. 24,776.

As regards the number of chairs occupied by the spectators, the Divisional Judge is, in our opinion, wrong in presuming that there were 1,750 chairs and not 1,250. Muhammad Ali, appellant, has stated on oath that 500 chairs were supplied by his firm to the Municipal Committee on a separate contract, and this statement is borne out by an entry in his books and has in no way been rebutted by the respondent. We, therefore, take it that only 1,250 chairs were provided by the appellants for the spectators in front of the benches, and we must assume that all these chairs were occupied. As the price of a ticket for a chair was Rs 5 the takings would amount to Rs. 6,250. Adding this sum to Rs. 24,776 mentioned above, we find that the total income from the takings was Rs. 31,026, the plaintiff's share of which at seven annas in the rupee would be Rs. 13,574.

Coming to the question of expenditure, we have no reason for differing from the concurrent finding of the Courts below that the total expenditure incurred by the appellants in providing benches, stands, &c., was Rs. 6,000. To this we must add Rs. 625 as the hire of the 1,250 chairs at annas 8 per chair and Rs. 700 as the amount of the commission fee paid by the appellants on the sale of the tickets, the total expenditure thus being Rs. 7,325. From this amount we must deduct Rs. 2,600 which, according to the Courts below, was the value of the benches, &c., left in appellants' hands after the Darbar. The net expenditure, therefore, comes to Rs. 4,725.

The plaintiff's share of the income was, as we have noted above, Rs. 13,574, and from this sum we have to deduct the sum of Rs. 4,725 which was expended by the appellants in carrying out their contract with the

Municipal Committee. The balance to which the respondent is entitled is thus Rs. 8,849.

There remains the question whether on this sum of Rs. 8,859 the respondent is entitled to any interest. In his plaint the respondent did not claim any interest on the amount which might ultimately be found due to him by the appellants and he did not ask for interest until he filed his objections to the report of the local Commissioner. In our opinion he was very much to blame in not having made a *bona fide* attempt to perform his part of the contract with the appellants and the whole trouble was due to his unreasonable refusal to help the appellants to bring to a successful conclusion their contract with the Municipal Committee.

The appellants were, therefore, obliged to put on their own workmen to do the work which the respondent had undertaken to do; and although the contract of partnership between the parties was not thereby terminated, the respondent cannot reasonably ask the Courts to allow him interest on the amount of money which, on a settlement of accounts, is found due to him by the other party. We, therefore, decline to award any interest to the respondent on the sum of Rs. 8,849.

For the reasons given, we accept this appeal and vary the decree of the Divisional Judge so as to reduce the amount payable by the appellants to respondent to Rs. 8,849. The parties will pay their own costs in this Court, and the plaintiff will get his costs in the lower Courts proportionate to the amount decreed.

Appeal allowed.

LOWER BURMA CHIEF COURT.

CIVIL REVISION PETITION No. 151 OF 1914.

January 14, 1915.

Present:—Mr. Justice Ormond.

Nawab ISMAIL ALI—PETITIONER

versus

E. M. VISVANADAN CHETTY AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 89—Execution-sale, application to set aside within time but after confirmation of sale, effect of—Deposit, whether can be made by cheque.

An application to set aside an execution-sale on the day of confirming the sale but subsequent to the confirmation is within time if it is within 30 days of sale.

A deposit under Order XXI, rule 89, must be a deposit in cash and not by a cheque.

Mr. *Mya Bu*, for the Petitioner.

Mr. *Bilimoria*, for Respondent No. 2.

JUDGMENT.—The petitioner was a judgment-debtor whose house was sold in execution under a mortgage-decree to the 2nd respondent on the 20th June 1914. On the 20th July the sale was confirmed, and on that day the judgment-debtor applied for leave to pay in the purchase-price of the house *plus* 5 per cent. and asked to have the sale set aside. The application was made at 3-30 P.M. and was subsequent to the confirmation of the sale. The District Judge passed the following order:—"The sale has already been confirmed. Application rejected."

On appeal to the Divisional Court it was held that the judgment-debtor was out of time. The judgment-debtor had thirty days from the date of the sale. He was, therefore, in time, but he did not deposit the amount; he merely stated that he was ready to do so and in his affidavit in the Divisional Court, it appears that he was ready to do so by means of a cheque on the Bank of Bengal. The deposit under Order XXI, rule 89, by the judgment-debtor must be a deposit in cash, which he has not made; and he has not shown that he was ready and willing to make such deposit but was prevented. His Advocate contends that if the Judge had objected to the cheque he would have then tendered cash, but it was for the judgment-debtor to comply with the provisions of rule 89.

This application is, therefore, dismissed, with two gold *mohurs* costs.

Application dismissed.

ANANDRAO BALKRISHNA v. EMPEROR.

BOMBAY HIGH COURT.

CRIMINAL REVISION APPLICATION No. 318 OF 1914.

December 22, 1914.

Present:—Mr. Justice Davar, Mr. Justice Heaton and Mr. Justice Shah.

ANANDRAO BALKRISHNA RANGNEKAR—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss 52, 499—Defamation—'Lowers'—'In the estimation of others'—'Good faith'—Imputation, when in good faith—Care and attention must relate to occasion and circumstances—Reason to believe a thing to be true—Conviction, legality of—Defamation, charge of, proof of.

The accused felt aggrieved by an order made by the *Mamlatdar* complainant, and as he was entitled to do under the provisions of the Land Revenue Code, appealed to the Assistant Collector against the order praying that it may be reversed. In the petition of appeal it was stated that the *Mamlatdar* had acted towards the appellant unjustly and spitefully, that in passing the order appealed against he was actuated by personal ill-will and malice against the appellant and that the *Mamlatdar* had in acting as he had done exercised his authority with a view to cause harassment and loss to the appellant. The *Mamlatdar* charged the accused for defaming him.

Held by *Davar* and *Shah, JJ.*—That the accused was protected by exceptions 8 and 9 of section 499 of the Indian Penal Code.

Per *Davar, J.*—That as the *Mamlatdar* by his previous conduct had given ample reasons to the accused for believing rightly or wrongly that he was acting with personal ill-will against him, the imputation was made in good faith.

Per *Shah, J.*—The care and attention required by law must have relation to the occasion and the circumstances and the question as to what would be due care and attention must be determined with reference thereto.

Per *Davar, J.*—It is an elementary principle of law which Criminal Courts have always to keep in view that where a person is charged with having committed a criminal offence, the commission of that offence must be strictly proved against him, and every necessary ingredient of the section under which he is charged must be satisfied before an accused person can be convicted and punished.

To convict a man under section 499, Penal Code, it must be shown that the complainant has proved that the imputation *has* directly or indirectly *lowered* his moral or intellectual character or has *lowered* his character in respect of his calling or *has lowered* his credit in the 'estimation of others'. The words 'in the estimation of others', taken in conjunction with the word 'lowers' in Explanation 4 govern all clauses in that provision of section 499. It is not sufficient for the complainant merely to raise a presumption that the imputation may lower him or may lower his moral or intellectual character in the estimation of others, or that it may, in the estimation of others, lower his character in respect of his calling, or may lower his credit. These are matters that must be proved. There must be proof that the complainant has been lowered as to his character, credit, or calling, reputation or position in the estimation of some person or persons.

Bhoopa Money Dossee v. Natobar Biswas, 28 C. 452, 5 C. W. N. 659, dissented from.

Per *Heaton, J.*—That the imputation was not made in good faith.

It does not constitute 'good faith' necessarily that the person making the imputation believed it to be true. 'Due care and attention' implies genuine effort to reach the truth and not the ready acceptance of an ill-natured belief.

Explanation 4 to section 499, Penal Code, like the other three merely describes the quality or nature of the imputation and not its actual effects.

Criminal application for revision from an order passed by the Sessions Judge of Ratnagiri, confirming the conviction but modifying the sentence passed by the first Class Magistrate at Malwan.

Mr. *Binning* (with him Mr. *A. G. Desai*) for the Applicant.

Mr. *S. S. Patkar* (Government Pleader), for the Crown.

JUDGMENT.

DAVAR, J.—Rao Saheb Anant Bhasker Nimkar, the *mamlatdar* of Vengurla, filed a complaint against Anandrao Balkrishna Rangnekar, in the Court of the first Class Magistrate of Malwan, Mr. Bijurkar, charging the said Rangnekar with having defamed him and thereby committed an offence punishable under section 500 of the Indian Penal Code. The Magistrate convicted the accused and sentenced him to three months' simple imprisonment and a fine of Rs. 200, and directed that out of the fine, Rs. 75 should be paid as compensation to the complainant under section 545 of the Criminal Procedure Code. On appeal, the Sessions Judge remitted the sentence of imprisonment, but confirmed the conviction and sentence of fine. Against this, the accused has applied to us for revision, and the record and proceedings having been sent for, the case has been fully argued before us.

The questions that arise for consideration are, whether the accused is guilty of the offence of defamation, and whether, if what he wrote amounts to defamation, the same is covered by any of the Exceptions to section 499 of the Indian Penal Code, and whether he is properly convicted. In the course of the arguments before us, two very important questions have been argued namely, whether the proceedings in connection

with which the offence is alleged to have been committed were judicial proceedings, and whether the accused is not entitled to absolute privilege as a party to such judicial proceedings independently of any question of good faith governing his action.

I propose in the first instance to deal with the main question in the case, *viz.*, whether the conviction is proper and ought to be upheld. In doing so, I must first consider whether the petition presented by the accused to the Assistant Collector of Ratnagiri against the order of the complainant contains statements which are defamatory, and if so, whether they are or are not covered by any of the Exceptions to section 499. The facts which led to the filing of this complaint are shortly these. As far back as 1849 a portion of certain lands in the village of Kochre in the Ratnagiri District was mortgaged to the grandfather of the accused by one Ramchandra Jivaji Rege, and under the terms of the mortgage-deed the mortgagors paid the assessment on the mortgaged portion of the land, although the accused was in possession thereof. The mortgagors had been doing so for about fifty years, but in 1902, the accused alleges, there was a dispute as to who should pay the assessment and the then Revenue Authorities decided that the mortgagors should continue to pay the same. That order does not appear to be forthcoming but the fact remains that the mortgagors continued to pay the assessment till March 1913. About this time some new arrangement seems to have come into operation for the collection of revenue in the Ratnagiri District and what are spoken of as *kabja khatas* were opened, whereby the parties in possession of lands were primarily made liable to pay the assessment to Government. The last instalment for the year 1912/13 fell due in May 1913 and was not paid. The mortgagors' moveable property was attached in the first instance. After holding an investigation, the warrant of attachment against the mortgagors was cancelled by the complainant, and a warrant was issued against the accused to recover from him the overdue instalment of Rs. 6-1-4. This was on the 6th of July 1913. In consequence of the warrant the accused paid this amount. He, however, felt aggrieved by this order made by the complainant, Rao Saheb Nimkar, and as he was entitled to do under the provisions of the Land Revenue Code, appealed to the Assistant Collector of Ratnagiri against the order, praying that it may be reversed. The appeal he presented was in the shape of a petition which he sent to the Assistant Collector by post, and the *mamlatdar* complains that it is in this petition that the accused has made statements defamatory of him and thereby committed an offence for which he was prosecuted and convicted. The petition is in Marathi. It has been translated and placed before us and I have very carefully perused the contents of that petition. Put at its highest in favour of the complainant and at its worst against the accused, the defamatory statements amount to this that the *mamlatdar* acted towards the appellant unjustly and spitefully, that in passing the order appealed against he was actuated by personal ill-will and malice against the appellant, and that the *mamlatdar* had in acting as he had done exercised his authority with a view to cause harassment and loss to the appellant. The accused when questioned before the Magistrate admitted having sent the petition and admitted that he did make the allegations complained of by the *mamlatdar*. He pleaded that he was justified in making those allegations, because he believed them to be true and when asked by the Magistrate whether he did not think that in making those allegations his action came under section 500 of the Indian Penal Code, he answered that he had not exceeded the privilege given by law to aggrieved persons to make representions to superior officers. There is thus no question of the responsibility of the accused for the petition he presented, and there is no doubt that in that petition he has charged the *mamlatdar* that in passing the order he did against the accused, he was actuated by malice and personal ill-will against him. In justification for his attributing personal ill-will to the *mamlatdar*, the accused relies on a previous incident between himself and the *mamlatdar*, which is fully brought out in the cross-examination of the complainant before the Magistrate, and it is most important for the purposes of this case that the facts relating to that incident should be carefully scrutinized and taken into consideration. It appears that on the 18th of February 1913 two instal-

ments of revenue, which became due in December 1912 and February 1913 amounting in all to Rs. 32, were in arrears. The *mamlatdar* went to the accused's village of Kochre, sent for him and told him to pay up the arrears of these instalments on that very day. The accused promised to pay the only due instalments on the next day. He did take the moneys to the *mamlatdar* on the next day, the 19th of February, but did so late in the evening. The *mamlatdar* seems to have directed an hour and a half before the accused went to him with the money that a warrant should issue for the distraint of the accused's moveable property not only for the two instalments that were in arrears, but also for the remaining two instalments for that year which had not become due and superadded a fine of Rs. 5 in the said warrant. Although the accused paid the two instalments that were due, the *mamlatdar* insisted on the warrant being executed against him for instalments that were not due and for the fine that was included in that warrant. The accused's moveable property was distrained and sold in execution and the *mamlatdar* confirmed the sale on the 10th of March 1913, the warrant having been executed on the 20th of February 1913. The property attached was valued by the *punch* at Rs. 45 and it was sold for Rs. 22. The *mamlatdar*, complainant, has stated to the Magistrate that he thought he had no power to recall the warrant he had issued when the accused paid up the arrears of instalments, but went further and said that even if he had the power, he "had no mind to revise the order." In justification for this action, the *mamlatdar* says that he acted as he did towards the accused "with intent to make a deterrent example in a case." He admits that there were other people in the village who were equally in default as the accused, but pleads that he selected the accused because his name was first in a list of about ten or twelve persons that was handed over to him and who were alleged to be prominent defaulters. This list was called for by the Sessions Judge, but has not been forthcoming. This conduct of the complainant though strictly legal was, in the opinion of the Magistrate, "exceptionally stringent and invidious" and in the opinion of the Sessions Judge was "of questionable propriety." The details of the action of the *mamlatdar* are clearly brought out in his cross-examination before the Magistrate by the accused's Pleader, and it is unnecessary to discuss them here with any further elaboration. The accused proved this incident of February, preceding the order of the Magistrate of July against which he appealed, as justification for his belief that the *mamlatdar* was actuated by personal ill-will against him in acting as he did.

These being the facts in the case, I will now turn to consider whether in the first instance the accused has been *proved* guilty of having committed the offence of defamation, quite apart from any question of the offence, if any, being excused or covered by any of the Exceptions to section 499. Under this section a person is said to defame another when "by words... intended to be read" he..."makes or publishes any imputation concerning any person intending to harm or knowing or having reason to believe that such imputation will harm the reputation of such person." This description of the offence of defamation is governed by certain Explanations and Exceptions, and unfortunately, as it too often happens and as it has happened in this case, sufficient attention is not paid to the governing clauses of Explanation 4, to this section. This Explanation in clear and explicit terms lays down that "*no imputation*," such as is referred to in the section, "*is said to harm a person's reputation unless that imputation directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his...calling, or lowers the credit of that person.*" It is an elementary principle of law, which Criminal Courts have always to keep in view, that where a person is charged with having committed a criminal offence, the commission of that offence must be strictly proved against him, and every necessary ingredient of the section under which he is charged must be satisfied before an accused person can be convicted and punished. Therefore in this case, before the conviction of the accused can be sustained, it must be shown that the complainant has proved that what the accused wrote in his petition *has* directly or indirectly *lowered* his moral or intellectual character or *has lowered* his

character in respect of his calling or *has lowered* his credit "in the estimation of others." The words "in the estimation of others" taken in conjunction with the word "lowers" in Explanation 4 govern all clauses in that provision of section 499. There is no evidence whatever in this case even alleging, much less proving, that the complainant, Rao Saheb Nimkar, has been lowered in the estimation of *any* person. It is most essential to remember that the word used by the Legislature is "lowers" and not "would lower" or "is likely to lower" or "tending to or intended to lower." It is not, therefore, sufficient for a complainant merely to *say* that the allegations he complains of have harmed or are likely to harm or were intended to harm his reputation in the estimation of others He must *prove* this before he can obtain a conviction. It is not sufficient for a complainant merely to assert that the allegations against him have caused him annoyance, harassment or mental worry. It is not sufficient for him merely to raise a presumption that such imputations may lower him or may lower his moral or intellectual character in the estimation of others, or that they may, in the estimation of others, lower his character in respect of his calling, or may lower his credit. These are matters that must be proved. In this case there is absolutely no proof whatever of all the requisites necessary before a conviction for defamation could be obtained. I have carefully gone through the whole of the proceedings before the Magistrate. Besides the complainant himself, two other witnesses have been examined. Vithal Krishna, the *sheristedar* of the officer to whom the appeal was presented, deposes to the receipt of the petition by post, of its being read by the addressee and of its being sent to the *mamlatdar* of Vengurla for report. All he says is he read it and the Barnishi Karkun read it, and not one word more. The second witness, Mukund Gopal Thucker, the Kulkarni of Kochre, merely proves the handwriting of the accused and his solvency and deposes to nothing else that is relevant in the case. There is not even an effort made to prove that the complainant has been lowered as to his character, credit or calling, reputation or position in the estimation of any single individual. Having regard to the requirements laid down by Explanation 4 to section 499, I have come to a very clear conclusion that, on the evidence adduced before the Magistrate, he ought not to have convicted the accused of having committed the offence of defamation, and this Court could not confirm the conviction. The accused may have, in writing his petition, been guilty of any other offence, such as using abusive language or insult or any other offence, but he is clearly not guilty of defamation as defined in section 499 of the Indian Penal Code.

While coming to this conclusion, I am not unaware of the fact that in the case of *Gobinda Pershad Pandey* v. *Garth* (1), Mr. Justice Prinsep has expressed a view of the law of defamation that is in conflict with my view of the requirements of section 499. Referring to the Sessions Judge, Mr. Prinsep observes:—

"He seems, however, to have followed the Magistrate into an error regarding the evidence necessary to prove the offence of defamation, for he points out that there is no evidence to show that the complainant has been injuriously affected by such alleged defamation. That, however, is not necessary to constitute an offence of defamation as defined in section 499, Indian Penal Code. The law requires merely that there should be an intent that the person who makes or publishes any imputation should do so intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person."

I am entirely unable to agree with the learned Judge's view of the law as laid down by section 499. It seems to me that the view taken by the Sessions Judge in that case was quite correct and that when Mr. Justice Prinsep stated his view of the requirements of section 499 of the Indian Penal Code, he entirely ignored or overlooked the provisions of Explanation 4 to section 499. There is no reference whatever to the limitations imposed by that Explanation, and reading the case under reference, one would be led to believe that section 499 stood by itself in the Statute Book without the explanation to which I have referred. The judgment, again, loses all force and importance by the fact that the learned Judge in pronouncing

(1) 28 C. 63, 5 C. W. N. 819.

his opinion does not give one single reason for his dictum that it was not necessary to constitute an offence of defamation that the complainant should prove that he was injuriously affected. It must also be noticed that this view of the learned Judges is purely *obiter*, the question before them not being what were the requisites to constitute the offence of defamation, but whether the procedure followed by the Sessions Judge was correct under the provisions of the Criminal Procedure Code. With all my respect for the learned Judges who decided this case, I cannot persuade myself to a belief that the view of the requirements of the section taken by the learnd Judges in this case is the right view. It is interesting to note that in the same volume is reported a civil case of *Bhooni Money Dossee* v. *Natobar Biswas* (2) decided by Mr. Justice Harrington. In that case the plaintiff Bhooni Money Dossee proved to the satisfaction of the learned Judge that the defendant Natobar Biswas had publicly addressed the following words to the plaintiff in the presence of several persons:—"You are unchaste, you are a prostitute: I will publish before the caste people that you are a prostitute, and stop invitations to you. I took you to the garden house at Kalighat and had illicit intercourse with you." The woman filed a suit to recover damages from the defendant for malicious slander. The learned Judge found on the evidence as a fact that the slander complained of was spoken of and published by the defendant. He further found that the words were not merely vulgar abuse but conveyed a distinct imputation of unchastity and alleged a specific charge of an act of immorality. He, however, dismissed the suit with costs, holding the words were not *per se* actionable and no damage in fact was alleged or proved.

If both the cases are correctly decided, we have this anomaly before us that a party against whose character and morality the very gravest imputations are publicly made would have no remedy in a Civil Court, unless he or she proves the actual damage, whereas according to Mr. Justice Prinsep, the same party could obtain a conviction in a criminal case without proving that he or she was "injuriously affected," for he says such proof "is not necessary to constitute the offence of defamation." I find it impossible to believe that that could have been the intention of the Legislature when framing section 499 and attaching thereto Explanation 4.

But assuming for argument's sake that the requirments of the section and Explanation 4 were satisfied, the next question that arises is, whether the petition presented by the accused contained imputations which were made in good faith for the protection of the accused's own interests and whether they were made to a person in lawful authority over the complainant. In order to claim the protection given by Exceptions 8 and 9, the accused must prove his "good faith." Section 52 provides that nothing is said to be done or believed in good faith which is done or believed without due care and attention. It cannot be disputed in this case that the Assistant Collector to whom the appeal was presented was a person in lawful authority over the *mamlatdar*, for he had the power to revise, re-call or reverse the order of the *mamlatdar* against which the accused appealed. It cannot also be disputed that the accused in presenting his appeal was protecting his own interests. Did he do and say all he did and said in good faith? If he did, he would be protected under Exceptions 8 and 9 to section 499. The *mamlatdar* admits that there has been no private quarrel or personal ill-will between him and the accused. The accused has no doubt attributed personal ill-will and malice to the complainant. The Sessions Judge in his judgment asks a very pertinent question. He says: "The question is whether a reasonable man in the appellant's position could have believed, when making the petition of appeal, that the *mamlatdar* had been moved by malice to take the step that he did take, to recover the sum of Rs. 6."

It is a pity that the learned Judge did not follow up this question and seek for its answer in the *mamlatdar's* own conduct. My answer to this question is in an emphatic affirmative. The *mamlatdar* by his previous conduct had given ample reason to the accused for believing rightly or wrongly that he was acting with personal ill-will against him. According to the Magistrate, his conduct towards the accused was "invidious and exceptionally stringent." According to the

(2) 28 C. 452; 5 C. W. N. 670.

Sessions Judge, his conduct towards the accused was "of questionable propriety." He selects from the whole village in which there were numerous defaulters the accused and makes him a victim in order to set a "deterrent example" to other people. No Government officer has a right to act towards a subject with undue or unecessary harshness in order that other people may take an example by it. The accused had paid his assessment regularly for years, and not even a notice had been served on him before being called upon to pay. The assessment had fallen into arrears because admittedly the village accountant was inexperienced and incompetent, and the delay in the recovery of the assessment was entirely due to this cause. The accused only asked for a day's time, he tendered payment within less than a couple of hours of the issue of the warrant against him, he paid all that was due by him and yet, because the law allowed him, with unnecessary harshness the *mamlatdar* proceeded to sell the man's property for moneys that were not due. Not content with that he imposed and levied a fine. The accused's property was sold for half the value which was placed upon it by the *punch*. The *mamlatdar's* statement that he believed that he had no power to re-call the warrant is, to my mind, an idle pretence. It is equally a hollow pretence when he tells the Magistrate that the value placed on the property of the accused by the *punch* was higher than the real value. He confirms the sale days afterwards. He confesses that even if he had the power, he would not have re-called the warrant. He fails to prove that he selected this man because his name was first in some list which was handed to him but which is not now forthcoming.

Having regard to all these facts, I have no hesitation in holding that the accused had the gravest reasons for believing that the *mamlatdar* was actuated by malice and personal ill-will towards him in the present instance The *mamlatdar's* action in February had been most oppressive, and under these circumstances it seems to me astonishing that Government should have sanctioned the accused's prosecution and paid the expenses of it. Having regard to all these facts, I am very clearly of opinion that even if the offence of defamation had been proved against him, the accused is protected under Exceptions 8 and 9.

An extremely unsavoury feature of this case is the order of the Magistrate, Mr. Bijurkar, awarding Rs. 75 as compensation to the *mamlatdar* out of the fine which he imposed upon the accused. The complainant had not been put to the expense of one pice. The harassment, annoyance and hardship was all the accused's and none of the complainant's, and yet the Magistrate assesses the *mamlatdar's* mental worry at Rs. 75 and awards that sum to him out of the fine imposed by him on the accused. Quite apart from any consideration of its legality this order is one that, in my opinion, never ought to have been made by the Magistrate. I also think it very necessary to say that in my opinion even if the accused had been guilty of the offence charged against him, the sentence of three months' simple imprisonment was absolutely and wholly uncalled for and was quite out of proportion to the particular offence charged against the accused.

Having regard to the view I take of this case, it is quite unnecessary to discuss the other question whether the petition in question was presented in the course of judicial proceedings and whether the absolute privilege accorded to a party to judicial proceedings under English Law is or is not applicable to the present case.

I would acquit the accused and order that the fine should be refunded to him, and the compensation, if paid, to the complainant be re-called from him.

I cannot conclude this judgment without expressing my very deep regret that in this case my views are not in accord with those of my brother, Heaton. The great experience of my learned colleague in the administration of criminal justice in the Presidency entitles his views to be considered with the greatest respect. I am quite aware of the difficulties pointed out by him as to Explanation 4 in his judgment, which he has been good enough to let me see. My difficulty in accepting those views lies in the fact that the Legislature has in express terms laid down what is necessary to constitute the offence of defamation and as long as the explanation remains on the

Statute book, it cannot be ignored nor its importance and significance minimised by Courts administering criminal law.

HEATON, J.—In this case as I have the misfortune, which I very greatly regret, to differ from my learned colleagues, I must say a few words as to my own view of the case. The petition we are concerned with, besides describing the order of the *mamlatdar* in effect as harsh and unjust, attributes to the *mamlatdar* personal spite. Apart from that the petition might be taken as criticising merely the order made by the officer and as not reflecting personally on the officer himself. But when personal spite is attributed, the matter is taken into the region of personalities and has to be dealt with as such. To attribute personal spite to a *mamlatdar* in the performance of his duties is a very grave imputation. If true, it would subject the *Mamlatdar* to the possibility of dismissal; to the probability of degradation or stoppage of promotion; and to the certainty at least of a very severe reprimand. A person who imputes such a thing to a *mamlatdar* must be taken to intend harm to his reputation. For, I cannot conceive why such a thing should be said in a written petition unless it was intended to harm the officer's reputation, in other words, to represent his conduct as improper and induce his official superior to believe it to be so. It seems to me, therefore, that the case, unless covered by some exception, falls precisely within the definition of section 499 of the Indian Penal Code. Both of my learned colleagues think, however, that the case is covered by one or other of the Exceptions and one of them thinks that, in consequence of the provisions of one of the explanations, the evidence in the case falls short of proof of the offence. He relies on Explanation 4. My own opinion is that Explanation 4 like the other three merely describes the quality or nature of the imputation and not its actual effects. To illustrate what I mean, I would suppose that a Judge of this Court is accused by some entirely unimportant and insignificant person of taking bribes. It would very probably be quite impossible for the Judge to prove that his character was actually lowered by this imputation. The obvious want of truth, coupled with the entirely insignificant character of the slanderer, would probably make it impossible for the Judge to prove that his character was lowered in the estimation of any one whatever. And yet if Explanation 4 relates to the effects of the imputation and not merely to its nature or quality, in the case I have supposed it would be impossible to convict the slanderer of the offence of defamation. I think, therefore, both from the words used and from the general intention of the law that Explanation 4 does not provide any difficulty in the way of upholding the conviction. Nor do I think that the case is covered by any of the exceptions. It can only be covered by them if the words constituting the imputation were used in "good faith." "Good faith" is defined in the Penal Code as meaning that which is done with due care and attention. It does not constitute good faith necessarily that the person making the imputation believed it to be true. "Due care and attention" implies genuine effort to reach the truth and not the ready acceptance of an ill-natured belief. In the case before us, I think that the language of the petition is the language of irritation, that it voices the grievance of the petitioner and not the reasonable reflections of even an ordinary man. That being so, I do not think the imputation, gross as it is, can be said to have been made in good faith. That is the positive conclusion at which I have arrived after considering the petition itself and the conduct of the *mamlatdar* as elicited from his cross-examination. It would, I think, ordinarily have been enough to say that I saw for myself no good reason for supposing that the lower Courts were wrong in their conclusion that the imputation was not made in good faith. But having regard to the views of my colleagues, I think it better to express a positive opinion of my own.

SHAH, J.—I agree that in this case the conviction and sentence should be set aside and the fine, if paid, refunded.

I hold with my brother Davar that the accused is protected by Exceptions 8 and 9 of section 499 of Indian Penal Code. I do not consider it necessary to give my reasons in detail for this conclusion as, generally speaking, I agree with the reasons given by my learned brother in his judgment for holding that the case is covered by Exceptions 8 and 9.

There could be no doubt in this case that the accused was acting in pursuance of a remedy allowed to him by law and presented the petition of appeal to the Tribunal authorised by law to entertain it. It is also clear that he was acting for the protection of his own interest. The only question, therefore, with reference to the applicability of the exceptions is whether he acted in good faith. It seems to me that the lower Courts in dealing with the question of good faith have approached the question from a wrong point of view and have failed to give effect to the circumstances under which and the occasion on which the accused is found to have acted. There is nothing in the case to show that he was acting otherwise than in good faith, and the facts, in my opinion, clearly point to the conclusion that he was acting in good faith, that is, with such care and attention as could be reasonably expected of him under the circumstances. The intrinsic evidence afforded by the petition itself fails to show that the accused did or believed anything without due care and attention. The care and attention required by law must have relation to the occasion and the circumstances, and the question as to what would be due care and attention must be determined with reference thereto. I am, therefore, of opinion that the accused ought to be acquitted. In this view of the case, it is unnecessary to express any opinion as to the other important points arising in this application.

Conviction and sentence set aside.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 552 OF 1914.

August 1, 1914.

Present:—Mr. Justice Chevis and Mr. Justice Shadi Lal.

JOWALA SAHAI—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Evidence Act (I of 1872), ss. 6. 122—Hearsay evidence—Statement by by-stander—Husband and wife, communications between

A statement by a person alleged to be the eye-witness of a murder made to persons who came to the scene of occurrence after the murderers had left the place, cannot be proved against the accused for the purpose of showing that their names were mentioned as murderers.

In order to make the statement of a by-stander admissible, it must have been made, as contemplated by section 6 of the Evidence Act and illustration *(a)* to it, at the time the transaction was taking place, or so shortly before or after it as to form part of the transaction. If the transaction has terminated and then the statement is made, the statement is irrelevant. The admissibility is dependent on continuity.

The evidence of the wife of the accused as to certain communications between her and her husband is inadmissible under section 122 of the Evidence Act.

Appeal from the order of the Sessions Judge, Shahpur Division, at Sargodha, dated the 9th June 1914, convicting the appellant.

The Hon'ble Mr. *Muhammad Shafi*, K. B., and Mr. *Nanak Chand*, for the Appellant.

Messrs. *Fazl-i-Hussain*, *Jai Gopal Sethi*, and Diwan Bahadur *Daulat Ram* (for the Government Advocate), for the Respondent.

JUDGMENT.—The Sessions Judge of the Shahpur Division has convicted Sajawali, Muhammad and Shera of having murdered Sajawal *alias* Tali on the night of the 26th-27th of April 1914 at *Mansa* Gujranwala by striking blows on the head and throat with an axe and Jowala Sahai of having abetted the murder, and has sentenced each of the four accused to death. All of them have preferred, through Counsel, appeals to this Court from the order of conviction, the first three-named persons, Appeal No. 553 of 1914 and the last-named, Appeal No. 552 of 1914. The case is also before us under section 374, Criminal Procedure Code, for confirmation of the capital sentences. We have heard lengthy arguments by Messrs. Pestonji Dadabhai and Muhammad Shafi for the appellants and Mr. Fazl-i-Hussain for the Crown, given our most careful consideration to what these gentlemen had to urge before us and to the evidence on the record and come to the conclusion that the evidence does not establish the guilt of the accused and that their appeals must succeed.

The case for the prosecution is stated *in extenso* in the judgment of the learned Sessions Judge and need not be repeated here at great length. It is clear that there was bitter enmity between the deceased Tali and each of the four accused. The facts in support of this allegation of the prosecution are fully given by the Sessions Judge (*vide*

pages 40-41 of the paper-book) and borne out by the record. But enmity, while it supplies a motive on the part of the accused for committing the crime, constitutes at the same time a strong incentive for implicating falsely or suspecting persons who were not on good terms with the deceased and the members of his family. This is an aspect of the case which has to be borne in mind in weighing the evidence for the prosecution. Another fact which has been prominently brought to our notice is that the four accused were not the only persons in the village who were inimical to the deceased. It seems that he was a man often giving trouble to other persons and even the qualified statement made by his brother, Ali, does not give him a good character. Ali says: "My brother was perhaps a *badmash* and that was perhaps why he was called Tali," and the learned Sessions Judge correctly describes the deceased's relations with his co-villagers when he observes: "The deceased Tali, who appeared only recently before me in a forgery case against a *patwari*, appears to have been a man of a high-handed disposition, and there can be little doubt that he was done to death as he had made the lives of many people in the village more or less intolerable."

With these preliminary observations we now proceed to deal with the case against the accused. The story for the prosecution is that the four accused conspired together to murder Tali, three of them, namely, Sajawali, Muhammad and Shera, were to attack and kill him and the fourth accused, Jawala Sahai, was to remain in the background and supply the funds for defending the criminals and other necessary purposes. In pursuance of this conspiracy Jawala Sahai on the evening of the 26th of April visited Sajawal's house to call him and took the latter away. The three accused, Sajawali, Muhammad and Shera after midnight and before dawn went armed with axes to the courtyard where the deceased was sleeping and killed him by striking blows on the head and throat. They then went to a well outside the *abadi*, were seen on the way by Ditta, a tenant of the deceased, and remained there with Jawala Sahai until they were arrested on the afternoon of the 27th of April. There was an uproar in the courtyard and the mother, the two wives of the deceased, Dittu, *Musammat* Jawai, who is the wife of Sajawali accused and the sister of the deceased, and other persons were awakened by the noise and came to the scene of the murder. Ram Ditta, a private *patwari* of the deceased, also heard the outcry, went to the place, saw a large crowd there and then left it to send some one to fetch Ali, brother of the deceased, who was away at Shahpur, and to make the report at the Police Station. He met Ramzan *chaukidar* in the lane and told him to go to Ali and inform him that his brother had been killed and also either to report himself at the *thana* or to get Ali to do it. Ramzan at once went off to Shahpur, informed Ali of the occurrence and recorded a report at the Police Station there at 9 A. M. The Police arrived at the scene in the afternoon and began the usual investigation, which resulted in the prosecution of the four accused.

This, in brief, is the version of the prosecution and the medical evidence shows conclusively that three blows were inflicted on the head and throat of the deceased with a sharp-edged weapon like an axe and that death was due to the wound on the head. There is no doubt whatever that the deceased was murdered, and the only question for determination is whether the appellants committed the crime. Before dealing with the evidence it is necessary to say a few words with respect to the first information report. It is to be noted that it does not mention the accused either as the actual perpetrators of the crime or as suspects. In fact it does not state as to how or by whom Tali was killed and the reason given by Ramzan for this omission is that Ram Ditta, who sent him to report the occurrence at the *thana*, did not say who had murdered the deceased. Nor did he himself inquire as to the offenders, though he had been awakened by the outcry, came near to the house of the deceased and heard that Tali had been killed. We consider this reason assigned by Ramzan for the omission of the names of the appellants in the first report as wholly unsatisfactory. It must be remembered that Ram Ditta was the private *patwari* of the deceased and probably knew that it was most important to state in the first information report to the Police

all the facts which were known at that time and that their suppression was likely to be used against the prosecution. Now it appears from the evidence for the prosecution that a large number of persons had been awakened by the "hall hall!" and had assembled in the courtyard where the murder had been committed. And Ram Ditta himself says that he saw a large crowd there. Dittu, it seems, was one of the first to reach the place and deposes that he stated that he had seen Sajawali, Muhammad and Shera going back with the axes. The same remark applies to *Musammat* Jawai. In fact, according to the prosecution the names of all the accused were mentioned at once and if that be the fact it is hard to understand why Ram Ditta, who is an enemy of at least Jawala Sahai and Muhammad, two of the appellants, did not come to know of the murderers. It is difficult to believe that neither he nor Ramzan made any inquiry with respect to the offenders before the latter left for Shahpur. It seems to us clear that the very first question which a man, after learning of a brutal murder like this, is likely to ask would relate to the persons by whom and to the manner in which it was committed. Yet we are told that Ram Ditta did not at that time find out who had killed Tali and that Ramzan, who had been roused from his sleep by the noise, came to the lane near the deceased's house and did not spend a few minutes in ascertaining the facts about the crime before leaving for the Police Station. In view of the above considerations we are inclined to think that the reasonable and probable explanation is that at the time when Ramzan was despatched to make the report the names of the accused had not been mentioned as the murderers. In fact Raja, P. W. No. 15, who was sent to call Muhammad Khan, the *halqadar*, deposes that before he left no one in the village told him who had committed the crime. The learned Sessions Judge states that "It has, owing to certain decisions, notably one of the Chief Court in the recent Jabbi murder in this district, come to be regarded as highly dangerous to mention the actual criminals in the first report, because it lays it open to the allegation that the case was concocted before the Police arrived." We are unable to say anything as to what is contained in the other judgments of which no particulars are given by the learned Judge, but as regards the Jabbi murder case (Case No. 272 of 1914), we must observe that the judgment of the Chief Court was not pronounced till the 12th of May 1914, *i. e.*, about two weeks after the date of the report in the present case, and we fail to understand how that decision could possibly have any effect on a report made several days before. Further, after reading the judgment we do not find any remarks therein which deprecate the mention of the names of the actual offenders in the first report or make the slightest suggestion of that kind. The case for the prosecution there failed because the learned Judges of this Court were of opinion that there was not sufficient evidence to warrant the conviction and made the following pertinent observations: "Indeed we do not say that any false evidence has been fabricated. We do, however, find that the evidence is not reliable and we cannot support the conviction." If, as the learned Sessions Judge states, there is an impression among the people that it is dangerous to mention the actual criminals in the first report, we take this opportunity of stating emphatically that it is altogether unfounded and that this Court always attaches very great importance to the statements contained in the first report, if it is recorded without unreasonable delay and considers it necessary that persons making the report should state all the details about the crime which are known at that time. Indeed the omission of the names of the offenders is, as in this case, urged always as a point against the prosecution and this defect should as far as possible be avoided.

Coming now to the evidence against the accused, we find that the case for the prosecution rests almost entirely on the testimony of four persons, namely, Dittu, Imam, *Musammat* Jawai and the tracker Allah Rakha, the first witness implicating only Sajawali, Muhammad and Shera, and the last proving footprints of only Sajawali and Shera. Sardara, the only person who is alleged to be the eye-witness of the occurrence, denied all knowledge both in the Committing Magistrate's Court and

the Sessions Court. Any evidence as to what he said in the morning is clearly inadmissible as hearsay, and we are unable to agree with the learned Sessions Judge that under section 6 of the Indian Evidence Act the statement made by Sardara to other persons can be proved against the accused for the purpose of showing that the names of Sajawali, Muhammad and Shera were mentioned as the murderers. That section gives statutory recognition to a well-known rule of the law of evidence that facts which form part of the *resgestæ* are admissible in evidence. But this rule only applies when the facts are so connected together as to form part of the same transaction. As observed in *Chain Mahto* v. *Emperor* (1): "in order to make the statement of a by-stander admissible,...it must have been made, as contemplated by section 6 and illustration (*a*) to it, at the time the transaction was taking place or so shortly before or after it as to form part of the transaction. If the transaction has terminated and then the statement is made, the statement is irrelevant. The admissibility is dependent on continuity." To the same effect is the following passage in Ameer Ali and Woodroffe's Law of Evidence. The facts admissible under section 6 "must be necessary incidents of the litigated act in the sense that they are part of the immediate preparation for or emanations of such act and are not produced by the calculated policy of the actors. They are the act talking for itself, not what people say when talking about the act. In other words, they must stand in an immediate causal relation to the act—a relation not broken by the interposition of voluntary individual weariness, seeking to manufacture evidence for itself. Incidents that are thus immediately and unconsciously associated with an act, whether such incidents are doings or declarations, become in this way evidence of the character of the act. They are admissible though hearsay, because in such cases it is the act that creates the hearsay, not the hearsay the act. It is the power of perception unmodified by recollection that is appealed to; not of recollection modifying perception. Whenever recollection comes in, whenever there is opportunity for reflection and explanations—then statement ceases to be part of the *res gestæ*. Declarations to be admissible must be made during the transaction. If made after its completion they are too late." In the case before us, we find the murderers had left the place, the transaction had terminated and then the alleged statement was made to the persons who came to the scene of occurrence after hearing the noise. We cannot, therefore, regard this statement as forming part of the same transaction as the murder and must hold that it cannot be used against the accused. The case in *Chain Mahto* v. *Emperor* (1) is very similar and lays down the correct rule.

There is thus no direct evidence to prove the murder by the appellants and the circumstantial evidence is, in our opinion, not sufficiently reliable to warrant the conviction. The evidence of Dittu is to the effect that, at *sargi wela*, he went out for natural purposes and was coming back when some 25 *karams* from Tali's *haveli*, he saw the three accused with axes in their hands going away quietly and that they did not return any reply to his question as to what they had been doing and where they were going. The witness states that it was about dawn when he met them and that the place of meeting was an open *maidan*. Many villagers at that time usually go out for the purposes for which Dittu left his house and it is strange that though the murderers, with axes in their hands, were quietly moving along the *maidan* towards their well, they were not observed by any other person. Now Dittu has been a tenant of the deceased for some 15 years or so and has helped the latter in his acts of hostilities with the accused and his cross-examination shows that he is a very unsatisfactory witness. He pleads lack of memory with respect to several matters which he ought to remember and which would, if disclosed, materially detract from the value of his testimony. As observed already we do not understand why, if this man saw the three accused and mentioned the fact at once to the relatives of the deceased, it was not stated in the first report. But it is unnecessary to labour the point, because we

(1) 11 C. W. N. 266; 5 Cr L. J. 71.

think the learned Sessions Judge is right in stating that "in view of the fact that he (the witness) appears to have been more or less a retainer of deceased helping him in many acts of oppression, his evidence by itself must be received with so much caution, that I prefer to exclude it from consideration."

The next person whose evidence requires consideration is Imam. He deposes that on the night of the murder he was returning to his well after paying a visit to his uncle Ghulam at Sabowal and that when he passed by the well of Sajawali, he saw the four accused sitting there and conspiring together to murder Tali. Now we find that this witness and his cousin, the son of his uncle Ghulam, are both tenants of one Khuda Bakhsh and the certified copies of judicial records show that Jawala Sahai is not on good terms with Khuda Bakhsh, each having given evidence against the other on at least three occasions. It cannot, therefore, be said that Imam is a disinterested witness. Further, we think that his story is *per se* improbable. It is unlikely that Jawala Sahai who wanted to remain in the background should be so foolish as to hold a conference with the three accused in the open and talk to them in a sufficiently loud tone to be audible to a passer-by. Moreover it is strange that Jawala Sahai should continue to talk even when Imam, whom the accused must have recognised, had come near him. The reason given by this witness for going to Sajawali's well is not convincing when we know that his own well was very near and, therefore, there was no special necessity for going to Sajawali's well for a drink of water. Having regard to all the facts stated above, we are not prepared to hold that the evidence of this witness establishes the fact of the conspiracy at the well, more especially when there is not an iota of evidence to corroborate him.

The most important witness for the prosecution is *Musammat* Jawai, the wife of Sajawali accused and the sister of Tali deceased, and if her evidence is to be believed all the accused are undoubtedly guilty of murder. Her testimony relates to two matters. In the first place, she says that four days before the murder she, in the afternoon, went to fetch drinking water and while passing by Jawala Sahai's *baithak* overheard the four accused there conspiring to murder her brother. She then gives evidence as to certain communications between her and the husband which under section 122 of the Indian Evidence Act are clearly inadmissible in evidence and which the Sessions Judge should have excluded from the record [Vide *Bishen Das* v. *Emperor* (2)]. She further says that she went to her brother and informed him of the conspiracy and that he laughed at her and regarded the whole thing as a joke. The next matter deposed to by this witness is that on the night of the murder when all the members of the family had taken their meals and were about to retire, Jawala Sahai turned up, called her husband out and took him away.

She then went to sleep, was awakened by the noise from her brother's house and found that her husband was still absent. She hastened to the brother's house and found him murdered. This is an abstract of her statement and the question is whether her evidence should be believed. The husband's allegation is that the wife was unfaithful to him and had a liaison with Dittu, whose evidence we have already discussed, and that he (the husband) turned her out about two years before the murder. Some evidence has been adduced in support of this allegation, but after perusing it we think that the imputation upon her character has not been made out. The fact, however, remains that we have here a wife who, according to her own version, has always been on the best of terms with the husband and yet she gives most damaging evidence against him which, if accepted, must result in his conviction and in the sentence of death being passed upon him, with the inevitable consequence that she must be left a widow and her children without a father to look after them. She deposes not only to the husband having been taken away by Jawala Sahai the previous night, but also to the former taking part in the conspiracy four days previously in Jawala Sahai's *baithak*. Now it is clear that barring the

(2) 19 Ind Cas. 1004; 14 Cr. L. J. 316; 244 P. L. R. 1913; 44 P. W. R. 1913 Cr.; 27 P. R. 1913 Cr.

accused, she is the only person cognizant of the alleged conspiracy on that day and it seems extraordinary that the wife should volunteer information about a matter which she could have easily withheld by simply keeping quiet and about which no other evidence was available. It is by no means rare to find a woman to do everything possible to save the life of her husband and even go so far as to tell a falsehood for that purpose. It is, indeed, hard to believe that a wife would tell even the truth against her husband in a serious case of this nature. But here we have a woman who, without going so far as to perjure herself, could have helped her husband by simply holding her tongue, but she does not do so. The position, as the Sessions Judge says, is extraordinary. Has she such an overwhelming regard for truth that she must depose not only as to whether her husband was at home on the night in question, which she was reasonably expected to know, but also as to a matter which is alleged to have happened four days previously and which no other witness was aware of? It is still more extraordinary that, according to her statement, nobody on behalf of her husband should have made the slightest attempt to get at her and dissuade her from giving evidence. We have known of criminals producing even outsiders to give false evidence in their favour but, in this case, the husband does not approach even his own wife, who is said to cherish most affectionate feelings towards him, with a request to desist from giving evidence against him. The situation is exceedingly improbable and we refuse to believe that mere regard for truth can account for her action in this case. We are forced to the conclusion that there must be some ulterior motive which has prompted her to adopt this attitude towards her husband and in view of the above-mentioned considerations we must take her evidence with a good deal of caution.

Furthermore, the story as to the conspiracy related by her seems to be improbable. Some of the reasons given in connection with Imam's evidence apply *mutatis mutandis* to her statement. and there is the further fact that it is unlikely that Jawala Sahai, who has already figured in many cases as a party or as a witness and is not unacquainted with what takes place in Courts of Law, should select his own *baithak* which is almost adjacent to the house of his enemy, Tali, for the purpose of conspiring to murder him and should deliver a lecture to the other three accused to induce them to commit the crime. This action of his exposed him to the risk of being overheard by Tali, his servants, Ram Ditta and Dittu, and his brother and other relatives. And if he selected his own *baithak* for the purpose, we fail to understand why he should talk in a loud voice so that any passer-by could hear him. The story is full of improbabilities and the facts deposed to by Jawai rest upon her uncorroborated testimony. Considering all the *pros* and *cons* and taking the statement as a whole, we cannot regard it as trustworthy.

As regards the tracker's evidence, which implicates only two accused, the only remark which need be made is that evidence of this kind cannot always be accurate and unless there is other independent evidence on the record to connect the accused with the crime, not much reliance can be placed on the track evidence. Even this tracker has, as the judgment of Mr. Ellis in another sessions case shows, made mistakes.

There is only one more incident which need be mentioned. It is stated by Muhammad *chaukidar* that on the morning of the 27th of April the four accused were together at the well of two of them, Shera and Muhammad, and that they refused to come to the village. Now the statement of this witness in cross-examination shows that he is not an impartial witness. It also appears that the time of the year was one when gram is harvested and when the agriculturists are expected to be out in their fields. With respect to Jawala Sahai, we do not understand why after the murder he should mix himself up with the other three accused and thereby create evidence against himself. He was, as already observed, anxious to remain behind the scenes and wanted other persons to do the crime and it would, therefore, be a most foolish act on his part to be in their

company after the murder had been committed.

This practically finishes all that can be possibly urged against the accused. It is to be observed that each of the witnesses testifies to a separate fact which receives no corroboration from other evidence. It, therefore, becomes very difficult to test by cross-examination or otherwise whether the witnesses are really telling the truth, but after judging the evidence in the light of probabilities and looking at all the facts, we cannot help thinking that the evidence is insufficient to support the convictions. Direct evidence is wholly wanting in this case and the circumstantial evidence which is by no means convincing is given by persons who are biassed and inimical to the accused. There is a good deal of factious feeling in the village and the deceased was a troublesome person and had made many enemies. If we exclude the evidence that Sardara was sleeping with him on that night, it is clear that the deceased was alone in the courtyard, which was accessible to any outsider who wanted to come in and wreak his vengence upon him. It is, therefore, possible that murder was committed in the early part of the night when it was dark and as nobody else was with the deceased at that time, the offenders escaped without being detected by any persons and this probably explains why the names of the offenders were not stated in the first report. It is not, however, for us to offer conjectures. The simple issue before us is whether the evidence can justify an affirmative finding that the offence of murder has been proved against the accused. We think that the evidence which we have analysed above is not reliable and that it would be unsafe to pass, on the strength of it, sentences of death on four persons.

We accordingly accept the appeals, set aside the convictions and sentences and direct that all the accused be released forthwith.

Appeals accepted.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 144 OF 1914.

September 4, 1914.

Present:—Mr. Kanhaiya Lal, A. J. C., and Mr. Kendall, A. J. C.

ABDUL GAFUR AND ANOTHER—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 144—Cow-sacrifice—General order.

Under section 144, Criminal Procedure Code, a District Magistrate can issue an order to the public generally who in certain particular circumstances cannot be individually addressed. Sub-section (3) of the section is intended to extend rather than to limit the scope of the order so as to include therein even casual or frequent visitors from outside the limits of the particular locality within which the order is to have application.

A general order issued by a District Magistrate to the effect that no person should sacrifice or cause to be sacrificed any cow or bullock within a certain specified boundary and period, is a legal order.

Application against an order of the Sessions Judge, Fyzabad, dated the 17th February 1914, upholding that of the District Magistrate, Fyzabad, dated the 5th January 1914.

Mr. *Mumtaz Husain*, for the Applicants.

The *Government Pleader*, for the Crown.

JUDGMENT.—This is an application for revision of an order of the District Magistrate of Fyzabad by which two persons, Abdul Gafur and Abdul Wahid, have been convicted under section 188 of the Indian Penal Code and sentenced to pay a fine of Rs. 150 each.

At the time of the *Bakrid* in 1912 some cows were brought to be slaughtered by certain Muhammadans in the town of Ajodhya. This led to a very serious riot, and to loss of life. On the 1st November 1913, with a view to obviate a recurrence of the trouble, the District Magistrate of Fyzabad, in anticipation of that festival, issued a general notice to the public not to drive cattle intended for slaughter through any public place in Ajodhya from the 2nd to the 12th of November. In the meantime Abdul Wahid and certain other persons applied on November 6th for permission to sacrifice cows in Ajodhya on the occasion of the *Bakrid*. On the 8th of November the District Magistrate rejected their application, and issued an order to 36 individuals in Ajodhya, including Abdul Wahid,

not to kill or cause to be killed any cow or bullock on the 9th, 10th, 11th, or 12th November in their houses or elsewhere in Ajodhya. This notice was served upon Abdul Wahid. As a further precaution, the District Magistrate issued a general order on the 10th November in which he set out that whereas separate orders had been issued to 36 persons forbidding them to sacrifice cows or bullocks, but as there was reason to believe that other persons, to whom such orders were not issued, were intending to sacrifice cows or bullocks in connection with the *Bakrid* festival, it was ordered that no person should sacrifice or cause to be sacrificed any cow or bullock in any place within the boundaries of the city of Ajodhya at any time on the 9th, 10th, 11th, or 12th of November. This order was duly promulgated. On the 12th November at 9 A. M. Abdul Gafur reported at Ajodhya Police Station that he had that morning sacrificed a cow in *Mohalla* Bashishth Kund at the house of Abdul Wahid, with the permission of Abdul Wahid. The house in which the sacrifice took place was a vacant house belonging to Abdul Basit, a close relation of Abdul Wahid; and it is not denied that Abdul Wahid and Abdul Gafur were privy to the sacrifice which was carried out there. They were prosecuted and convicted of an offence under section 188 of the Indian Penal Code. Abdul Wahid was prosecuted for defiance of the orders of both 8th and 10th November, and Abdul Gafur for defiance of that of the 10th November only. It is not in set terms noted by the Magistrate in respect of disobedience of which order Abdul Wahid was convicted. The learned Sessions Judge in disposing of the appeal treated the conviction as having been directed against the contravention of the order of the 10th November, that is to say, the general order.

Application in revision has been filed in this Court to the effect that the order dated 10th November was not a legal order, and that the Magistrate had no power to fetter the exercise of a private right in private places, such as a house, by an order directed to the public generally. It is not pretended that the private right must not on proper occasions be subordinate to the public interest, and it is admitted that the District Magistrate had power to control the actions of a person in his own private house by a direct order addressed specifically to such person, under the second paragraph of section 144 (1) of the Code of Criminal Procedure. The order which the Magistrate issued on the 10th November was an order under section 144 (1) and was issued in accordance with the provisions of section 144 (3) which runs as follows:—

"An order under this section may be directed to a particular individual, or to the public generally when frequenting or visting a particular place."

Into this provision the applicants seek to read the word "public" so that the provision would run "or to the public generally when frequenting or visting a particular public place."

We can see no justification for any such interpolation. The temporary order contemplated in this Chapter is an order under section 144 (1), which would issue when immediate prevention or speedy remedy is desirable to prevent a disturbance of the public tranquility, a riot or an affray or danger to human life. Section 144 (1) contemplates an order to any person to abstain from a certain act, or to take certain order with certain property in his possession or under his management. Section 144 (3) has nothing to do with the nature of the order, but is one of four sub-sections which refer to the manner of promulgation and to the duration of an order under section 144 (1). It is quite clear that the proper interpretation of section 144 (3) is that the order may be directed to a particular individual; and that when, because of the number of particular individuals, it is impracticable that the Magistrate could issue notice to each one of them, he can issue a general order to the whole number of such particular individuals, here designated as "the public generally;" and such order, in respect of each particular individual, will have the same effect as a separate order served upon him, provided of course that it has been so promulgated that it has come to his knowledge. The argument for the applicants is based upon a misapprehension of the word "public," which does not only mean here the corporate body pursuing

its public avocations, but also means the whole number of particular individuals who in the circumstances cannot be particularly addressed. The order will have effect to control either the private or public actions of every such individual, according to its tenor. It is argued that by using the words "frequenting or visting a particular place," the Legislature intended to enact that no general order could be directed against residents, but rather that such a general order could only be directed against casual or frequent visitors. With this we cannot agree. The intention of the sub-section is to extend rather than to limit the scope of the order, so as to include therein even casual or frequent visitors from outside the limits of the particular locality within which the order is to have application. The order, therefore, as it was issued, was a legal order, and the two applicants, when disobeying it, rendered themselves liable to a prosecution under section 188.

Incidentally we may note that the order was further justified by section 118 of Act I of 1900, Municipalities Act.

The application is, therefore, rejected.

Application rejected.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 807 OF 1914.

June 24, 1914.

Present:—Mr. Justice Sharfuddin and Mr. Justice Teunon.

SADANANDA MANDAL—1ST PARTY—PETITIONER

versus

KRISTA MANDAL—2ND PARTY—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 145, 356—Order under s. 145—Procedure under s. 356 not complied with, effect of.

The provisions of sub-section (3), section 356, of the Criminal Procedure Code apply only to cases in which the evidence recorded under the first sub-section is not recorded in the Magistrate's own hand. The provisions of the first sub-section are imperative and where a Magistrate in a proceeding under section 145, Criminal Procedure Code, does not follow this procedure, his order cannot be sustained.

Rule issued against the order of the Sub-Divisional Magistrate, Magura, dated 18th March 1914.

Babus *Hari Bhushan Mookherjee* and *Satis Chandra Ghatak*, for the Petitioner.

Babu *Narendra Kumar Bose*, for the Opposite Party.

JUDGMENT.—This Rule, issued at the instance of the first party to proceedings under section 145, Criminal Procedure Code, called upon the District Magistrate and the opposite party to show cause why the final order made in these proceedings should not be set aside on two grounds, namely, *first*, that the evidence had not been recorded in the manner provided by section 356, Criminal Procedure Code, and *secondly*, on the ground that the Magistrate did not receive the oral and documentary evidence tendered by the petitioner. The District Magistrate has submitted an explanation. From this explanation we find that in fact the trying Magistrate did receive all the evidence, oral or documentary, that was offered. With regard to the first ground what the Magistrate says is that the Sub-Divisional Magistrate, that is to say, the trying Magistrate made a memorandum of evidence in the manner required by the third sub-section to section 356, Criminal Procedure Code, and that the making of that memorandum should be regarded as a sufficient compliance with the requirements of the law. We are unable to accept this contention. The provisions of sub-section (3), section 356, Criminal Procedure Code, apply only to cases in which the evidence recorded under the first sub-section is not recorded in the Magistrate's own hand. The provisions of the first sub-section are imperative and we are unable to condone the non-compliance therewith. We, therefore, make this Rule absolute and set aside the order complained of.

Rule made absolute.

NARAIN DAS *v.* *Musammat* DAROPTI.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1365 OF 1913.

November 12, 1914.

Present:—Mr. Justice Scott-Smith.

NARAIN DAS AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Musammat DAROPTI—PLAINTIFF AND ANOTHER—DEFENDANT—RESPONDENTS.

Second appeal—Plea raised for the first time, whether can be allowed

The plaintiff sued his vendor and the brother and mother of the vendor for possession of a specific portion of a house, alleging that it represented his one-third share in the house which had been purchased in the name of the defendants and one-third of which had been sold to the plaintiff. The vendor confessed judgment, but the other defendants pleaded that in a partition after the purchase the house had fallen to the share of the defendant, who was vendor's brother. The plea was held proved by the original Court and the suit was dismissed, but the Appellate Court found that the plea was not established and passed a decree for possession of one-third of the house. On second appeal it was contended that the vendor, being a member of a joint Hindu family, had no right to alienate any portion of the house which the plaintiff could claim:

Held, that it was a new plea and could not be raised for the first time on second appeal.

Piare Lal v. *Ram Chand*, 11 Ind. Cas. 443; 21 P. R. 1912; 112 P. W. R. 1911, referred to.

Second appeal from the decree of the Divisional Judge, Rawalpindi Division, dated the 13th May 1913, reversing that of the District Judge, Rawalpindi, dated the 25th July 1912, dismissing the claim.

Bhagat *Gobind Das*, for the Appellants.

Lala *Dharm Das Suri*, for the Respondents.

JUDGMENT.—Ram Chand, Narain Das, and their mother *Musammat* Ditti, in 1891, bought a house for the consideration of Rs. 800. On the 6th January 1912, Ram Chand sold a specific portion of the house as his third share to the plaintiff-respondent. Plaintiff brought the suit out of which this appeal arises for possession of the portion sold to her, or in the alternative for one-third of the house. The defendants pleaded that prior to the sale there had been a partition in virtue of which the house in dispute fell to Narain Das. The first Court found that plaintiff had proved the sale by Ram Chand in her favour, but the defendants had also proved their allegation as to the partition. On these findings it dismissed the plaintiff's claim. The Divisional Judge on appeal was of opinion that the evidence produced by the defendants was not satisfactory and that the alleged partition of the property had not been proved. He, therefore, accepted the appeal and gave the plaintiff a decree for possession of one-third of the house. Narain Das and *Musammat* Ditti have filed a second appeal in this Court.

The first three grounds of appeal traverse the lower Appellate Court's findings on questions of fact. These findings cannot be contested in second appeal. The fourth ground is the important one upon which Bhagat Gobind Das for the appellants has laid stress in his argument. He urges that Ram Chand, being a member of a joint Hindu family, could not sell any specific portion of the joint property without the consent of the other co-parceners. *Piare Lal* v. *Ram Chand* (1) is an authority in support of his contention. Mr. Dharam Das, on behalf of the respondent, contends that there was no plea by the defendants in the first Court that this property was the property of the co-parceners, members of a joint Hindu family, and that one co-parcener could not sell his share without the consent of the others. I have carefully considered the written pleas filed in the first Court and I am clear that this specific plea was never raised. Even if the defendants were members of a joint Hindu family, it does not follow that this house was part of the joint family property. In the deed of 1891, by which it was acquired, it was not stated that it was acquired for the family. It was simply stated that the purchasers were three persons whose names were specified. If the plea had been distinctly raised by the defendants in the first Court, the plaintiff would have had an opportunity of saying whether the property was joint family property or not, and an issue would have been struck and evidence would have been taken thereon. It certainly would not be proper to throw out the plaintiff's claim upon this ground which was never raised in the first Court.

The only question is, whether I should allow the plea to be raised and order a remand for further inquiry. In my opinion the plea should not be allowed now. Defendants

(1) 11 Ind. Cas. 443; 21 P. R. 1912; 112 P. W. R. 1911

never intended to contest the claim on this ground. The appeal is, therefore, dismissed with costs.

Appeal dismissed.

PRIVY COUNCIL.

APPEALS FROM THE CALCUTTA HIGH COURT.

December 2, 1914.

Present:—Lord Dunedin, Lord Shaw, Sir John Edge, and Mr. Ameer Ali.

HARI KISHEN BHAGAT AND OTHERS—APPELLANTS

versus

KASHI PARSHAD SINGH AND OTHERS—RESPONDENTS

AND

HARI KISHEN BHAGAT AND OTHERS—APPELLANTS

versus

BAJRUNG SAHAI SINGH AND OTHERS—RESPONDENTS.

Hindu Law—Hindu widow, alienation by—Legal necessity—Onus probandi—*Consent of reversioners—Attestation by nearest contingent reversioner, effect of—Evidence of consent.*

To be valid as against the reversioners, or to affect their reversionary rights, a charge created by a Hindu widow or an alienation effected by her can be supported only by proof *aliunde* that such debt was contracted or alienation was made for valid and legal necessity, and the onus of establishing such necessity rests heavily on the person who claims the benefit of transactions with a Hindu widow or other females taking similar estates. The requirements of the law as to valid and legal necessity may, however, be fulfilled by proving the consent or concurrence of the reversioners to or in the transactions. But the mere attestation by a relative even though he might be the sole contingent reversioner, does not necessarily import concurrence. When a stringent equity arising out of an alleged consent by the reversioners is sought to be enforced against them, such consent should not be inferred from ambiguous acts or be supported by dubious oral testimony, but must be established by positive evidence that upon an intelligent understanding of the nature of the dealings they concurred in binding their interests; and the kindred in such case must generally mean all those who are likely to be interested in disputing the transaction, or at all events there should be such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one and one justified by Hindu Law.

Raj Lukhee Debea v. Gokool Chunder Choudhry, 13 M. I. A. 209 at p. 228; 12 W. R. 47; 3 B. L. R. 57; 2 Suth. P. C. J. 275; 2 Sar. P. C. J. 518; 20 Eng. Rep. 529, followed.

Jiwan Singh v. Mani Lal, 23 I. A. 1; 18 A. 146; 6 M. L. J. 47; 6 Sar. P. C. J. 675, referred to.

Consolidated appeals from two decrees of the High Court at Calcutta, dated the March 11th, 1909, affirming those of the Court of the Subordinate Judge of Monghyr, dated the June 22nd, 1908.

FACTS.—Two suits, in which these decrees were made, were instituted by the respondents, Bajrang Sahai Singh and Kashi Parshad Singh and Ram Parshad Singh, for the recovery of their respective shares of certain property as the reversionary heirs of one Shayamal Singh, deceased, whose widow had alienated the same. Both Courts in India decreed the suits, holding that there was neither valid and legal necessity for the alienations challenged, nor were they proved to have been made with the consent of the reversioners to make them binding on them. The defendants-appellants then preferred the present appeals.

Mr. *Dunne*, for the Appellants:—Where there is consent of the reversioners, the transaction by a Hindu widow is binding on them, and the question whether there is legal necessity or otherwise is immaterial. When such consent is once proved, there is a presumption that the transaction is a fair one, and unless those seeking to set aside the transaction show that there was fraud or something else that would vitiate the transaction, the transaction in question must stand: *Raj Lukhee Debea* v *Gokool Chunder Chowdhry* (1) and *Collector of Masulipatam* v. *Cavaly Vencata Narrainopah* (2). Such consent may be given subsequently to make the transaction binding: *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (3).

[LORD DUNEDIN referred to *Muirhead* v. *Muirhead* (4).]

[LORD SHAW referred to *Sham Sundar Lal* v. *Achhan Kunwar* (5).]

The High Court has, however, held that this doctrine of consent applies only in the case of a sale by a Hindu widow, and that it does not apply where she gives a mort-

(1) 13 M. I. A. 209 at p. 228; 12 W. R. 47; 3 B. L. R. 57; 2 Suth. P. C. J. 275; 2 Sar. P. C. J. 518; 20 Eng. Rep. 529.

(2) 8 M. I. A. 500; 2 W. R. 59; 1 Suth. P. C. J. 417; 1 Sar. P. C. J. 732, 19 Eng. Rep. 620.

(3) 35 I. A. 1; 17 M. L. J. 605; 9 Bom. L. R. 1348; 12 C. W. N. 74; 6 C. L. J. 706; 3 M. L. T. 1; 5 A. L. J. 1; 30 A. 1.

(4) 15 A. C. 269 at p. 290.

(5) 15 I. A. 188; 21 A. 71; 2 C. W. N. 729; 7 Sar. P. C. J. 417.

gage, for in the latter case she does not surrender the whole of her interest and consequently there is no acceleration. But the decision is not followed in *Debi Prasad Chowdhry* v *Golap Bhagat* (6), where a Full Bench has ruled that this doctrine of consent applies also in the case of a mortgage by a Hindu widow. It is submitted that the evidence establishes that there was such consent in respect of both mortgages, the first of which is attested by the sole contingent reversioner, and the second, though not attested by him, is given with the approval of one of his sons and other reversioners to pay off the interest on the first mortgage.

Mr. *Lowndes*, for the Respondents.

[LORD DUNEDIN asked Counsel to deal with the first mortgage only.]

The doctrine of acceleration applies when the widow makes an out and out conveyance to the next reversioner: *Behari Lal* v. *Madho Lal Ahir Gayawal* (7). It is, therefore, clear that it does not apply where the widow gives only a mortgage. The doctrine of surrender has been recognised as the basis of the validity of an out and out sale by a widow with the reversioners' consent, and it is, therefore, submitted that a mortgage by a widow even with the consent of the reversioners would not be binding on them.

Further, mere attestation by a reversioner is not sufficient to make the transaction binding on him: *Raj Lukhee Debea* v. *Gokool Chunder Chowdhry* (1).

The consent must be of all the kindred of the deceased husband and in order to raise the presumption arising from the reversioners' consent, it must be established that such consent was given with knowledge of the effect of what they were doing and that there was an intelligent intention to consent to such effect: *Jiwan Singh* v. *Misri Lal* (8) and *Sham Sundar Lal* v. *Achhan Kunwar* (5). But in this case there is no evidence whatever to show that there was such consent. Moreover, what was sold under the mortgage decree was the right, title and interest of the mortgagor, that is, the estate of the widow. [Counsel was stopped].

(6) 19 Ind. Cas. 278; 40 C. 721; 17 C. W. N. 701; 17 C. L. J. 499.

(7) 19 I. A. 30; 19 C. 236.

(8) 23 I. A. 1; 18 A. 146; 6 M. L. J. 47, 6 Sar. P. C. J. 675.

Mr. *Dunne* replied.

JUDGMENT.

MR. AMEER ALI.—The question for determination in these appeals relates to the validity, as against the reversioners, of certain sales held in execution of decrees obtained on mortgages effected by a Hindu widow, who had succeeded to her husband's estate on his death without leaving any issue. Shyamal Singh, the husband, died in 1842, and the widow, Dulhin Nawab Kumari, held the properties, which form the subject of the present litigation, until the transactions the validity of which is challenged in these suits.

The first mortgage was executed by Nawab Kumari in favour of the defendant-appellant on the 26th of November 1877 in respect of three of the properties in her possession On the 11th of July 1882 she mortgaged the rest of the properties to Bhagat for a further loan, and in 1889 she gave him what is usually called in India a *ticca pottah* of the shares of Shyamal Singh in all the *mousahs* save one. Under this usufructuary lease the defendant obtained possession of the shares covered by it.

In 1893 Bhagat brought a suit against Nawab Kumari on the mortgage of 1877 and in execution of the decree on that bond purchased the three properties to which it related. In 1897 he obtained a decree on the bond of 1882, in execution of which he himself purchased again the remaining properties held by the widow. He thus obtained possession of all the shares in the different villages which Nawab Kumari had inherited from her husband for a widow's estate.

Nawab Kumari died in 1900, and the plaintiffs, who are Shyamal Singh's brothers' sons and whose reversionary right to his estate, though questioned in the first Court, is not disputed now, brought the present suits to recover possession of the properties held by Bhagat under the execution sales of 1893 and 1897, their main contention being that neither the mortgages executed by Nawab Kumari nor the sales thereunder affected more than her interest, which ceased on her death.

Hari Kishen Bhagat is the principal defendant, but his sons have been impleaded in both actions, as they are joint in estate

and living in commensality with him, and are, therefore, necessary parties.

The main defence to the plaintiffs' claims was that the mortgages were effected by the widow for valid and legal necessity under the Hindu Law, and, further, that they were concurred in by the reversioners, and that consequently the defendants by virtue of the sales in question acquired the interests of the widow as well as theirs. It is to be remarked that in neither of the mortgage suits were the reversioners made parties.

At the time when the bond of 1877 was executed, the nearest reversioner to Shyamal Singh was his sole surviving brother, Raghubir Singh. After him stood Raghubir's sons, of whom there were several, and the sons of two other brothers, Bhupal and Jagrup, who were dead at the time. Among these nephews of Shyamal Singh the names of Behary, the only son of Bhupal, and Bajrung Sahai, a son of Jagrup and a plaintiff in one of the present actions, should be particularly mentioned, as they figure in the transactions in question.

In the instrument of 1877 the name of the widow is written by Bajrung Sahai Singh. He also appears to have purchased the stamp paper on which the bond is inscribed. Among the witnesses to the document are Raghubir and Behary.

The name of the widow in the mortgage of 1882 appears to be written by Behari Singh, and one of the witnesses to this bond is Bajrung Sahai. On the lease of 1889 Nawab Kumari's name is written by Modenarain, a son of Raghubir, and the witnesses are Ram Parshad, another son of Raghubir, Bishan Parshad, one of the sons of Behary, and Bajrung Sahai, who also appears to have identified the lady to the Registrar. Both the Courts in India have found that so far as the *ticca pottah* of 1889 is concerned, the debt contracted thereunder has been satisfied out of the usufruct of the properties covered by the lease.

The points for determination in these appeals depend on the transactions of 1877 and 1882 respectively. The law relating to the dealings of a Hindu widow with her husband's estate which devolves on her in default of issue is now too well settled to need a prolonged consideration. To be valid as against the reversioners, or to affect their reversionary rights, a charge created by a Hindu widow or an alienation effected by her can be supported only by proof *aliunde* that such debt was contracted or such alienation was made for valid and legal necessity, and the onus of establishing such necessity rests heavily on the person who claims the benefit of transactions with a Hindu widow or other females taking similar estates. The requirement of the law may, however, be fulfiled by proving the consent or concurrence of the reversioners to or in transactions.

In the present cases the Trial Judge in a careful and well-considered judgment held that the defendants had failed to prove any valid and legal necessity for the mortgages executed by the widow. This view has been affirmed on appeal by the High Court of Calcutta, and there being thus a concurrent finding of fact by the two Courts in India, that subject is now out of the region of discussion. Both the Courts have further held in effect that the part taken by the reversioners with respect to the transactions in question did not amount to a consent to bind their interests. In view of the facts and circumstances of the case, their Lordships have no hesitation in expressing their concurrence with the conclusion at which the Courts in India have arrived. The Trial Judge has carefully examined the phraseology of the two instruments and he is of opinion that their language is fully consistent with the fact that the interest of the widow alone was intended to be charged. Nor is there anything to show that the reversioners who helped her to raise the loans understood it otherwise. There is no evidence that they benefited from the transactions, or that so far as they were concerned there was any need for the mortgages. Their Lordships think that when a "stringent equity," to use Lord Hobhouse's expression in the course of the argument in *Jiwan Singh* v. *Misri Lal* (8), arising out of an alleged consent by the reversioners is sought to be enforced against them, such consent must be established by positive evidence that upon an intelligent understanding of the nature of the dealings they concurred in binding their interests; and

that such consent should not be inferred from ambiguous acts or be supported by dubious oral testimony, such as appears to have been relied upon in this case

In *Raj Lukhee Debea* v. *Gokool Chunder Chowdhry* (1), this Board refused to affirm the proposition that mere attestation by a relative necessarily imports concurrence, and they added that when the consent of the husband's kindred is relied upon for the validity of alienations effected by the widow, "the kindred in such case must generally be understood to be all those who are likely to be interested in disputing the transaction. At all events, there should be such a concurrence of the members of the family, as suffices to raise a presumption that the transaction was a fair one, and one justified by Hindu Law." The observations of the Board in that case seem to their Lordships to apply with particular force to the facts of the present case.

On the whole, their Lordships are of opinion that the judgments appealed from are right and ought to be affirmed, and that these appeals ought to be dismissed with costs. And they will humbly advise His Majesty accordingly.

Appeals dismissed.

Solicitors for the Appellants:—Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondents:—Messrs. *Theodore Bell & Co.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 229 OF 1912.

January 7, 1915.

Present:—Mr. Justice D. Chatterjee and Mr. Justice Chapman.

MUKTA NATH ROY CHOWDHURI—PLAINTIFF—APPELLANT

versus

JITENDRA NATH ROY CHOWDHURI—DEFENDANT—RESPONDENT.

Succession Act (*X of* 1865), *s.* 50, *cl.* (3)—*Interpretation*—*"Direction," meaning of*—*Attestation by witnesses, when legally made*—*Indian Law contrasted with English Law.*

In order to constitute a direction it is not necessary that anything should be said. If a testator in making his mark is assisted by some other person and acquiesces and adopts it, it is just the same as if he had made it without any assistance.

Wilson v. *Beddard*, 12 Sim. 28; 10 L. J Ch. 305; 5 Jur. 624; 59 Eng. Rep. 1041, referred to.

It is sufficient for the purposes of section 50 of the Succession Act if each of the two or more witnesses to a Will speaks either to the signature, or to the fixing of the mark, or to the signature by another person, or to the personal acknowledgment.

The Indian Law does not require that the witnesses to a Will must be present at the same time as the English Law does.

Appeal from the decision of the Additional District Judge, 24-Parganas, dated the 4th April 1912.

Babu *Tarak Chandra Chakrabarti*, for the Appellant.

Babus *Satya Charan Sinha* and *Dhirendra Kumar Roy*, for the Respondent.

JUDGMENT.—This appeal arises out of an application for Letters of Administration with a copy of the Will annexed to the property of one Khirodebasini Debi who died on the 7th February 1911 after having, it is said, executed her last Will on the 6th of February, the day previous. The learned Judge has refused to grant Letters of Administration, holding that there was no independent evidence as to the execution of the Will and that the attestation was not legally proved. The learned Judge found, and we think rightly found, upon the evidence that the lady wanted to make a Will or in any case some disposition of her property in favour of the beneficiary in this case, that is, Bhupendra Nath Roy Chowdhuri, the son of Mukta Nath Roy Chowdhuri. Of this there can be no doubt. She was living in the same house with Mukta Nath and his children, and this boy Bhupendra Nath is said to have been very much loved by her. So far as the motive of the testatrix is concerned, it is in favour of the Will having been executed.

As regards independent evidence, objection has been taken that nearer relations were not made to attest the Will nor her spiritual guide. Her nearer relations were, however, not residing at Cossipur where she resided and died. It is true that her spiritual guide resided at Cossipur. But as she did not want to make any disposition in favour of her spiritual guide, it would not look proper to have the spiritual guide attesting a document in which he was disappointed of any expectation that

he might have had upon the property of the dying widow. In any case the people who were about her and who were principally to be benefited by the execution of the Will, would not take initiative in calling the people who might induce her at her last moment to make deductions from what they expected to get, so that these other people might be benefited. Four witnesses are said to have attested the Will and all of them have been examined. With regard to Mukta, who was the writer, he cannot be said in this case to have attested the Will as a witness, because there is no evidence that he signed the Will after the testatrix. As regards Kripa Nath, the learned Judge is not inclined to believe that he was present at the time of the execution of the Will and we are not prepared to differ from him. As regards other witnesses, however, there does not seem to be any particular reason for disbelieving them, specially seeing that the Will is in accordance with the wishes of the testatrix expressed during her life-time before reliable witnesses. Now, as regards these witnesses. Shibendra and Keshab, Shibendra guided her hand in fixing her mark and also put down the name of the testatrix under the mark by his own pen. If the writing of the name of the testatrix by her direction and by the pen of Shibendra be considered as the execution of the Will, then Shibendra cannot be considered as an attesting witness. It is contended, however, that apart from that signature there is the mark and under the law execution was complete as soon as the testatrix put down the mark upon the document intending the document to be her Will. Then the question is whether the mark put upon the document has been proved in accordance with the provisions of section 50 of the Indian Succession Act, which has been made applicable to the Wills of the Hindus. Shibendra says that "I think her finger mark was taken by catching hold of her finger." In cross-examination he says that "I got her make the finger mark by taking hold of her finger." It is contended that this cannot be taken as execution of the document by the testatrix, because the motive power was that of Shibendra and that there is no evidence that this was done in accordance with the direction of the testatrix. Shibendra, however, says that Khirodebasini made the Will, that he read over the Will to Khirodebasini, that when he asked her whether he would sign the Will for her she nodded her assent and that she had sense when the Will was read over to her. If her finger was guided to make the mark in this state of things and she did not snatch away her finger or opposed the finger mark being made on the document, it cannot be said that the finger mark was made against her will. On the other hand considering the occasion on which the finger mark was put, the surroundings and the evidence that the Will was executed at her desire, the better opinion seems to be that the finger mark was placed upon the document by her desire. We may in this connection refer to the case of *Wilson* v. *Beddard* (1), where the Vice-Chancellor is reported to have said that "in order to constitute a direction, it is not necessary that anything should be said. If a testator, in making his mark, is assisted by some other person and acquiesces and adopts it, it is just the same as if he had made it without any assistance." Then there is the evidence of Keshob Chandra Majumdar. This witness was somewhat confused in his cross-examination. But taking the purport of his whole deposition it seems that his evidence that the testatrix told him that she had made the Will and directed him to sign as a witness, may be taken as correct. If that be so, then we have the direct evidence of Shibendra that the mark was put upon the document by the testatrix and the evidence of Keshab that the testatrix acknowledged the Will before him.

The next question is whether this would be a sufficient attestation in accordance with the provisions of the 3rd clause of section 50 of the Indian Succession Act which provides that, "The Will shall be attested by two or more witnesses, each of whom must have seen the testator sign or affix his mark to the Will, or have seen some other person sign the Will in the presence and by the direction of the testator, or have received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person." Now, it is contended by the learned Vakil for the respondent that the attestation will not be in accordance with the law unless each of the witnesses

(1) 12 Sim. 28; 10 L. J. Ch. 305; 5 Jur 624; 59 Eng. Rep. 1041.

proves the same state of things, that is, unless each of the two witnesses speaks either to the signature or to the fixing of the mark or to the signature by another person or to the personal acknowledgment. This interpretation of the section may be plausible, but we do not think that it is a reasonable interpretation of the section. There may be cases in which one witness saw the testator sign the document and the Will was acknowledged before another. Such cases would go out of the category of properly executed Wills, if this interpretation of the section be accepted; and the language of the section is not incapable of an interpretation in accordance with which it would be quite sufficient if each of the two or more witnessess conforms to one of the alternatives. In this view we think that the evidence of Shibendra as regards the putting of the mark taken with the evidence of Keshob that the Will was acknowledged before him, is sufficient to meet the requirements of the section as regards the attestation. The Indian Law does not require that the witnesses must be present at the same time as the English Law does. The learned Judge is not, therefore, right in objecting to the evidence on this ground. On the whole we think that the Will ought to be supported and Letters of Administration granted in due course.

The appeal is, therefore, allowed with costs, two gold *mohurs*.

Appeal allowed.

MADRAS HIGH COURT.
FULL BENCH.
SECOND CIVIL APPEAL No. 1804 OF 1911.
September 24, 1914.

Present:—Sir John Edward Power Wallis, Offg. Chief Justice, Mr. Justice Ayling, and Mr. Justice Seshagiri Aiyar.

PONNAMMAL—PLAINTIFF—APPELLANT
versus
RAMAMIRDA AIYAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. II, rr. 1, & 2—Suit for possession of land only—Subsequent suit for mesne profits payable before institution of suit for possession, whether barred—Claims for possession and for mesne profits—Causes of action.

Claims for recovery of land and claims for mesne profits are separate causes of action.

If a plaintiff sues for possession only when he might have joined in the same action claims for profits and damages, it is open to him to sue subsequently for the profits which became payable before the institution of the suit and which might have been included in such suit.

Monohur Lall v. Gouri Sunkur, 9 C. 283; 12 C. L. R. 434; 5 Shome L. R. 128, *Tirupati v. Narasimha*, 11 M. 210, *Lalessor Babui v. Janki Bibi*, 19 C. 615, *Gutta Saramma v. Maganti Raminedu*, 31 M. 405; 4 M. L. T. 192, followed.

Second appeal against the decree of the Court of the Subordinate Judge of Kumbakonam, in Appeal Suit No. 840 of 1910, preferred against that of the Court of the District Munsif of Mannargudi, in Original Suit No. 117 of 1909.

This second appeal coming on for hearing on the 9th February 1914, the Court (Sankaran Nair and Ayling, JJ.) made the following

ORDER OF REFERENCE.

"Plaintiff is the daughter-in-law of one Sundarappier. In a partition between him and his sons 30 *mahs* of land were allotted to him, which under the partition-deed on his death were to devlove in equal shares on the plaintiff's husband and his brothers, defendants Nos. 1 and 3. He died in 1888. On account of the minority of the plaintiff's husband, the defendants Nos. 1 and 3 continued in possession of the entire property including the plaintiff's husband's share, paying him his share of the profits till 1890. After her husband's death, the plaintiff sued for partition of her husband's share and got a decree. She now sues for mesne profits. The question for decision is, whether her claim for mesne profits prior to the institution of the suit for partition is barred.

"The following cases are relied upon in favour of the plaintiff's contention:—

Monohur Lall v. *Gouri Sunkur* (1), *Tirupati* v. *Narasimha* (2), *Lalessor Babui* v. *Janki Bibi* (3), *Gutta Saramma* v. *Maganti Raminedu* (4).

"On behalf of the defendants, the following cases are relied upon:—

(1) 9 C. 283; 12 C. L. R. 434; 5 Shome L. R. 128.
(2) 11 M. 210.
(3) 19 C. 615.
(4) 31 M. 405; 4 M. L. T. 192.

Venkoba v. *Subbanna* (5), *Mewa Koer* v. *Banarsi Prasad* (6), *Shanmugam Pillai* v. *Syed Ghulam Ghose* (7).

"All these cases are referred to and discussed in *Subbraya Chetti* v. *Rathnavelu Chetti* (8) in which, however, the question argued before us was not decided.

On this question which we propose to refer to a Full Bench for decision, there is a real difference of opinion. We accordingly refer to the Full Bench the question:—

If a plaintiff sues for possession only when he might have joined in the same action claims for profits and damages, is it open to him to sue subsequently for the profits which became payable before the institution of the suit and which might have been included in such suit?"

This second appeal coming on for hearing as per order before a Full Bench, Mr. *L. A. Govindaraghava Aiyar* appeared for the Appellant and Mr. *T. R. Krishnaswami Iyer*, for the Respondents.

Mr. *L. A. Govindaraghava Aiyar*, for the Appellant.—The cause of action for possession and the cause of action for mesne profits are quite distinct causes of action; but the two may be joined together (Section 10 of Act VIII of 1859). That is the result of the English authorities. [See also *Gledhill* v. *Hunter* (9).] The provisions of Order II, rule 4, are only enabling, not compulsory. It corresponds to Order II, rule 2, of the Supreme Court Rules. *Kuppusamy Aiyar* v. *Venkatramier* (10) shows that claim a for mesne profits does not arise out of the same cause of action as the one for recovery of land.

Tirupati v. *Narasimha* (2), which follows *Monohur Lall* v. *Gouri Sunkur* (1), and *Gutta Saramma* v. *Muganti Ramireddu* (4) are clearly in my favour. Also *Lalessor Babu* v. *Janki Bibi* (3). *Monohur Lall* v. *Gouri Sunkur* (1) is based on the Full Bench decision in *Pratap Chandra Barua* v. *Rani Swarnamayi* (11). There is no difference in meaning between the words 'arising out of' and 'entitled to make in respect of' in the old section 43 and the new Order II, rule 2, of the Civil Procedure Code, for it is still necessary that the cause of action must be identical to apply Order II, rule 3. In *Subbraya Chetti* v. *Rathnavelu Chetti* (8), suits for possession and for rent though arising out of obligations created by the same contract are held to be on distinct causes of action. *Kashinath Ramchandra* v. *Nathoo Keshav* (12) is based on identity of media of proof or the evidence to substantiate the two claims. It is not quite consistent with the view taken in *Subbraya Chetti* v. *Rathnavelu Chetti* (8). *Venkoba* v. *Subbanna* (5) and *Mewa Koer* v. *Banarsi Prasad* (6) are against me. But subsequently cases in this Court have not followed them. *Shanmugam Pillai* v. *Syed Ghulam Ghose* (7) is distinguishable. It clearly comes within Order II, rule 2, and is like the illustration to that rule itself. *Saminathan Chetty* v. *Palaniappa Chetty* (13) also shows that Order II, rule 2, has no application where the causes of action (in that case the one on a pro-note and the other on the original consideration) are different.

Mr. *T. R. Krishnaswami Aiyar*, for the Respondents:—There is a distinction in principle between cases of subsequent suits for mesne profits after date of the prior suits for possession, and cases of subsequent suit for possession after a prior suit for mesne profits. In the former class of cases the cause of action for the subsequent suit arises after the first suit. It is a new cause of action based on the subsequent continuance of wrongful possession. The actual decisions in *Tirupati* v. *Narasimha* (2), *Monohur Lall* v. *Gouri Sunkur* (1) and *Pratap Chandra Barua* v. *Rani Swarnamayi* (11), therefore, do not really apply. It is only the dicta in them, which are too general, that can be relied on, on the other side. In *Subbraya Chetti* v. *Rathnavelu Chetti* (8) there were two independent causes of action, one on tort and the other on contract, and that case has no application. The only decisions

(5) 11 M. 151.
(6) 17 A. 533; A. W. N. (1895) 121.
(7) 27 M. 116
(8) 2 Ind. Cas. 313, 32 M. 330, 5 M. L. T. 105.
(9) (1880) 14 Ch. D. 492; 49 L. J. Ch. 333, 42 L. T. 392; 28 W. R. 530
(10) 15 M. L. J. 462.
(11) 4 B. L. R. 113; 13 W. R. 15.
(12) 25 Ind. Cas. 78; 38 B. 444; 16 Bom. L. R. 454.
(13) 26 Ind. Cas. 228; (1914) A. C. 618; 41 I. A. 142; 18 C. W. N. 617; 88 L. J. P. C. 131; 17 New Law Rep. 56; 110 L. T. 913.

which are really in point are *Venkoba* v. *Subbanna* (5) and *Mewa Koer* v. *Banarsi Prasad* (6), and they are in my favour. There is only one cause of action in cases of claims for possession and mesne profits for the period up to that suit, namely, the wrongful possession. Order II, rule 4, clause (*a*), only applies to cases where possibly there may be a difference in the causes of action for possession and mesne profits. It does not mean that in all cases they are distinct. Clause (*c*) clearly shows that claim for mesne profits can form part of the claim arising from the cause of action for recovery of the land.

Mr. *L. A. Govindaraghava Aiyar*, in reply:—Order II, rule 4, clause (*c*), applies to cases like partition suits where partition of moveables can be asked for along with partition of immoveable property as the claims for both arise from the same cause of action. It is not intended to apply to any case of claim for mesne profits.

OPINION.—The answer to the reference must be in the affirmative. It seems to us that claims for possession and claims for mesne profits have always been treated as separate causes of action in the Code of Civil Procedure following in this the English Law. At Common Law claims for ejectment and for mesne profits were separate causes of action, and before the Common Law Procedure Act 1852, an action for mesne profits did not lie until judgment had been recovered in ejectment. Section 10 of the Code of 1859 expressly provided that a claim for the recovery of land and a claim for mesne profits arising out of such land should be deemed to be distinct causes of action within the meaning of the two preceding sections, which dealt with joinder of causes of action in the same suit. When the Code was remodelled in 1877 after the Judicature Act and the Rules of Practice framed thereunder had come into force in England, the language of these rules was in many instances substituted for the language of the Code of 1859, and in this way section 10 dropped out and was re-placed by section 44 (now Order II, rule 4, of the Civil Procedure Code, 1908), the language of which was taken from Order XVII, rule 2, of the English Rules. The effect, however, is the same because, when the rule says that no cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immoveable property except (*a*) claims for mesne profits or arrears of rent in respect of the property claimed, or any part thereof, it is quite clear that the Legislature considered that claims for the recovery of land and claims for mesne profits were separate causes of action, and that it was not intended to depart from the express provisions to that effect in section 10 of the Code of 1859. We have also been referred to *Saminathan Chetty* v. *Palaniappa Chetty* (13), a decision on section 34 of the Ceylon Code of Civil Procedure, which is in the same terms as section 43 of the Code of 1882, in which their Lordships discuss the scope of that rule and lay down that it is not intended to secure the inclusion in one and the same action of different causes of action, even if they arise out of the same transactions, and point out that the provision that an obligation and a collateral security for its performance should be deemed to constitute but one cause of action is a substantive enactment, making, what would otherwise be two independent causes of action, one cause of action for the purposes of the section. This shows that the distinction between different causes of action must be strictly observed. For the foregoing reasons and following the decisions quoted in the reference, *Monohur Lall* v. *Gouri Sunkur* (1), *Tirupati* v. *Narasimha* (2), *Lalessor Babui* v. *Janki Bibi* (3) and *Gutta Saramma* v. *Maganti Ramineidu* (4), we answer the reference in the affirmative.

Reference answered.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1754 OF 1913.

January 12, 1915.

Present:—Mr Justice Rossignol.

GURMUKH SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

KANSHI RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 9 — Death of one of the defendants during pendency of

GURMUKH SINGH *v.* KANSHI RAM.

suit—Legal representative not made party within time—Abatement—Sufficient cause for setting it aside.

A preliminary decree in a suit for rendition of partnership accounts was made on the 1st November 1909 and the appeal against it was finally dismissed by the Chief Court on the 20th December 1911. In the meantime one of the defendants had died in September 1910 and when the record was returned to the first Court on the 17th January 1912, it directed that the deceased defendant's representatives shall be impleaded, which was done on the 17th February 1912. The Court then decided that the suit abated as against the deceased and decreed it against the others. On appeal the Divisional Judge held that the suit failed against all the defendants:

Held, that the deceased defendant was an essential party to the suit and as the plaintiffs did not make an application for impleading his legal representatives on the earliest possible date after the first Court was again seized of the case, there was no sufficient cause for the delay and the suit failed.

Second appeal from the decree of the Divisional Judge, Rawalpindi, dated the 16th of May 1913, reversing that of the District Judge, Rawalpindi, dated the 4th of October 1912, decreeing claim.

Mr. *D. C. Ralli*, for the Appellants.

Bhagat *Govind Das*, for the Respondents.

JUDGMENT.—This was a suit for rendition of partnership accounts, which has been declared by the lower Appellate Court to have abated by reason of the fact that one partner died during the pendency of the case and no application within limitation was made to bring his legal representatives on to the record.

It is admitted for the appellants-plaintiffs that the deceased partner was an essential party to the suit, at any rate, in the first instance, but it is urged that as a preliminary decree was issued against him, he was not an essential party to the rest of the proceedings; in other words, the suit could proceed to an end in his absence, and the suit abated against him alone and could proceed against the other defendants.

The facts are that the parties each took a license for the vend of liquor, but after receiving their licences, they entered into a partnership by which they agreed each to work his shop and divide the profits of all.

The preliminary decree issued on 5th November 1909, and the Commissary, who examined the accounts, made a report on 3rd January 1910, but before any final decree ould be pronounced, one of the defendants appealed to the Divisional Court which dismissed the appeal on 11th April 1910.

From that dismissal there was a further appeal to this Court on 5th June 1910, which was dismissed on 20th December 1911 on the ground that one of the defendants, Than Singh, had died in September 1910 and his legal representatives had not been made a party within limitation.

On 17th January 1912 the record was returned to the first Court, which directed that Than Singh's representatives should be impleaded and this was done on 17th February 1912. The first Court then decided that the suit abated as against Than Singh, but proceeded with the case against the other defendants and decreed for plaintiffs.

The defendants appealed to the Divisional Judge, who dismissed the suit on the ground that Than Singh was an essential party, that the suit against him had abated and, therefore, failed against all defendants. The learned Divisional Judge in this respect followed the line of argument employed in the Hon'ble Mr. Justice Chevis' order of 20th December 1911.

Thus it has been decided between the parties that Than Singh was an essential party to the suit, but appellant attempts to avoid this conclusion by pointing out that the preliminary decree is in existence against Than Singh and that the local Commissary had settled Than Singh and other persons' liability before Than Singh died. The preliminary decree, however, established no specific liability against Than Singh and the Commissary's conclusions have not any force till adopted by a Court.

But appellant further argues that he should be permitted to bring Than Singh's representatives on the record even at a late date, for he took action shortly after the suit was returned to the first Court from this Court.

Now no party can be allowed to reprobate and approbate the same thing, as it suits him. The plaintiffs objected to the impleading of Than Singh's representatives in this Court, but were anxious to implead them when the case returned to the first Court.

No doubt this Court was bound *suo motu* to notice that the application was time-barred, but there is on the record an objec-

tion by plaintiffs, dated 20th December 1911, to the impleading of Than Singh's heirs.

But it is urged that Than Singh died at a time when the suit could not be continued by reason of the presence of the record in this Court, yet if it be granted that this is correct, still I find that when the record was returned to the first Court, the plaintiffs were not ready with an application at the first hearing and when a fortnight later they did put in an application, they stated that they did so only in obedience to the Court's order. It should be needless to say that the matter was one in which the Court should have issued no orders or suggestions. The words employed in Order XXII, rule 9, are :—"prevented . . . . from continuing the suit", and I am inclined to agree with appellants' contention that the suit could not be continued by the plaintiffs-appellants whilst the defendants-respondents' appeal lay before the Chief Court, but on the other hand I find that the plaintiffs did not make an application on the earliest possible date after the first Court was again seized of the case, and when they did make an application, it was made reluctantly.

My conclusion is that appellants' delay was due to a careless mistake of law and there was no sufficient cause for the delay. The appeal is, therefore, dismissed with costs.

Appeal dismissed.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

November 5, 1914.

Present:—Lord Shaw, Lord Parker of Waddington, Lord Sumner, Sir John Edge and Mr. Ameer Ali.

MUNNA LAL PARRUCK AND OTHERS—APPELLANTS

versus

SARAT CHUNDER MUKERJI AND ANOTHER—RESPONDENTS.

Limitation—Mortgage—Preliminary mortgage decree—Application for sale of mortgaged property—Transfer of Property Act (IV of 1882), ss. 88, 89—Limitation Act (IX of 1908), Sch. I, Art. 183.

Where a High Court in the exercise of its ordinary original civil jurisdiction passes a preliminary mortgage-decree under section 88 of the Transfer of Property Act, 1882, an application under section 89 of the Act for an order absolute for sale of the mortgaged property made after twelve years from the date of the preliminary decree is barred by Article 183 of Schedule I of the Limitation Act, 1908.

Appeal from an appellate order of the High Court at Calcutta, dated the 20th July 1911 and reported in 11 Ind. Cas. 943, which affirmed an order made on the 13th of May 1910 by Mr. Justice Fletcher sitting on the original side of the said High Court.

FACTS.—The sole question for determination on the present appeal was whether an application made on the 3rd July 1909 to execute or enforce a decree made by the said High Court on the 16th December 1886, was or was not barred by the Indian Limitation Act.

On the 25th January 1886, Sarat Chunder Mukerji executed a mortgage in favour of Amlook Chand Parruck, the first respondent (now represented by the appellants), of his share in certain family property, including houses No. 30, Clive Street, Calcutta, Nos. 2 and 3, Bishoo Babu's Lane, Kidderpore, and the family dwelling-house at Kidderpore.

On the 10th of December 1886 the mortgagee instituted a suit on the said mortgage in the High Court at Calcutta (original side), and on the 16th December 1886 a decree was made by consent in the terms following :—

"It is ordered and decreed with the consent of the plaintiff by his Counsel and of the defendant in person that the defendant do at the end of six months from the date hereof that is, on the fifteenth day of June, one thousand eight hundred and eighty seven, on the middle floor of the Court House opposite the Registrar's room pay to the plaintiff the sum of rupees twenty-five thousand three hundred and eighty-two and eight annas with interest thereon at the rate of twelve percent. per annum from the date hereof until payment: And it is further ordered and decreed with the like consent that upon payment as aforesaid the plaintiff do reconvey or re-transfer the properties, comprised in the mortgage in the plaint in this suit mentioned, free from incumbrances done by him or any persons claiming by, from or under him and do deliver up all deeds and writings in his custody or power relating thereto upon oath or solemn affirmation to the defendant or to whom he shall appoint: But in default of such payment as aforesaid

it is further ordered and decreed with the like consent that the properties comprised in the said mortgage be sold with the approbation of the Registrar of this Court to the best purchaser or purchasers that can be got for the same. provided the said Registrar shall consider that a sufficient sum has been offered and in order to such sale let the plaintiff produce before the said Registrar upon oath or solemn affirmation all deeds and writings in his custody or power relating to the said property: And it is further ordered and decreed with the like consent that the money to arise by such sale be paid into Court to the end that the same may be duly applied in payment of the said sum of rupees twenty-five thousand three hundred and eighty-two and eight annas with interest thereon as aforesaid: And it is further ordered and decreed with the like consent that if the money to arise by such sale shall not be sufficient for the payment in full of the said sum of rupees twenty-five thousand three hundred and eighty-two and eight annas with interest thereon as aforesaid, the defendant do pay to the plaintiff the amount of the deficiency, together with the plaintiff's costs of this suit to be taxed by the Taxing Officer of this Court under the heading (class 1, short causes.)"

On the 2nd May 1887 an ordinary application to execute the said decree was made, but the application was, however, not pressed and no further proceedings were taken till the 3rd July 1909, when the mortgagee made the application now in dispute for "liberty to proceed to sell pursuant to the decree made in this suit on the 16th day of December 1886 an undivided quarter share of the said defendant, Sarat Chunder Mukerji, of and in the premises No. 30, formerly No. 49, Clive Street, in the town of Calcutta and Nos. 2 and 3 of Bishoo Babu's Lane, Kidderpore, and the family house at Kidderpore" and prayed that "for the purpose of such sale all necessary directions may be given to the Registrar."

The application was heard by Mr. Justice Fletcher, who held that it was to enforce the decree, dated the 16th December 1886, and was barred by Article 180 of the Limitation Act 1877 as not being made within 12 years from the 15th June 1887. The material part of his judgment was as follows:—

"It is said this is an application under the Transfer of Property Act and that since it has been decided by this Court on certain appeals from Courts which are subordinate to it that there is no limitation within which an application for an order for sale may be made under that Act, the Court is bound to make an order for the sale of the property.

"But without in any way wishing to cast doubt on the authorities in this Court in support of that proposition, I have in the present case to decide what is the effect of the consent decree in this suit. Now it seems to me that the portion of the decree which orders the defendant to pay to the plaintiff Rs. 25,382-8-0 on the 15th June 1887 is the real and substantial portion of the decree, the rest of the decree being purely conditional on the defendant failing to obey the order to pay the amount on the 15th June 1887.

"What then is the real substance of the present application? It seems to me on the decree that it is merely an application to enforce the decree and that being so, it is barred by Article 180 of the Limitation Act 1877 as not being made within 12 years from the 15th June 1887.

"The argument of the learned Counsel for the plaintiff that the present application could be made at any time after the decree, even if it be more than 100 years, is an alarming one.

"Whatever may have been held in the cases cited by the learned Counsel for the plaintiff during his argument, I hold that the present application is merely one to enforce the decree made by this Court in its original jurisdiction and, therefore, is barred by limitation."

On the mortgagee's appeal the Court of Appeal (Jenkins, C. J., and Woodroffe, J.) affirmed the order of Mr. Justice Fletcher dismissing the application, and decided that the said application was also barred under the Limitation Act, 1908, Schedule I, Article 183. [For the full judgment see 11 Ind. Cas. 943.]

The appellants, who represent the mortgagee, then appealed to His Majesty in Council.

Mr. *Jenkins, K. C.* (with him *Sir W. Garth*), submitted that the application was not one to enforce a decree within the mean-

ing of either Article 180, Schedule II, of the Limitation Act, 1877, or Article 183, Schedule 1, of the Limitation Act, 1908, because the decree of the 16th December 1886, being merely a preliminary mortgage decree, could not be enforced but required another supplemental decree, a decree absolute for the purpose of being executed. The application was, therefore, not barred. No period of limitation was provided for such applications either in the Limitation Act or the Code of Civil Procedure. Reference was made to the Transfer of Property Act (IV of 1882), sections 85, 86, 87, 88 and 89, Limitation Act 1877, Schedule II, Article 178, and Limitation Act, 1908, Schedule I, Article 181.

[MR. AMEER ALI referred to the Code of Civil Procedure, 1908, Order XXXIV, rule 5.]

[SIR JOHN EDGE remarked that the mortgagee's right under the decree of 1886 was extinguished by virtue of section 28 of the Limitation Act, 1877.]

[Mr. *DeGruyther*, *K. C.*, for the Respondents, referred to *Batuk Nath* v. *Musammat Munni Dei* (1) and *Chaudhri Abdul Majid* v. *Jawahir Lal* (2), where their Lordships of the Privy Council recently held that there was a period of limitation provided for such an application under the Limitation Act, 1877].

Counsel submitted that the case of *Madhab Moni Dasi* v. *Pamela Lambert* (3) was in his favour, but said that in view of the cases cited against him he could not carry the argument any further.

Messrs. *DeGruyther*, *K. C.*, and *R. Macklin*, for the Respondents, were not called upon.

JUDGMENT.

LORD SHAW.—Their Lordships see no reason for interfering with the decisions of the Courts below, and they will humbly advise His Majesty to dismiss the appeal with costs.

Appeal dismissed.

Solicitor for the Appellants: Mr. *G. C. Farr.*

Solicitors for the Respondents: Messrs *Richards, Fox & Co.*

(1) 23 Ind, Cas. 644; 36 A. 284; 18 C W. N. 740; 12 A. L. J. 596; 19 C. L. J. 574, 16 Bom. L. R. 360; 27 M. L J. 1; 16 M L. T. 1, 1 L. W. 729.

(2) 23 Ind. Cas. 640; 36 A. 350; 12 A. L. J. 624; 16 Bom. L. R. 395; 18 C. W N. 963; 19 C. L. J. 628; 27 M. L. J. 17; (1914) M. W. N. 485, 16 M. L. T. 44, 1 L. W. 483.

(3) 6 Ind. Cas. 537; 15 C. W. N 337; 12 C. L. J. 328; 37 C. 796.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 15 OF 1914.

January 13, 1915.

Present:—Mr. Justice Shadi Lal.

THE LIQUIDATORS OF THE MARWAR BANK, LTD., IN LIQUIDATION—DEFENDANTS—PETITIONERS

versus

PANNA LAL—PLAINTIFF—RESPONDENT.

Companies Act (VII of 1913), s. 215—Winding-up of Company—Proceedings in Court, stay of—Discretion of Court.

In the case of a compulsory liquidation the creditor is debarred from proceeding by way of action, unless he can show special grounds for granting him leave to do so.

In the case of a voluntary liquidation the onus is on the Liquidator to show that an order should be made staying an action brought against the Company for *prima facie* the ordinary tribunal is the proper one to decide upon a claim against the Company. The proceedings may be stayed when sufficient ground is shown to do so, *e g.*, when existence of the liability is substantially admitted and the dispute is only as to what is the exact amount due.

The plaintiff sued the Company for refund of a certain sum of money alleged to have been paid on some shares, which the plaintiff alleged were allotted to him subject to a condition The Company went into voluntary liquidation and the Liquidators moved the Chief Court for an order under section 215 of the Companies Act, 1913, to stay proceedings in the suit filed against the Company. The claim was denied *in toto* by the Liquidators.

Held, that no sufficient ground was shown for passing the order prayed for

Petition, under section 215, Indian Companies Act of 1913, for stay of proceedings in the case of *Panna Lal* v *The Marwar Bank in Liquidation*, pending in the Court of the Munsif, first Class, Ambala.

Mehta *Bahadur Chand*, for the Petitioners,

Mr. *Santanam*, for the Respondent.

ORDER.—The Liquidators of the Marwar Bank, Limited, which is being wound up voluntarily, have applied to this Court under section 215 of the Indian Companies Act, VII of 1913, to pass an order for the staying of an action brought against the Company by the respondent, Lala Panna Lal, and

now pending in the Court of a Munsif at Ambala. It appears that the action was brought on the 16th of March 1914 for the recovery of Rs 510, the amount paid by the respondent on 51 shares which, he alleged, were allotted to him subject to a condition. He asserted that in consequence of the failure of the Company to perform the condition, the contract to take shares did not come into existence and that he was, therefore, entitled to obtain re-payment of the money already paid by him. On the 1st of April 1914, the Company filed its written statement in answer to the claim, and on the 12th of May the Court struck the issues which arose on the pleadings of the parties. On the 20th of June, the Company went into voluntary liquidation, and on the 25th June, the Liquidators, who are petitioners before me, were impleaded as defendants in the case. Thereafter, several dates were given for producing evidence, but on account of the non-attendance of witnesses, it could not be recorded. It was on the 12th of October 1914 that the present application was made to this Court and the question, which I have to determine, is whether having regard to the facts stated above and to the law bearing on the subject I should accede to the prayer of the petitioners.

There is no doubt that section 215 of the Act empowers the Court to stay an action pending against a Company in voluntary liquidation, if the Court is satisfied that the required exercise of the power will be just and beneficial. It will be observed from a comparsion of the provisions of that section with those of section 171 that, while in the case of a winding-up by the Court, no suit or other legal proceeding can be proceeded with or commenced after the winding-up order except by leave of the Court, no such leave is necessary in the case of a voluntary liquidation and that it is for the Liquidator to make out a case for staying an action brought against the Company. In the first case, the stay of an action or proceeding is the rule and its continuance is an exception. In the second case, it is just the other way. The Court has got a discretion to make an order for the staying of suit or proceeding, but the discretion can only be exercised upon special ground being shown by the Liquidator for the exercise thereof. The law draws a clear distinction in this respect between a winding-up by the Court and a voluntary winding-up, and it seems to me that the distinction is often overlooked. "Whereas in the case of a compulsory liquidation," observed Collins, M. R., in *Currie* v. *Consolidated Kent Collieries Corporation, Limited* (1), "the creditor is debarred from proceeding by way of action, unless he can show special grounds for granting him leave to do so, in the case of a voluntary liquidation the onus appears to be thrown on the Liquidator of showing that an order should be made staying an action brought against the Company. One looks for some basis in principle for this distinction being made, and it would seem that it must have been because the Legislature thought that *prima, facie* in the case of a voluntary liquidation the ordinary Tribunal was the proper one to decide upon a claim against the Company. The Court had, no doubt, stayed the action in cases where the Liquidator could show some sufficient reason for its not being decided in the ordinary way. Where, for instance, the existence of a debt or liability was substantially admitted, though there might be some question of the exact amount due, the ordinary practice seems to have been that, liability not being really contested, but only the exact amount due, the matter was treated as one which might properly, and ought to, be determined in the liquidation. But that practice does not appear to apply to a case like the present, where there is real dispute as to the existence of any liability. It seems to me that the learned Judge at Chambers was right. We have not been referred to any decision which establishes that, in the case of a voluntary liquidation, the burden is, in all cases, thrown on the creditor of showing special grounds why his action should not be stayed and the presumption appears to be *prima facie* in his favour."

Now what are the circumstances of the present case? The Liquidators dispute the claim of the respondent *in toto* and it is manifest that if I accede to the application the respondent is bound to be settled on the list of the contributories and he would then move this Court to determine the question (and this is the real bone of contention between the parties) of his liability to be

(1) (1906) K. B. 134; 75 L. J. K. B. 199, 94 L. T. 148, 13 Manson 60.

placed on that list. In that event, the whole matter would be gone into by this Court and there would really be, in substance though not inform, a trial of an action. Can it be said that any good would accrue by staying the action? It is further observable that the suit had been instituted more than three months before the Company went into liquidation, and that certain proceedings had in the meanwhile been taken, and that even after the commencement of the winding-up, this Court was not promptly moved to exercise its power of staying the suit.

For the aforesaid reasons, I have no hesitation in holding that the petitioners have absolutely failed to make out a case for the exercise of my discretion. Accordingly I reject the application with costs.

Application rejected.

ALLAHABAD HIGH COURT.

[SECOND CIVIL APPEAL No. 218 OF 1914.

December 9, 1914.

Present:—Mr. Justice Chamier.

KALYAN SINGH—DEFENDANT—APPELLANT

versus

PITAMBAR SINGH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch I, Arts. 144, 44, 91—Sale by one member of joint Hindu family—Suit to set aside sale and for possession—Limitation

A suit to set aside a sale executed by one member of a joint Hindu family, and for possession of the property is governed by Article 144 of the Limitation Act and not by Article 44 or 91.

Shama Chandra Dajadar v. *Gadadhar Mandal*, 9 Ind. Cas. 877; 13 C. L. J. 277, referred to.

Second appeal from the decision of the District Judge of Budaun confirming that of the Munsif, Sahaswan.

Mr. *Benode Behari*, for the Appellant.

Dr. *S. C. Banerji*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the respondents to set aside a sale, made by their brother Sardar Singh and their mother Kaunsilia, of a 16, *biswansi* 13 *kachwansi* 5 *nanwansi*-share in a village and for possession of the property.

The share in question is part of a 1 *biswa* 19 *biswansi* 15 *kachwansi*-4 *tanwansi* 2 *nanwansi* share in the village, which was the joint property of the three brothers and their father, who died many years ago when all three brothers were minors. During their minority their mother Kaunsilia mortgaged a 1 *biswa* 15 *biswansi* 13 *kachwansi* share to one Raghunath Singh and placed him in possession. In 1895 after the eldest brother Sardar Singh had attained full age, he and his mother sold the share now in suit to the aforesaid Raghunath and a man named Subadar Singh. The mortgage-money was paid off out of the usufruct by June 1909, and the two purchasers then took possession as such of the share which they had purchased.

The present suit was instituted in August 1912. The plaintiffs-respondents say that they did not get to know of the sale till August 1911, and they suggest that the purchasers, who are represented in this suit by the appellant Kalyan and another, fraudulently concealed the fact of the sale from them.

It has been found by both Courts below that no legal necessity for the sale has been established by the purchasers' representatives. The only question for decision is whether the Courts below were right in holding that the suit was brought within time. It has been found, and it is now admitted, that both the plaintiffs-respondents attained majority more than three years before the suit. If, as contended by the appellant, Article 44 of the first Schedule to the Limitation Act applies, then the suit is plainly barred by limitation unless the case is saved by section 18 of the Act. Both Courts below have held that the suit is governed, not by Article 44, but by Article 144 and is within time, because the possession of the purchasers did not become adverse till 1909, when the mortgage was cleared off. The plaintiffs-respondents have treated the mortgage as binding upon them as they were entitled to do [see *Mata Din* v. *Ahmad Ali*(1)] and, therefore, possession of the purchasers did not become adverse to them till the mortgage was cleared off. If Article 144 applies the suit is well within time.

I am unable to accept the contention that Article 44 applies to this suit. When the sale was made, *Musammat* Kaunsilia was not guardian of the property of the plaintiffs-respondents [see *Ghariballah* v. *Khalak Singh* (2)]. The property was part of the joint family property of the plaintiffs and their brother, Sardar Singh. *Musammat* Kaunsilia

(1) 13 Ind. Cas. 976; 16 C. W. N. 338, 11 M. L. T. 145; (1912) M. W. N. 183; 9 A. L. J. 215; 15 C. L. J. 270; 14 Bom. L. R. 192; 15 O. C. 40; 23 M. L. J. 6, 39 I. A. 49, 34 A. 213 at p. 223.

(2) 25 A. 407 (P. C.); 5 Bom. L. R. 478; 7 C. W. N. 681; 30 I. A. 165.

must, I think, be disregarded altogether. She had no right whatever to deal with the property of the family after Sardar Singh came of age. Regarded as a sale by her alone, the sale was void altogether and Article 44 does not apply to such a case [see *Sham Chandra Dafadar* v. *Gadadhar Mandal* (3)]. The sale should, I think, be regarded as having been made by Sardar Singh and even if it be assumed that he was *karta* of the family, he was not guardian of the property of his brother within the meaning of Article 44. This Article has never been applied to a suit to set aside a sale by a *karta* of joint family property. Nor, as far as I am aware, has Article 91 ever been applied to such a case as this. It appears to me that the relevant Article is 144, that the prayer in the plaint that the sale may be set aside is probably superfluous and that the suit is well within time. The appeal is dismissed with costs.

Appeal dismissed.

(3) 9 Ind. Cas. 377; 13 C. L. J. 277.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1058 TO 1077 OF 1913.

October 30, 1914.

Present:—Mr. Justice Kumaraswami Sastri.

VENKATA PERUMAL RAJU DEVA MAHARAJULUNGARU, MINOR, BY GUARDIAN W. A. WARADACHARIAR—DEFENDANT IN ALL SUITS—APPELLANT IN ALL THE APPEALS

versus

IN S. A. No. 1058

RAMUDU—PLAINTIFF—RESPONDENT.

IN S. A. No. 1059

G. PAPANNA—PLAINTIFF—RESPONDENT.

IN S. A. No. 1060

VENKATAPATHI—PLAINTIFF—RESPONDENT.

IN S. A. No. 1061

GANGANNA—PLAINTIFF—RESPONDENT.

IN S. A. No. 1062

K. VENKATAPATHI—PLAINTIFF—RESPONDENT.

IN S. A. No. 1063

G. VENKATAPATHI—PLAINTIFF—RESPONDENT.

IN S. A. No. 1064

A. CHENGANNA—PLAINTIFF—RESPONDENT.

IN S. A. No. 1065

ERRAGOPALU—PLAINTIFF—RESPONDENT.

IN S. A. No. 1066

R. GANGANNA—PLAINTIFF—RESPONDENT.

IN S. A. No. 1067

SIDDAPPA—PLAINTIFF—RESPONDENT.

IN S. A. No. 1068

GANGANNA—PLAINTIFF—RESPONDENT.

IN S. A. No. 1069

A. VENKATAPATHI—PLAINTIFF—RESPONDENT.

IN S. A. No. 1070

CHENGANNA—PLAINTIFF—RESPONDENT.

IN S. A. No. 1071

M. GANGANNA—PLAINTIFF—RESPONDENT.

IN S. A. No. 1072

G. GOPALU—PLAINTIFF—RESPONDENT.

IN S. A. No. 1073

G. VENKATARAMANNAH—PLAINTIFF—RESPONDENT.

IN S. A. No. 1074

CHENGANNA—PLAINTIFF—RESPONDENT.

IN S. A. No. 1075

CHAKALA GONAMVADU—PLAINTIFF—RESPONDENT.

IN S. A. No. 1076

BUDDANNA—PLAINTIFF—RESPONDENT.

IN S. A. No. 1077

MUNIGADU—PLAINTIFF—RESPONDENT.

Madras Estates Land Act (I of 1908), s. 13 (3), scope of—"Contract to the contrary" in s. 13, cl. (3), meaning of—Interpretation of Statute—Act, whether retrospective—Improvement by tenant—Payment of higher rent, when enforced—Contract before Act, effect of—Sadelwar *and* Madiri Kasuvu, *whether illegal cess.*

Per *Kumaraswami Sastri, J.*—The words 'contract to the contrary" in section 13, clause (3), of the Madras Estates Land Act refer only to contracts made after the passing of the Act and the section has no retrospective operation in cases where rent claimed was payable under a contract which would have been legally enforceable under the Rent Recovery Act or any other law in force at the time of the passing of the Estates Land Act.

Per *Kumaraswami Sastri and Napier, JJ.*—Section 13, clause (3), of the Madras Estates Land Act does not enable a tenant to claim exemption from liability to pay a higher rate of rent for crops raised with the help of improvements made at his sole expense, where the improvements had been effected before the Act came into force and where there had been a contract entered into between him and the landlord before the passing of the Act for the payment of such enhanced rent.

An Act is always prospective in its operation, and to make it retrospective stronger words than those found in section 13, clause (3), of the Estates Land Act are necessary.

Reid v. *Reid*, (1886) 31 Ch D. 402; 55 L. J. Ch. 294, 54 L. T. 100; 34 W. R. 332; *Lauri* v. *Renad*, (1892) 3 Ch. D. 402; 61 L. J. Ch. 580; 67 L. T. 275; 40 W. R. 679; *Muhammad Abdussamad* v. *Qurban Hussain*, 31 I. A. 80; 6 Bom. L. R. 238; 8 C. W. N. 201, 26 A. 119 (P. C.); *Ramakrishna Chetty* v. *Sub-*

VENKATA PERUMAL v. RAMUDU.

aya Aiyar, 18 Ind. Cas. 64; 24 M. L. J. 54, (1913) M. W. N. 360, *West* v. *Gwynne* (1911), 2 Ch D. 1 at p. 15; 80 L. J. Ch. 578; 104 L T. 759; 55 S. J. 510; 27 T. L. R. 444, followed.

Sadasiva Aiyar, J., (dissenting).—Clauses (1) and (2) of section 13 of Act I of 1908 merely declare the existing law and do not create new rights, and there is no reason to hold that section 13, clause (3), is intended to apply only to prospective improvements made by the tenant.

Arunagam Chetti v. *Raja Jagaveera Rama Venkateswara Ettappa*, 28 M. 444; 15 M. L. J. 292; *Maharaja of Venkatagiri* v. *Sheik Mohadeen Sahib*, 25 Ind. Cas. 590; 1 L. W. 592, followed.

A landlord is not entitled to increase the annual assessment by the addition of a second crop assessment.

Sadelwar and *Madiri Kanva* are part of rent and not illegal cesses.

Per *Sadasiva Aiyar and Napier, JJ.*—In the case where the payment of higher rate of rent for crops raised with improvements effected by tenants has gone on for over 60 years, consideration for agreement to pay at the higher rate should be presumed.

Second appeals against the decrees of the District Court of North Arcot, in Appeal Suits Nos. 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 454, 494 and 495 of 1912, preferred against those of the Court of the Revenue Divisional Officer of Chandragiri, in Suits Nos. 1210, 1211, 1213, 1214, 1215, 1216, 1217, 1218, 1219, 1221, 1222, 1223, 1224, 1225, 1226, 1227, 1228, 1212, 1209 and 1220 of 1912.

Messrs. *L. A. Govindaraghava Aiyar* and *L. S. Veeraraghava Aiyar*, for the Appellant.

Mr. *S. T. Srinivasa Gopalachariar*, for the Respondents.

These second appeals and the memoranda of objections in all except in S. A. No. 1067 of 1913 coming on for hearing and having stood over for consideration, the Court (Sadasiva Aiyar and Napier, JJ.) delivered the following

JUDGMENT.

SADASIVA AIYAR, J.—The appellant is the minor Rajah of Karvetnagar. He was the defendant in the twenty suits out of which these twenty, second appeals have arisen. The suits were brought under section 55 of the Madras Estates Land Act by several tenants in the estate, who are the plaintiffs in the suits, for obtaining *pattahs* for *Fasli* 1321. The Revenue Divisional Officer of Chandragiri Division, in whose Court the suits were brought, passed a decree directing the defendant to grant *pattahs* containing certain terms which that officer found to be proper and legal. The learned District Judge on appeal modified the decrees of the Court of first instance in one important respect and confirmed the decrees in other respects. In nineteen of the twenty-second appeals before us, the tenants (the plaintiffs) have filed memoranda of objections as regards the points decided against them. In the appeals by the minor Rajah the questions for decision are:—

(*a*) Whether the Appellate Court's finding that the wells on the lands of the tenants were sunk at their own expense is correct?

(*b*) Whether the *zemindar* is entitled to charge rent on dry lands, on which garden crops are raised with the aid of the water in such wells, at the higher rate claimable for lands classed as wet, that is, a rate higher than is charged per *gunta* on dry lands cultivated with dry crops without the aid of well water.

As regards the question (*a*), I do not see sufficient reason not to accept the concurrent findings of the lower Courts that the wells were excavated at the sole expense of the tenants. Though the direct evidence is not very satisfactory, the lower Courts were justified in finding the wells to have been dug at the tenants' sole expense, having regard to all the circumstances and especially seeing that the defendant in his written statement did not deny that the plaintiffs dug the wells but merely said that it was not at their sole expense that the wells were dug.

The answer to question (*b*) depends upon the answers made to the following subsidiary questions:—

(*b*1) Whether under the law before the Estates Land Act came into force the condition in the *pattah* to pay the higher wet assessment for garden crops raised on dry lands with the aid of the tenants' well water was a lawfully enforceable term?

(*b*2) Whether after the enactment of section 13, clause (3), of the Estates Land Act such a term in the *pattah* would be valid?

(*b*3) Whether section 13, clause (3), applies to a case where the improvement at his sole expense, relied on by the tenant,

was effected before the Madras Estates Land Act came into force.

In *Arumugam Chetti* v. *Raja Jagaveera Rama Venkateswara Ettappa* (1), Mr. Justice Subrahmanya Aiyar held that a custom to pay enhanced rent for lands improved by the improvements effected by a tenant at his own cost is illegal as opposed to the provisions of the Rent Recovery Act, that it made no difference whether the tenant constructed the well (at his own cost) prior to or after the passing of the Act of 1865, that in either case, a higher rent cannot be claimed by the landlord and that payment for a number of years of the enhanced rent may be *evidence* of an *agreement* to pay at that rate but that it will not be binding as a *contract* unless supported by consideration. The learned Judge left open the question whether if payments at the higher rate had continued to be made for a great many years, so as to make it unfair to the landlord, on account of such lapse of time, to be compelled to prove the existence of some consideration when the payment commenced, whether, under those circumstances, the Court should not presume a lawful origin for the payment at the higher rate, on the analogy of the lost grant principle availed of to support long possession and enjoyment. In that particular case in *Arumugam Chetti* v. *Raja Jagaveera Rama Venkateswara Ettappa* (1), the learned Judge found that in that suit and the connected suits, the payment at the higher rate had begun only from between 1 and 18 years before the date of the suits and that hence the passing of consideration for the agreement to pay at the higher rate cannot be presumed.

In the case now before us, the payments at the higher rate had gone on from about 1846 for more than 60 years and I think that consideration for the agreement to pay at the higher rate can be presumed in these cases. If so, under clause (1), section 11, of the Rent Recovery Act of 1865, all contracts for rent between the landlord and the tenant should be enforced and I would answer the question (*b*1) in the affirmative.

(1) 28 M. 444; 15 M. L. J. 292.

As regards the question (*b*2), section 13, clause (3), of the Estates Land Act begins with the words "Notwithstanding any usage or contract to the contrary", and hence under the new law even a contract (that is, an agreement supported by consideration) to pay at the higher rate for lands improved at the sole expense of the tenants cannot avail the landlord.

We have lastly the question (*b*3), whether the tenant can claim the greater protection given by the Estates Land Act in cases where the improvements had been effected before the passing of the Act.

I am free to admit that I have found it very difficult to arrive at a satisfactory answer to this last question. Section 13 of the Madras Estates Land Act contains three clauses. Under the first clause, neither the *ryot* nor the landlord can prevent the other party from making an improvement to the holding. Under the second clause, the *ryot* has ordinarily the prior right to make the improvement, but the landlord has the prior right if the improvement affects not only the holding of the *ryot* who wishes to make it, but also the holding of another *ryot*. Then the third clause says: "a *ryot* shall not, by reason of making an improvement at his sole expense, become liable to pay a higher rate of rent on account of any increase of production as a consequence of such improvement." Under the first two clauses, it may be fairly argued that the Legislature has enacted those provisions in respect of improvements contemplated to be made by the landholder or the *ryot* after the passing of the Act, as it is almost useless for the Legislature to legislate about their respective rights to make the improvements which had already been made. Pursuing the same argument, it might be contended that the third clause about the *ryot* not being liable to pay a higher rate of rent on account of improvements effected at his sole expense also contemplates the raising of rent in future in respect of improvements to be made in future. After the best consideration which I was able to give, however, to these three clauses, I have come to the conclusion that the third clause is intended to give a right to the tenant to claim exemption from payment of enhanced rent from the date the

Act came into force, even in cases where the improvements had been effected by him before the Act came into force. Clauses (1) and (2) of section 13, in my opinion, merely declared the law which existed even prior to the passing of this Act. Sir S. Subrahmanya Aiyar, J., says in *Arumugam Chetti* v. *Raja Jagaveera Rama Venkateswara Ettappa* (1): "It is impossible to understand why the landlord's permission for the sinking of the well was necessary. And even supposing that a custom supporting the averment can be shown, such custom must be held to be bad, if not for its unreasonableness, at least on account of its utter inconsistency with the policy of the proviso to section 11 of the Rent Recovery Act, which expressly admits the tenant's unqualified right to make improvements free from any liability to make any payment to the landholder in respect of the benefit accruing therefrom.....

.....It is scarcely necessary to add that the tenant's right to relinquish the whole or any part of his holding ..in no way detracts from the tenant's right to make such an improvement as the sinking of a well during the subsistence of the tenancy." If then clauses (1) and (2) do not create new rights as regards the making of improvements, it is unnecessary to hold that clause (3) contemplates only the effect of future improvements on the right of the tenant to claim exemption from enhancement of rent. If Sir S. Subrahmanya Aiyar's view in *Arumugam Chetti* v. *Raja Jagaveera Rama Venkateswara Ettappa* (1), that whether the wells were constructed before or after the passing of the Act VIII of 1865, no additional rent can be claimed unless there was a contract, is correct law, it seems to me that clause (3) of section 13 was intended only to further benefit the tenant, that is, further than even Sir S. Subrahmanya Aiyar's dictum, by taking away the restriction imposed by the old Rent Recovery Act that if there was a contract to pay the higher rate (as opposed to an agreement without consideration), the tenant ought to pay the higher rate. In other words, it seems to me that the opening words of section 13, clause (3), "Notwithstanding any contract or usage to the contrary," were specifically intended to favour the tenant even further than the old law and not to take away the right already vested in him, under Sir S. Subrahmanya Aiyar's decision, to claim exemption whether the improvements were made before or after the passing of the Act VIII of 1865, that is, it was not intended to take away his right to claim exemption from enhancement in some cases on the mere ground that the improvements had been effected before the Estates Land Act. In *Maharajah of Venkatagiri* v. *Sheik Mohadeen Sahib* (2), it was held that the tenant was not liable to pay enhanced rent when he had improved his holding by digging a well at his own cost. It appears from the facts of that case that the wells were dug in that case and the connected cases by the tenants or their ancestors before the Estates Land Act came into force. That decision, however, is not a direct authority on the question whether section 13, clause (3), affected the improvements made before the Act came into force, and it can only be said that the appellant's learned Vakil in that case did not put forward any argument that section 13, clause (3), would not affect the landlord's right to enhance where improvements had been made before the Act came into force.

It is, no doubt, hard upon the landlord that where he had been obtaining the enhanced rent on account of a contract from long before the Act came into force, it should be held that notwithstanding that contract he should lose his right to the enhanced rent owing to the passing of the Act. But the Estates Land Act does favour the tenant, notwithstanding "contracts to the contrary" and whether the contracts were made *before the passing of the Act or after it* in numerous other respects (see section 187, clauses (1) (*a*) to (*g*), and section 188). When rights under contracts entered into before the passing of the Act are *not* intended to be taken away but only rights under contracts made after the passing of the Act, apt words are used to so conserve the rights created under prior contracts (see section 12). I am, therefore, of opinion that after the passing of the Act the landlord cannot claim enhanced rent on account of the enhanced outturn of the crops due to the improvements made by the *ryot*, whether the improvements were made before or after the passing of the Act and whether or not there was a contract to the contrary

(2) 25 Ind. Cas. 590; 1 L. W. 592.

and whether such contract was made before or after the passing of the Act.

In the result, I would dismiss the appeals preferred by the landlord, but under the circumstances without costs.

Coming to the memoranda of objections by the tenants, the questions raised by them are:

(*a*) that the lower Appellate Court ought to have allowed only the lowest *manavari* dry rates, that is, Rs. 15-12-0 per 100 *guntas*, and not the higher dry rate of Rs. 26-4-0 per 100 *guntas*,

(*b*) that the District Judge erred in holding that the landholder was entitled to charge for a second crop raised with the aid of improvements by the *ryot*,

(*c*) that the District Judge ought to have held that *sadelwar* and *madiri kasuvu* are illegal cesses not payable by the *ryot*.

As regards contention (*a*), as the landholder is entitled to charge for the best dry crops that can be grown on a dry land there is no force in the contention.

As regards contention (*b*), I would follow the decision in *Maharaja of Venkatagiri* v. *Sheik Mohadeen Sahib* (2) and hold that the landlord is not entitled to increase the annual assessment by the addition of a second dry crop assessment.

On the contention (*c*), I am prepared to follow the decision in Second Appeal No. 57 of 1896 and to hold that *sadelwar* and *madiri kasuvu* form part of the rent of the lands and are not additional illegal cesses. In the result, the lower Court's decrees will be modified by disallowing the direction to enter second crop assessments in the *pattahs*. There will be no order as to costs in these memoranda of objections.

NAPIER, J.—I regret that I am unable to concur in the conclusion arrived at by my learned brother. I accept with some hesitation the finding that the wells were excavated at the sole expense of the tenants, though it is a little difficult to see on what evidence this finding is arrived at: and I agree with him in applying the decision in *Arumugam Chetti* v. *Raja Jagaveera Rama Venkateswara Ettappa* (1) to the facts of this case that consideration, for the agreement to pay a higher rate, should be presumed in the circumstances of this case. I differ from him, however, on the construction of clause (3) of section 13 of the Estates Land Act. I cannot apply the words "shall not, by reason of making an improvement . . . . . become liable" to anything but improvements after the Act, in view of the fact that the rest of the section obviously applies to improvements after the Act. It is clear that the rate of rent was lawfully payable at the date of this Act, and I cannot hold that this clause was intended to tear up contracts lawfully made and give a claim for a *reduction* by reason of words forbidding the *imposition* of a higher rate. In my opinion, section 28 applies and the rent payable at the time being lawfully payable, it should be presumed to be fair and equitable until the contrary is proved. I would, therefore, allow these appeals.

BY THE COURT:—Under section 98 of the Code of Civil Procedure, we refer to a third Judge for decision the question of law on which we differ, namely, whether section 13, clause (3), of the Estates Land Act enables the tenant to claim exemption from liability to pay a higher rate of rent for crops raised with the help of improvements made at the tenant's sole expense, where the improvements had been effected before the Act came into force and where there had been a contract entered into between the landlord and the tenant before the passing of the Act for the payment of such enhanced rent.

These second appeals and the memoranda of objections coming on for hearing under section 98 of the Code of Civil Procedure, before Kumaraswami Sastri, J., his lordship expressed the following

OPINION.—The question for decision is whether section 13, clause (3), of the Estates Land Act enables the tenant to claim exemption from liability to pay a higher rate of rent for crops raised with the help of improvements made at the tenant's sole expense, where the improvements had been effected before the Act came into force and where there had been a *contract* entered into between the landlord and the tenant before the passing of the Act for the payment of such enhanced rent.

The facts found by the learned Judges are:—

(1) that the rent claimed by the *semin-*

dar has been paid by the tenants for over 60 years,

(2) that there was a valid contract to pay the rent which was legally enforceable under the provisions of the Rent Recovery Act,

(3) that the improvements in respect of which the enhanced rent had been paid ever since 1846 were effected by the tenants.

Mr. Justice Sadasiva Aiyar was of opinion that in spite of these facts the landlord was not entitled to sue for the rent at the rate paid ever since 1846, as section 13, clause (3), of the Estates Land Act was retrospective and prevented the landlord from claiming higher rent in consequence of improvements effected by the tenants, even though such improvements have been effected before the passing of the Act and the rent claimed was legally recoverable under the Rent Recovery Act. Mr. Justice Napier took the opposite view and held that the section only applied to improvements made after the passing of the Act.

The question resolves itself into whether section 13, clause (3), has retrospective operation. There is nothing in the wording of the section to indicate that the Legislature intended it to be retrospective. Clause (3) runs as follows:—"Notwithstanding any usage or contract to the contrary, a *ryot* shall not by reason of making an improvement at his sole expense become liable to pay a higher rate of rent on account of any increase of production or of any change in the nature of the crop raised as a consequence of such improvement."

It would require very strong grounds for holding that the Legislature intended to disturb vested rights which landlords had under valid and enforceable contracts. It is no doubt true that the Madras Estates Land Act was intended in a large measure to benefit tenants, but that is no ground for construing the Act on the hypothesis that in every case tenants were to have all the rights and landlords were only to be subject to all the liabilities incident to the ownership and possession of property.

The principles guiding the interpretation of a Statute, where retrospective effect is sought to be given to provisions so as to defeat vested rights, have been clearly laid down in several decisions. In *Reid* v. *Reid* (3), Bowen, L. J., observed as follows: "The particular rule of construction which has been referred to, but which is valuable only when the words of an Act of Parliament are not plain, is embodied in the well-known trite maxim *omnis nova constitutio futuris formam imponere debet non praeteritis*, that is, that except in special cases the new law ought to be construed so as to interfere as little as possible with vested rights. It seems to me that even in construing an Act which is to a certain extent retrospective, and in construing a section which is to a certain extent retrospective, we ought nevertheless to bear in mind that maxim as applicable whenever we reach the line at which the words of the section cease to be plain. That is a necessary and logical corollary of the general proposition that you ought not to give a larger retrospective power to a section, even in an Act which is to some extent intended to be retrospective, than you can plainly see the Legislature meant." The same rule has been expressed by Lindley, L. J., in *Lauri* v. *Renad* (4), where he observes as follows:—"It is a fundamental rule of English Law that no Statute shall be construed so as to have a retrospective operation, unless its language is such as plainly to require such a construction; and the same rule involves another and subordinate rule to the effect that a Statute is not to be construed so as to have a greater retrospective operation than its language renders necessary." The same view was taken by him in *Muhammad Abdussamad* v. *Qurban Hussain* (5), where their Lordships of the Privy Council held that "it was not in accordance with sound principles of interpreting Statutes to give them a retrospective effect."

In *Ramakrishna Chetty* v. *Subraya Aiyar* (6), it was held that the Estates Land Act had no retrospective operation so as to affect the period of limitation in respect of contracts falling under Article 116 of the Limitation Act.

(3) (1886) 31 Ch. D. 402; 55 L. J. Ch. 294; 54 L. T. 100; 34 W. R. 332.

(4) (1892) 3 Ch. D. 402; 61 L. J. Ch. 580; 67 L. T. 275; 40 W. R. 679.

(5) 31 I. A. 30; 6 Bom. L. R. 238; 8 C. W. N. 201; 26 A. 119 (P. C.).

(6) 18 Ind. Cas. 64; 24 M. L. J. 54; (1913) M. W. N. 303.

The result of the decisions has been well summarised by Craies in his work, 'Statute Law,' where he observes (page 322*): "And perhaps no rule of construction is more firmly established than this—that a retrospective operation is not to be given to a Statute so as to impair an existing right or obligation otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only." As observed by Maxwell, the rules laid down in *Lauri* v. *Renad* (4), *Reid* v. *Reid* (3) and *West* v. *Gwynne* (7) have special operation "where the enactment would prejudicially affect vested rights or the legal character of past transactions or impair contracts."

Section 6, clause (*b*), of the General Clauses Act and section 8, clause (*d*), of Madras Act I of 1891 also provide that the repeal of an Act shall not affect any rights accrued under the enactment repealed.

Applying these well-known rules to the construction of section 13 of the Estates Land Act, it seems to me that a retrospective operation cannot be given to clause (3) of the section. Clauses (1) and (2) to the section can only refer to improvements to be effected in future and if the Legislature intended clause 3 to be retrospective, it would have given some indication of such intention. On the contrary the use of the words "shall not by reason of making an improvement *become* liable" indicate that only future improvements are intended.

It appears from other sections of the Act that where the Legislature intended any provision to be retrospective, it used words "whether before or after the commencement (or passing) of this Act." A reference to sections 8, 37, 187 and 188 makes this clear.

So far as rent is concerned section 28 provides that in all proceedings under the Act, the rent or *rate of rent* for the time being lawfully payable by the *ryot* shall be presumed to be fair and equitable until the contrary is proved. Under the law, as it stood prior to the passing of the Estates Land Act, a *contract* to pay increased rent even though improvements were made by the tenant was legally enforceable. It was, therefore, rent "lawfully payable by the *ryot*" when the Estates Land Act was passed and was to be presumed to be fair and equitable. It is difficult to see under what canons of interpretation it can be held that section 13, clause (3), should be construed as taking away such a right. It is argued by the respondent's Advocate that the policy of the law has always been to give to the tenant the benefit of improvements made by him. This may be so, but the law as it stood prior to the passing of the Estates Land Act did not prevent additional rent being legally recoverable in case where it was payable under a *contract*.

I am of opinion that the words 'contract to the contrary' refer only to contracts made after the passing of the Act and that section 13, clause (3), has no retrospective operation in cases where rent claimed was payable under a contract which would have been legally enforceable under the Rent Recovery Act or any other law in force at the time of the passing of the Estates Land Act.

Appeal allowed.

(7) (1911) 2 Ch. D. 1 at p. 15; 80 L. J. Ch. 578, 104 L. T. 759; 55 S. J. 519; 27 T. L. R. 444.

*See 2nd Edition, page 348—*Ed.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 145 OF 1913.

December 17, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerjee, KT.,

T. C. MUKERJI—PLAINTIFF—APPELLANT

versus

AFZAL BEG AND OTHERS—DEFENDANTS—RESPONDENTS.

Res judicata—*Suit for partition—Compromise—Agreement not carried out—Second suit for partition, if barred—Continuing right*

Where a suit for partition is dismissed upon a compromise whereby the defendants promise to sell their entire interest in the property for consideration to the plaintiff, a second suit for partition is not barred by *res judicata* if the agreement is not carried out.

The right to bring a suit for partition, unlike other suits, is a continuing right incidental to the ownership of joint property.

Gulkandi Lal v. *Mannu Lal*, 23 A. 219, A. W. N. (1901), 66; *Nasratullah* v. *Mujibullah*, 13 A. 309;

A. W. N. (1891) 117, *Bisheshar Das* v. *Ram Prasad*, 28 A. 627; A. W. N. (1906) 142; 3 A. L. J. 379; *Madan Mohan Mondul* v. *Baikunta Nath Mondul*, 10 C. W. N. 839, referred to.

First appeal from a decision of the Subordinate Judge of Dehra Dun.

Dr. *S. C. Banerji*, for the Appellant.

Mr. *Iqbal Ahmad*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for partition of a house. The plaintiff alleged that he was entitled to three-fourths of the house whilst the defendants were entitled to one-fourth. The Court below, without going into the merits of the case, held that the suit is not maintainable, upon the ground that there was a previous suit between the plaintiff and the predecessor-in-title of the defendants for partition of this very house which was dismissed on the 11th of November 1905, and the plaintiff did not obtain permission to bring a fresh suit. It appears that when the previous suit was instituted, the predecessor-in-title of the defendants agreed to execute a sale-deed to the plaintiff of all his rights in the house for the sum of Rs. 5,750. It is admitted on both sides that this agreement was never carried out. The plaintiff says in his plaint that after repeated attempts to get the sale-deed executed the predecessor-in-title of the defendants refused to execute the sale. We think the decision of the Court below was wrong. As soon as the defendants or their predecessor-in-title failed to carry out the compromise, the parties were relegated to their rights as they existed prior to the compromise. The right to bring a suit for partition, unlike other suits, is a continuing right incidental to the ownership of joint property. It may be that at one time the desire for partition may cease, circumstances may again occur which make it desirable or necessary that partition should take place. Reliance has been placed by the respondents on the case of *Gulkandi Lal* v. *Manni Lal* (1), where the facts were very similar to the facts of the present case. We find that the question involved had been previously decided in the case of *Nasratullah* v. *Mujibullah* (2). This case was followed in the case of *Bisheshar Das* v. *Ram Prasad* (3), one of the learned Judges being the same as had decided the case of *Gulkandi Lal* v. *Mannu Lal* (1). There is a Calcutta ruling to the same effect, *viz.*, *Madan Mohan Mondul* v. *Baikunta Nath Mondul* (4).

We may observe that no question of title was determined in the previous litigation and so no question of *res judicata* arises.

We allow the appeal, set aside the decree of the Court below and remand the case to that Court with directions to re-admit it under the original number on the file, and proceed to hear and determine the same according to law. The appellant will have his costs of this appeal. Other costs will be costs in the cause.

Appeal decreed, Case remanded.

(1) 23 A. 219; A. W. N. (1901) 66.
(2) 13 A. 309; A. W. N. (1891) 117.
(3) 28 A. 627; A. W. N. (1906) 142, 3 A. L. J. 379.
(4) 10 C. W. N 839.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2475 OF 1912.

November 11, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Kumaraswami Sastri.

KATHAPERUMAL THEVAN—DEFENDANT No. 2—APPELLANT

versus

RAMALINGA THEVAN—PLAINTIFF AND OTHERS—DEFENDANTS Nos. 1 AND 3 TO 9—RESPONDENTS.

Hindu Law—Alienation by uncle and mother of a minor acting as his guardian—Minor and his uncle members of an undivided Hindu family—Mother not the legal guardian—Limitation Act (IX of 1908), Sch. I, Art. 44, if applicable.

Where a minor and his uncle were members of an undivided Hindu family and certain joint family property was sold by the uncle and the mother of the minor, who was put forward as his guardian:

Held, that, as the undivided paternal uncle was the guardian in law of the minor and not the mother, a suit to set aside the sale would not fall under Article 44 of the first Schedule to the Limitation Act.

Second appeal against the decree of the Court of the Subordinate Judge of Tanjore in Appeal Suit No. 164 of 1911, preferred against the preliminary decree of the Court of the District Munsif of Pattukota, in Original Suit No. 17 of 1910.

Mr. *G. S. Ramachandra Aiyar*, for the Appellant.

Mr. *S. Doraiswami Aiyar*, for the Respondents.

JUDGMENT.—It is not disputed that the plaintiff's vendor and his uncle were members of an undivided family at the date of

the alienation in plaintiff's favour. Under Hindu Law the undivided paternal uncle will be the guardian of his minor nephew. The sale-deeds were executed by the uncle and by the mother of the minor who was put forward as his guardian, and the question is whether a suit to set aside the sale falls under Article 44 of the first Schedule of the Indian Limitation Act. If the mother was not in law the guardian, it is difficult to see how Article 44, which refers to suits to set-aside sales by guardians, could have any application. All the cases referred to by the appellant are cases where the mother was admittedly the guardian.

It is argued that the recital in the sale-deeds must be taken to have severed the status and that consequently the mother must be deemed to have been the guardian. This point was not raised in the lower Courts and we do not think that a mere perusal of the sale-deeds would enable us to decide that the minor and his uncle were divided when the sale deeds were signed.

The second appeal fails and is dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 134 OF 1914.

December 3, 1914.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

RAM DULARI—PLAINTIFF—APPELLANT

versus

BALAKRAM AND ANOTHER—DEFENDANTS—RESPONDENTS.

Possession, suit for—Decree-holder purchasing share of judgment-debtor in an undivided house, right of—Judgment-debtor obtaining partition decree on certain condition—Decree-holder, whether can fulfil condition and obtain exclusive possession.

B obtained a decree against *S* in execution of which he attached *S*'s one-sixth share in a house. *S* meanwhile sued *B* and others for partition of the house and obtained a decree on the condition to pay Rs. 237 into Court. *S* did not pay the money and the decree remained unexecuted. *B* brought to sale and purchased the specific share allotted to *S* in the partition suit. *B* paid Rs. 237 into Court and obtained possession. *R* sued for declaration of her right and that *B* was not entitled to possession of the house by virtue of his purchase:

Held, that *B* was not entitled to separate possession of any specific portion of the house by virtue only of his purchase at the execution-sale, as what passed to him was the right, title and interest of *S* in an undivided one-sixth share.

Second appeal from the decree of the Subordinate Judge of Shahjahanpur.

Mr. *S. C. Choudhri*, for the Appellant.

Mr. *A. P. Dube*, for the Respondents.

JUDGMENT.—The first respondent obtained in a Munsif's Court a decree against the second respondent in execution of which, some time before the end of March 1908, he attached the second respondent's one-sixth share in a house. In September 1908 while the share was under attachment, she brought a suit in a Subordinate Judge's Court against the appellant and others for partition and separate possession of her share, and in March 1909 she obtained a decree which was subject to a condition that she should pay Rs. 237 into Court. She has never paid in the money and consequently the decree has not been executed. In July 1911 the first respondent brought to sale in execution of his decree and purchased himself the specific share allotted to the second respondent by the decree in the partition suit. In February 1912 he paid Rs. 237 into the Court of the Subordinate Judge and immediately afterwards he applied to the Munsif for delivery of possession of the specific share purchased by him. The appellant objected but her objection was disallowed, and she then brought the present suit claiming a declaration that she is owner and in possession of the house and that the first respondent is not entitled to obtain possession of the house by virtue of his purchase at the execution-sale. The first Court dismissed the suit on a ground that is clearly untenable. On appeal the District Judge confirmed the dismissal of the suit, upon the ground that although the second respondent was not entitled to a specific share in the house till she paid the sum of Rs. 237 into Court, and therefore no specific share passed to the first respondent at the execution-sale, yet the latter must have acquired the right, title and interest of *Musammat* Sunder and was entitled to stand in her shoes, and having paid the required sum into Court before execution of the decree became time-barred was entitled to execute the decree obtained by her.

ROSHAN LAL v. MOOL CHAND.

The appellant is obviously not entitled to the relief claimed in the plaint, for at the date of the suit she certainly was not the sole owner of the house and the first respondent had never attempted to get possession of the whole house, but the facts are all before us and we may properly give her such relief as she may be entitled to. It appears to us that what passed to the first respondent at the execution-sale was the right, title and interest of *Musammat* Sunder to and in an undivided one-sixth share, even though it may have been wrongly described as a specific or separate share in the house, and the first respondent was entitled to go to the Munsif and get himself placed in possession of the undivided share. It is not for us to decide whether before or after obtaining possession of the share in this way the first respondent was or is entitled to go to the Court of the Subordinate Judge and execute the decree obtained by *Musammat* Sunder. That is a matter for the Subordinate Judge to decide. It is quite clear that the first respondent was not, by virtue only of his purchase, entitled to be placed by the Munsif in separate possession of that portion of the house which would have passed into the possession of *Musammat* Sunder if she had executed her decree, and we think that the appellant was and is entitled to a declaration that the first respondent is not entitled to separate possession of any specific portion of the house by virtue only of his purchase at the execution-sale. We allow the appeal and make a declaration to this effect. The parties will pay their own costs throughout.

Appeal allowed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL FROM ORDER No. 106 OF 1914.

November 25, 1914.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

ROSHAN LAL AND ANOTHER—DEFENDANTS—APPELLANTS

versus

MOOL CHAND AND OTHERS—PLAINTIFFS—RESPONDENTS.

Specific Relief Act (I of 1877), ss. 42, 52—Declaration—Injunction—Mortgagor and mortgagee, right and liability of—Mortgagor, right of, to enhance rent of tenant—Reduction of mortgage-debt—Suit for declaration and injunction, maintainability of.

H usufructuarily mortgaged certain shops to *R*. The tenants of the shops paid Rs. 30-8 per mensem as rent, which the mortgagee had to realise in lieu of interest. The mortgage-deed provided that in the event of the tenants paying less amount, the mortgagor would make good the deficiency, and in the case of enhancement he would take the excess. The mortgagor served a notice on two of the tenants to vacate the shops in their occupation and to the mortgagee to compel them to do so, on the ground that there was a man who was willing to pay Rs. 4-12 in excess of what was being paid by them. Both the tenants and the mortgagee failed to comply with the requisition. The mortgagor then sued both the tenants and the mortgagee for (1) an injunction to direct the mortgagee to enhance the rent payable by the tenants to the extent of Rs. 4-12 per mensem and (2) a declaration that in the event of his failing to do so the mortgagor would be entitled to have the excess credited in reduction of the mortgage-debt.

Held, that the suit as brought was not maintainable as there was no allegation that over a specified period of time the mortgagee had persistently and without reasonable cause been letting the shops for less than their fair letting value.

First appeal from an order of the District Judge of Aligarh.

Mr. *P. L. Banerji*, for the Appellants.

Dr. *S. C. Banerji*, for the Respondents.

JUDGMENT.—This is a first appeal from an order of remand passed under Order XLI, rule 23, of the Code of Civil Procedure. The suit was one by mortgagors against mortgagees, and for the determination of the question in issue before us it is necessary to consider carefully both the terms of the mortgage-deed and the frame of the suit. The mortgage was one of four shops, and in terms it purported to be a usufructuary mortgage in the full sense of the word, with delivery of possession. There were, however, some curious provisions, not wholly consistent with the ordinary status of a mortgagee in possession. Not only were the mortgagors liable for repairs, but there was a special stipulation with regard to the letting of the shops. The recital in the deed was that the four shops were let for a sum of Rs. 30-8 per mensem, and that the mortgagees were entitled to receive this as interest on their money. It is provided further that, in the event of the shops letting for less than this amount, the mortgagors are to make good the difference. Then comes a further provision that the right

to grant abatement of rent, or to enhance the rent, is reserved to the mortgagors, and that if the mortgagors can succeed in letting the shops so as to bring in a larger sum than Rs. 30-8 per mensem, the mortgagors are to receive the amount of such enhancement month by month.

The suit as brought was against two sets of defendants, the first set being the mortgagees and the second set being tenants occupying two of the shops. With regard to the other two shops not occupied by the defendants second party, nothing is said in the plaint. As regards these two particular shops, the plaintiffs allege that they are prepared to put in tenants who will pay a rent of Rs. 4-12 per mensem in excess of that at present being paid by the defendants second party. It is on that ground that the plaintiffs had served notices calling on the defendants second party to vacate the shops and on the defendants first party to compel them to do so; but both sets of defendants had refused to act on these notices. The relief sought is (1) an injunction to direct the defendants first party to enhance the rent payable by defendants second party to the extent of Rs. 4-12 per mensem; and (2) a declaration that, in the event of their failing to do this, the plaintiffs shall be entitled from the month of September 1911 to have the sum of Rs. 4-12 credited month by month in reduction of the mortgage-debt. The Court of first instance framed five issues, but decided only the first and the fifth. The learned Subordinate Judge was of opinion that the suit as brought was premature and not maintainable and he dismissed it accordingly. The District Judge on appeal has discussed the question solely from the point of view whether the suit could be said to be "premature," in the sense in which that expression had been used by the Court of first instance. The learned Subordinate Judge had expressed an opinion that all matters of account as between a mortgagor and his mortgagee could only be decided upon a suit for redemption of the mortgage, and he has given this as one of his reasons for holding that the suit was not maintainable. The learned District Judge has dissented from this view of the law and has accordingly set aside the decree of the first Court and remanded the case under Order XLI, rule 23, of the Civil Procedure Code, recording his opinion that the suit as brought is maintainable and not premature, though whether it can succeed or not is a point to be determined when the evidence has been taken and all issues in the case decided.

After hearing both parties, the conclusion we have come to is substantially this. The suit is not "premature" in the sense in which that expression was used by the Courts below; but we are, nevertheless, of opinion that the first Court was substantially right and that the suit is not maintainable as brought. In other words, we are of opinion that the facts stated in the plaint disclose a cause of action upon which the plaintiffs might have sought immediate relief, but their suit has been entirely misconceived and the reliefs sought by them could not possibly be granted. We have to deal with a mortgage-deed containing peculiar and somewhat anomalous provisions. It is necessary for us to put some reasonable interpretation on the provision of that deed which reserves to the mortgagors the right of enhancing the rent. We think this provision was inserted in order to protect the interests of the mortgagors in the event of any considerable rise in the letting value of the property. We do not think that it was intended that the tenants in possession should be tenants of the mortgagors, or that the mortgagors should be entitled to eject them at pleasure. In fact the plaintiffs did not put forward any such claim in the present suit. Had they desired the Court to accept any such view as this, they would have asked for the ejectment of the defendants second party, as tenants who are refusing to vacate the premises after having been duly served with notice by the proprietors. What we do think the provision in question means is that the mortgagors are entitled, in the event of any definite appreciation in the letting value of the mortgaged property, to call upon the mortgagees to secure them the benefit of that appreciation. It is obvious to us, on the terms of the deed as it stands, that if the mortgagees had in fact succeeded in letting this property so as to bring in a monthly rental of Rs. 35-4, instead of Rs. 30-8, and had endeavoured to keep the difference of Rs. 4-12 monthly in their own pockets, upon

a plea that this was a matter which could be decided only upon a suit for redemption, the mortgagors would be entitled to claim that the deed gave them a right to the present benefit and enjoyment in respect of the enhancement of rent. They could have maintained a suit for recovery of arrears of enhanced rents from the hands of the mortgagees, and they could have maintained such a suit even during the pendency of the mortgage. From this it seems to us a reasonable inference to hold that, if the plaintiffs are in a position to prove that over a specified period of time the mortgagees have persistently and without reasonable cause been letting the shops for less than their fair letting value, the latter will be liable under the terms of the deed for not securing to the mortgagors the benefit of the enhanced rent. If this view is correct, it is obvious that neither the claim for an injunction nor the claim for a declaration can be maintained. The declaration in any case is an impossible one, because it is difficult to conceive of evidence which would justify a Court in holding that, from any given period upto such indefinite period as may be marked by redemption of the mortgage, the letting value of the shops is certain to be a specified sum in excess of that at present assessed.

The only other question which we have to consider is whether, if the order of remand be maintained and the suit sent back to the Court of first instance, the plaintiffs might not obtain some relief after asking for an amendment of the plaint. We have duly considered this point, and are of opinion that an amendment, such as would satisfy the view which we have taken as to the respective rights and liabilities of the parties, would so change the entire nature of the suit that it would not be proper for any such amendment to be permitted at this stage of the suit. On the facts stated by them the plaintiffs have a continuing cause of action, in this sense that they are entitled to claim damages for any period over which they can prove that these mortgagees are persistently and without reasonable cause under-letting the mortgaged property. The only penalty which they may have to pay for the failure of this suit would be their inability to recover damages for a comparatively short period between the month of September 1911 and the date of the institution of the present suit. We are, therefore, of opinion that the learned Subordinate Judge was right in holding that this suit was not maintainable, inasmuch as it claimed reliefs not warranted by the facts upon which the cause of action was alleged to be based.

On this ground we accept this appeal, set aside the order of the lower Appellate Court and restore the decree of the Court of first instance. The defendants will get their costs throughout.

Appeal accepted.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 449 OF 1913.

November 10, 1914.

Present:—Mr. Justice Rattigan.

HAKAM SINGH AND OTHERS—DEFENDANTS —APPELLANTS

versus

INDAR—PLAINTIFF—RESPONDENT.

Registration Act (*XVI of* 1908), *s.* 17 (1) (b)—*Reversionary rights, surrender of—Adverse possession—Possession of third person with consent of widow—Mutation of names in favour of manager of widow's property—Presumption.*

An agreement whereby a reversioner surrenders his reversionary rights in immoveable property of the value of Rs 100 or upwards is compulsorily registrable, for the surrender amounts to an extinguishment of the right in immoveable property

Khairti v. *Matab*, 11 Ind. Cas. 211; 135 P. W. R. 1911; 214 P. L. R. 1911, followed.

Abdool Hoosein Mulla v. *Goolam Hoosein Ally*, 30 B. 304, 7 Bom. L. R. 742, referred to.

When a widow in possession of land agrees to mutation in favour of another person, who manages property of the widow, his possession cannot be considered adverse to the next heir from the mere fact of the mutation having taken place in his favour.

Second appeal from the decree of the Divisional Judge, Hoshiarpur, dated the 20th of January 1913, reversing that of the Subordinate Judge, second Class, Hoshiarpur, dated the 20th of April 1912, dismissing plaintiff's suit.

Bakhshi *Tek Chand*, for the Appellants.

Mr. *Nand Lal*, for the Respondent.

JUDGMENT.—The present appeal relates solely to the claim of the plaintiff Indar, and

it is contended that his suit should have been dismissed on the following grounds :—

(*a*) That he was bound by the agreement entered into by his father on the 23rd of June 1874,

(*b*) that Khema, defendant, has been in adverse possession of the land since 1882, when (upon the application of *Musammat* Chando) his name was recorded in the revenue papers as owner and in possession, and

(*c*) that he was a party to the *razinama* which was filed in the suit of 1890.

All these points have been considered by the Divisional Judge and he has decided them against the present appellant. I have heard Mr. Tek Chand at some length, but I see no reason to differ from the conclusions of the lower Appellate Court. In my opinion the agreement of the 23rd of June 1874 required registration and being unregistered, was inadmissible in evidence. Mr. Tek Chand argues that it amounted merely to a memorandum reciting past facts and that in any event there is no proof that the value of the right in immoveable property surrendered by *Musammat* Chando's reversioners was more than Rs. 100. I cannot agree upon either point. According to the agreement the reversioners surrendered any rights which they might have to succeed in respect of the property in dispute upon the death of *Musammat* Chando, and this was clearly an extinguishment of their contingent rights and not merely a recital of events which had already occurred. As regards the value of the property, both Courts are agreed that it must have been above Rs. 100 and I see no reason to take a different view. The learned Divisional Judge has a considerable experience of land in the Hoshiarpur District and his estimate may well be accepted as fairly accurate. The argument [founded upon *Abdool Hoosein Mulla* v. *Goolam Hoosein Ally*(1)] that the surrender by a reversioner of rights possessed by him under the customary rule of the Punjab does not amount to the extinguishment of the right in immoveable property, is opposed to a ruling of this Court to be found reported as *Khairti* v. *Matab* (2), an authority which, if I may venture to say so, appears to be perfectly correct and in accordance with the Customary Law of this province.

As regards the alleged adverse possession of Khema, the only facts upon which Mr. Tek Chand could rely were that *Musammat* Chando had in 1882 appeared before the revenue authorities and had mutation effected in favour of Khema who had remained in possession ever since. This entry was made at a time when Indar's father was dead and Indar himself was a minor. There is nothing to show that it was ever brought to Indar's knowledge and the fact that *Musammat* Chando had ever since the death of her husband been living with Khema and that Khema had been managing her property, would account for no action being taken with regard to the continued possession of Khema. So far as I can see, Indar had no knowledge that the possession of Khema, as it existed prior to 1882, had after that date been transformed into possession as owner. Finally as regards the *razinama* executed in 1890, it is sufficient to point out that there is no proof that Indar was a party to it. Admittedly, he was a *pro forma* defendant in that case and was in no way concerned one way or the other. The Divisional Judge is of opinion that the scratch, which purports to have been Indar's mark, was probably made in his absence, for while the other parties to the deed were examined and made statements in Court, Indar did not appear or make any such statement.

Upon a consideration of all the facts, I find that there is no ground to justify my differing from the lower Appellate Court, and I accordingly dismiss this appeal with costs.

Appeal dismissed.

(1) 30 B. 304; 7 Bom. L. R. 742.
(2) 11 Ind. Cas. 211; 135 P. W. R. 1911; 214 P. L. R. 1911.

MOHAMMAD HASHMAT ALI *v.* KANIZ FATIMA.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 228 OF 1914.
January 8, 1915.
Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerjee, KT.
MOHAMMAD HASHMAT ALI AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
KANIZ FATIMA AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 6—Contract not to claim property by inheritance in future for good consideration, legality of.

There is nothing illegal in a person, for good consideration, contracting not to claim a share in a property in the event of his becoming entitled to it on the decease of a living person.

Second appeal from the decision of the Subordinate Judge of Moradabad.

Mr. *B. E. O'Conor* and the Hon'ble Dr. *Tej Bahadur Sapru*, for the Appellants.

Nawab *Muhammad Abdul Majid* and Mr. *Hamid-ullah Khan*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for partition. The defence was that many years ago one Khurshed Jahan, through whom the plaintiffs claim, compromised certain disputes by abandoning not only all rights which were then vested in her, but also the possibility of her succeeding to shares as one of the heirs of her mother. There is no doubt that a suit was compromised by the lady upon these terms and that the compromise was acted upon, an arbitration held and the award incorporated into a decree in accordance with the award. It is contended on behalf of the appellants that under the provisions of section 6 of the Transfer of Property Act, it is impossible for any person to transfer the chance of becoming entitled to a share in the property of a living person. This no doubt is quite correct, but it seems to us that there is nothing illegal in a person, for good consideration, contracting not to claim in the event of his becoming entitled on the decease of a living person. This is in reality the substance of what happened in the year 1868. We accordingly agree with the view taken by the Court below and dismiss the appeal with costs.

Appeal dismissed.

GOPI KISHEN *v.* GOPI KISHEN.

PUNJAB CHIEF COURT.
FIRST CIVIL APPEAL No. 1524 OF 1912.
December 16, 1914.
Present:—Mr. Justice Rattigan and Mr. Justice Scott-Smith.
GOPI KISHEN—PLAINTIFF—APPELLANT
versus
GOPI KISHEN AND OTHERS, MINORS, THROUGH RAM KISHEN DAS, REPRESENTATIVES OF *Musammat* PANNA, DECEASED—DEFENDANTS—RESPONDENTS.

Hindu Law—Adoption—Widow, when can adopt to her deceased husband—Widows of two persons, whether can adopt same person—Evidence Act (I of 1872), s. 94—Document not exclusively relied upon—Admissibility of oral evidence.

A widow can adopt a son to her late husband only when she has been authorised by the latter to make the adoption, or possibly where her late husband's kinsmen assent to the adoption and there has been no express or implied prohibition by her husband.

It is not competent to the widows of two persons, even if brothers, to take the same person in adoption, either at the same time or at different times.

Where it appeared that a certain Hindu and his branch of the family left their ancestral home in Bikanir and settled down in Delhi:

Held, that succession to their property must be determined (in the absence of any proof that they were governed by some family custom) by the principles of their personal law.

Where the plaintiff put in a certain document of which the language was found to be "absolutely plain and unambiguous," but the plaintiff himself was no party to the document and did not rely upon it exclusively as establishing his title to the property and the plaint as well as the plaintiff's statement before the framing of the issues were very vague:

Held, that under the circumstances the plaintiff was not debarred from adducing oral evidence in support of his contention.

First appeal from the decree of the District Judge, Delhi, dated the 1st June 1912, dismissing plaintiff's suit.

Mr. *A. B. Broadway*, for the Appellant.

Mr. *Suraj Narain* and Lala *Balwant Rai*, for the Respondents.

JUDGMENT.—The family-tree showing the alleged relationship of the parties is given in the judgment of the District Judge. The property in suit is a house in Delhi and belonged originally to Sukh Deo Das, who died on the 31st December 1897. After his death it passed to Kishen Lal, who was either the son or the adopted son of Sukh Deo Das, and upon Kishen Lal's death in 1900, his widow, *Musammat* Ram Piari, remained in possession till her death in 1908, when *Musammat* Panna, present defendant, who is the daughter of Sukh Deo Das, took

possession. Plaintiff, Gopi Kishen, in the present suit seeks to recover possession on the ground that he is the adopted son of Fakir Chand and as such entitled to succeed to the property in preference to Sukh Deo Das' daughter, inasmuch as by the custom obtaining among *Maheshries* of the Bikanir State, *Musammat* Panna has no right to it either as a daughter of Sukh Deo Das or as a sister of the last male owner, Kishen Lal.

Defendant traversed the allegations of plaintiff, and denied that plaintiff was ever adopted by Fakir Chand.

The District Judge framed six issues, but found it necessary to discuss the second issue alone, *viz.*, whether plaintiff had been validly adopted by Fakir Chand. Upon this issue he found against plaintiff and as the latter's claims were based solely upon his alleged adoption, the learned Judge dismissed the suit with costs.

Plaintiff has appealed to this Court, and we have heard all that his learned Counsel had to urge in support of his client's alleged adoption, but we did not consider it necessary to call upon the respondents to reply, as we were satisfied that the finding of the District Judge was correct.

Mr. Broadway did not contend that Gopi Kishen had any right to the house in suit otherwise than as the adopted son of Fakir Chand, and his argument was confined to establishing his client's *status* as such adopted son. His contention was two-fold. In the first place, he maintained that plaintiff had been actually adopted by Fakir Chand himself in his lifetime, and in the second place, he urged that if there was no sufficient proof of this adoption by Fakir Chand, plaintiff had at all events been adopted by Fakir Chand's widow, *Musammat* Kakji, and that such adoption was valid by the custom of the family and had been recognized as such by the Courts at Bikahir where the family had their ancestral home.

As regards the first contention, the learned Counsel relied upon the evidence of certain witnesses called by the plaintiff. The learned District Judge in his judgment held that this evidence was inadmissible, as plaintiff relied upon a written document (Exhibit page 2) of which the language "was absolutely plain and unambiguous" (Section 94 of the Indian Evidence Act). But plaintiff himself was no party to the document in question, nor did he rely upon it exclusively as establishing his title to the property. The plaint is exceedingly vague and in point of fact makes no mention of any adoption, though in the family-tree which is therein set out, plaintiff is shown as the son of Fakir Chand. He was examined before issues were framed, but his statements were again exceedingly vague (see page 22 of the paper-book) and he merely stated that he was "adopted", but that he himself knew nothing about the adoption as he was an infant at the time. In these circumstances, we do not think the evidence adduced by him in support of his first contention was inadmissible. At the same time we have no hesitation in saying that it certainly does not prove that Fakir Chand adopted him. On the contrary, it is quite clear from the statements made by his own witnesses, Dhan Sukh Das (page 27, Answer 3), *Musammat* Basanti (page 39, Answer 7), Ram Lal (page 54, line 24), that the alleged adoption was effected, if at all, not by Fakir Chand but by his widow *Musammat* Kakji. Hem Raj (P. W. No. 1), no doubt, says that Fakir Chand adopted plaintiff, but he had to admit subsequently that his knowledge was derived from hearsay. But the strongest piece of evidence against this contention consists of the *khulanama* executed by *Musammats* Kakji and Chandni on the 11th *Magh Sudi, Sambat* 1949 (page 4). According to this document, it was these 2 ladies who adopted Gopi Kishen and the terms in which the document is written, and especially the reference to Gopi Kishen as the son of Ragnath Das (his natural father), preclude the idea that the ladies were merely acknowledging afresh an adoption that had already been effected by Fakir Chand. It is thus abundantly proved that no adoption was effected by Fakir Chand himself.

The next question is whether plaintiff was validly adopted as son of Fakir Chand by the latter's widow. It is a well-established principle of Hindu Law that a widow can adopt a son to her late husband only in those cases when she has been authorised by the latter to make the adoption, or, possibly, where her late husband's kinsmen assent to the adoption, and there has been

no express or implied prohibition by her husband. In the present case there is no evidence to support the argument that the adoption was made with the authority of Fakir Chand, though apparently at one time Fakir Chand did broach the subject to plaintiff's natural father, Ragnath Das. The latter is said to have declined the offer, and Fakir Chand appears to have done nothing further in the matter.

According to plaintiff's witness, Ram Lal, the adoption was not effected until some 17 or 18 years after Fakir Chand's death, and though this may not be strictly correct it is conceded that it did not take place for many years after that event. Furthermore, there is no mention whatever in the *khulanama* (which was obviously drawn up with great care) of any authority given by Fakir Chand, an omission which would be very remarkable if the widow was merely carrying out her deceased husband's wishes. It must, therefore, be held that the act of *Musammat* Kakji was one for which she had no authority from her late husband and it is not alleged that the adoption was effected with the assent of Fakir Chand's kinsmen. Mr. Broadway laid stress upon the fact that the adoption has been recognised as valid by the Bikanir Courts and in this connection has referred us to a copy of the judgment of *Munshi* Raghbir Singh, printed at pages 13-17 of the paper-book. We may assume that the adoption has been so recognised, but obviously this fact cannot prejudicially affect defendant who was no party to that case. Further, it is in evidence that the Bikanir State has its own peculiar laws and rules upon such matters, and these laws and rules can have no application when we have to decide a question to succession to house property situate in Delhi and lately the property of a Hindu of the *Maheshri* caste. Sukh Deo Das and his branch of the family appear to have left their ancestral home in Bikanir and to have settled down in Delhi, and succession to their property must clearly be determined (in the absence of any proof that they were governed by some family custom) by the principles of their personal law. So considered, the adoption by *Musammat* Kakji must be held invalid, as it is not shown that she had any authority either from Fakir Chand or his kinsmen to effect it.

Quite apart from that objection, the adoption is open to the equally fatal objection that it purports to have been effected by the widows of two men, Fakir Chand and Amar Chand, to both of whom plaintiff was thus made an adopted son and heir. If it is not possible for two persons, even if brothers, to take the same person in adoption, either at the same time or at different times (Trevelyan's Hindu Family Law, page 149), *a fortiori*, it would not be competent to their respective widows to make such an adoption.

In our opinion plaintiff's suit has been rightly dismissed and we, therefore, reject this appeal with costs.

Appeal rejected.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 533 OF 1913.

November 12, 1914.

Present:—Mr. Justice Rattigan.

KALU—PLAINTIFF—PETITIONER

versus

SOWARIA—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 160—Application to re-admit petition for review—Extension of time—Illness of co-petitioner whether sufficient ground—Absence of co-petitioners and their Pleader.

The illness of one of the petitioners for restoration of a petition for review is no ground for extending the period provided by Article 160 of Schedule I of the Limitation Act, 1908, specially when the absence of the petitioner's Counsel and of the other co-petitioner is not explained.

Petition, under Order XLVII, rule 1, of the Civil Procedure Code, for review of the order of the Judge of the Chief Court of the Punjab, dated the 4th June 1913, reported in 2 Ind. Cas. 567.

Malak *Muhammd Hussain*, for the Petitioner.

Lala *Hukam Chand*, for the Respondent.

JUDGMENT.—The application to re-admit the petition for review is clearly barred by Article 160 of the Indian Limitation Act and I can find no ground for extending (even if I had the power to do so) the period prescribed by law. Petitioner may have been ill, though we have only his

own statement in proof of that allegation, but his illness does not explain why neither his Pleader nor his brother, Fakir, appeared on the 12th October. The petition is accordingly rejected with costs.

Petition rejected.

CALCUTTA HIGH COURT.
CIVIL RULE No. 798 OF 1914.
January 13, 1915.
Present:—Mr. Justice Holmwood and Mr. Justice Mullick.
KRISTO KUMAR DAS—PETITIONER
versus
GIRISH CHANDRA PODDAR—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXII, r. 10, and O. I, r 10 (2)—Parties, when and how made—Evidence recorded in another proceeding, Judge, whether entitled to decide a question on—Transfer, admission of, by defendant, effect of.

A person can continue a suit as a defendant under Order XXII, rule 10, which is not restricted to plaintiffs and their representatives only.

Moti Ram v. *Kundan Lal*, 22 A. 380, A. W. N. (1900) 125, referred to.

A Judge has no jurisdiction to decide a matter on evidence recorded in another proceeding to which the applicant was not a party.

An admission by a defendant of a transfer of the property in suit is sufficient to entitle the transferee to be made a party under Order XXII, rule 10, as well as under Order I, rule 10 (2), Civil Procedure Code.

Ahmedbhoy Habibhoy v *Vulleebhoy Cassumbhoy*, 8 B. 328, followed

Rule against an order of the District Judge of Dacca, dated the 8th June 1914, dismissing an appeal preferred against that of the Sub-Judge of Dacca, dated the 1st April 1914.

Dr. *Sarat Chandra Basak* and Babu *Bepin Chandra Bose*, for the Petitioner.

Babus *Jogesh Chandra Roy* and *Brojendra Kumar Chakrabarty*, for the Opposite Party.

JUDGMENT.—This was a Rule to show cause why an order of the District Judge refusing to reverse the order of the Subordinate Judge in appeal should not be set aside. That order was that the applicant could not be added as a party defendant on the ground of his having purchased the property in dispute subsequent to the institution of the suit from the defendant No. 2.

It appears that before the Subordinate Judge both plaintiff and defendant No. 2 objected, on the ground that the alleged transfer was a fictitious and paper transaction without consideration.

The learned Subordinate Judge holding that the cases cited before him, which have also been cited before us in support of the applicant's contention, only applied where the transfer is admitted and also that the applicant would not be affected by any decree passed against the defendant No. 2, rejected the application.

On appeal the learned Judge, while not satisfied that an appeal lay under Order XXII, rule 10, of the Civil Procedure Code and holding that no appeal lay under Order I, rule 10 (2), held on the merits that as in certain interlocutory proceedings, to which the applicant was not a party but in which he gave evidence in support of his vendor, the question of *bona fide* sale had been fought out and as the High Court had set aside the decision on that matter on a question of jurisdiction and not on a different view of the evidence and had refused costs and as the suit was six years old, he was not inclined, in the exercise of his discretion, to add a party of his own motion who, as far as he could see on evidence, has no *bona fide* interest.

Before us it is contended, *first*, that a person can continue a suit as a defendant under Order XXII, rule 10, and that that rule does not only apply to a plaintiff or a person seeking to represent a plaintiff.

Secondly, that the Judge had no jurisdiction to decide the matter on evidence taken in an interlocutory proceeding to which the applicant was no party, and *thirdly*, that the case was hung up through a probate dispute in plaintiff's family and never came on for hearing till the 20th March 1914, on which date the applicant put in his petition to be added. As regards the Subordinate Judge's reason for refusing the application the case of *Rajaranee Dassee* v. *Debendra Nath Shaw* (1), where Sale, J., following an unreported order of Jenkins, J., directed that a disputed transferee should be added without prejudice, no inquiry being made into the *bona fides* of his claim, is cited.

(1) 8 C. W. N. 754.

As to the first contention, we are not prepared to say that Order XXII, rule 10, can only apply to plaintiffs and their representatives. Nor has any authority been put before us to show that it does. The case of *Moti Ram* v. *Kundan Lal* (2) shows that an admitted transferee can appeal against the original decree if he was not added as a party in the suit, and this implies that he had a right to be made a party defendant.

In the case in *Rajaranee Dassee* v. *Debendra Nath Shaw* (1), the application was under section 372 of the Civil Procedure Code corresponding to Order XXII, rule 10, and no doubt was expressed by the Court or urged at the Bar that such an application would lie on behalf of a person seeking to continue the suit as a party defendant. The only question there was whether the transfer must be admitted, before the assignee could come in. As regards the second point we are of opinion that the learned Judge had no jurisdiction to decide the question on evidence recorded in another proceeding to which the applicant was not a party.

As regards the third point it certainly appears that the case did not come before the Court for hearing till March 1914 and is not really a case of six years standing.

As regards the grounds stated by the Subordinate Judge he is clearly wrong in saying that the applicant's interests will not be affected. If the doctrine of *lis pendens* is applied, the decree will bind him and although the defendant No. 2 now denies the transfer, it was clearly admitted by him when his property was attached in May 1913 and he called in the applicant to support the case of the transfer.

It, therefore, appears to us that his denial at this late stage of the case is as Sale, J., pointed out in *Rajaranee Dassee* v. *Debendra Nath Shaw* (1) of little value and the transfer must be taken as an admitted transfer as far as the defendant No. 2 is concerned.

The case of *Ahmedbhoy Hubibhoy* v. *Vulleebhoy Cassumbhoy* (3) is clear authority for the proposition that an admission by the defendant of the transfer is sufficient to entitle the transferee to be made a party under section 372 (*i. e.* Order XXII, rule 10) as well as under section 32, *i. e.*, Order I, rule 10 (2), and the same view has been taken by the Allahadad Court in *Durga Prasad, In the matter of the Petition of*(4), and although in the case of *Rabbaba Khanum* v. *Noorjehan Begum* (5), the case was only under section 32, the Judges held that it was erroneous to hold that no person should be added as a defendant unless the plaintiff recognises some right in the party who seeks to be added to share in the thing in respect of which the interpleader suit is brought.

They, however, held that an erroneous order under section 32 was not an error going to the jurisdiction which could be interfered with under section 622 of the Civil Procedure Code.

In this case the learned Judge in appeal has refused jurisdiction under Order XXII, rule 10, and we are not concerned with his findings under Order I, rule 10 (2), although he has erroneously decided this question on evidence recorded in a proceeding to which the applicant was not a party. On his finding that the defendant No. 2 admitted the transfer in May 1913, we are bound to hold that the applicant is entitled to be added as a defendant.

The Rule is, therefore, made absolute, the order of the District Judge is set aside and the applicant will be added as a party defendant under Order XXII, rule 10, and the case will proceed from the point it had reached on the 20th March 1914. The applicant is entitled to his costs from the respondent, two gold *mohurs*.

Rule made absolute.

(2) 22 A. 380, A. W. N. (1900) 125
(3) 8 B. 323.
(4) 22 A. 231; A. W. N. (1899) 79.
(5) 13 C. 90.

MG. AUNG GYI v. MA THEIN MYA.

LOWER BURMA CHIEF COURT.

CIVIL APPLICATION No. 76 OF 1912.

January 25, 1915.

Present:—Sir Charles Fox, KT., Chief Judge, and Mr. Justice Hartnoll.

MG. AUNG GYI AND OTHERS—APPLICANTS

versus

MA THEIN MYA AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 148, O. XXXIV, rr. 7 (1) (d), 8 (2)—Mortgage—Simple—Court's power to enlarge time of paying mortgage amount.

In the case of a simple mortgage, an order debarring all right to redeem on a fixed date should not be passed in view of Order XXXIV, rule 7 (1) *(d)* and rule 8 (2), Civil Procedure Code, 1908. Section 148 of the Civil Procedure Code, 1908, gives a Court power to enlarge the period of redemption if it thinks fit.

Mr. *N. N. Burjorjee*, for the Applicants.

Mr. *Villa*, for the Respondents.

JUDGMENT.

HARTNOLL, J.—The applicants brought a suit for redemption of two mortgages and on March 30th 1912 obtained a decree for redemption, on payment into Court of Rs. 835 and interest on or before 30th April 1912. It was ordered that if such payment was not made by such date the applicants should be debarred from all right to redeem. Payment was made within time. This is not disputed. The defendant appealed and on the 24th February 1914 this Court modified the decree of the District Court by ordering the applicants to pay in a further sum of Rs. 1,420 with interest by the 24th May 1914 It was also ordered that if such payment was not made by the 24th May 1914, applicants should be debarred from all rights to redeem. The further sum was not paid in by the date fixed, though the sum said to be due on the appellate decree, Rs. 1,823-14-6, was paid in on the 24th July 1914.

This is an application to extend the time for payment.

On the 26th June the original defendant's representatives applied for an order to the District Court that the applicants be debarred from all rights to redeem and that they, the representaives, be placed in possession, and an order to that effect was passed on the 16th November 1914. Mg. Aung Gyi in support of this application says that he did not understand that the further sum ordered to be paid by the Appellate Court had to be paid by the 23rd May 1914 and that his illness caused further delay in paying it in. The plea as to illness is not substantiated. The reasons given by Mg. Aung Gyi are not, in my opinion, sufficient to condone the delay.

But it was urged at the hearing of the application:

(1) that an order debarring the applicants from all right to redeem should not have been passed at all, as the mortgages were simple mortgages; and

(2) that in Order XXXIV of the Civil Procedure Code six months are always allowed within which to pay mortgage monies due.

As regards the first point, from a perusal of the proceedings the mortgages do appear to have been simple ones. That being so, an order debarring all right to redeem on a fixed date should not have been passed: Order XXXIV, rule 7 (1) (*d*), and rule 8 (2).

The second point taken seems also to be correct.

Reliance was also placed on the proviso ending Order XXXIV, rule 8; but such proviso seems only to refer to the fourth paragraph of rule 8. *But* section 148 of the Code itself gives this Court time to enlarge the period of redemption if it thinks fit.

Considering the two main points raised and which I have set out above, I think that we should be exercising a sound discretion if we enlarged the time fixed for redemption in this case, but I would give interest on Rs. 1,420 from the 24th May 1914 at Rs. 6 per cent per annum.

I would, therefore, set aside the order of the District Court of the 16th November last and enlarge the time of payment up to the 31st March next, on condition that in addition to the sum further ordered to be paid by the Appellate Court an extra sum of interest at 6 per cent. per annum be paid on Rs. 1,420, the extra sum to be calculated from the 24th May last to the 31st March next. If all sums due in accordance with this order and that of the Appellate Court are not paid by the 31st March next, then, as it has not been appealed against, that portion of the decree of the Appellate Court debarring the applicants from all right to redeem will be of full force and virtue. As regards costs I think the applicants should

pay respondents' costs of this application, which I would fix at three gold *mohurs*.

Fox, C. J.—I concur.

Application allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 615 OF 1913.

December 4, 1914.

Present:—Mr. Justice Tudball.

Musammat NIADRI—DEFENDANT—APPELLANT

versus

KURA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Custom—Inheritance—Exclusion of daughter from inheritance—Balayan Jats *in Meerut Division.*

There is no custom excluding a daughter from inheritance among *Balayan Jats* in Meerut Division.

Second appeal from the decision of the Additional Judge of Meerut, dated the 19th April 1913.

The Hon'ble Dr. *Tej Bahadur Sapru* (with him Mr. *Durga Charan Banerjee*), for the Appellant.

Mr. *Sital Prasad Ghosh*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for possession of the estate of one Sher Singh, *Jat*.

The plaintiffs-respondents are the nearest male agnates of Sher Singh. The defendant is the daughter of Sher Singh. The plaintiffs pleaded a special custom in their family, village, the neighbourhood and the caste, under which a daughter is excluded from inheritance.

The Court of first instance, on the evidence, held that the custom alleged had not been established.

The lower Appellate Court held that the evidence was sufficient to prove the existence of the custom.

The only point before me is whether taking the evidence as accepted by the Court below, it is sufficient in law to establish an immemorial, invariable custom.

There is no plea that the parties are not Hindus. The custom alleged is one at variance with the ordinary rule of Hindu Law and is both harsh and unnatural, and it lay on the plaintiffs to prove it by clear and cogent evidence.

The parties are *Balayan Jats* and the story is that this class of *Jats* inhabit 84 villages in the Meerut Division, that they came from Malanai in the Delhi District and are, therefore, *Punjabi Jats* as having come from the Punjab.

The plaintiffs called in evidence some 18 witnesses who mentioned 36 instances (some five or six from this very village) of the custom having been followed. These were not supported by any documentary evidence relating to these instances.

Fifteen *Wajib-ul-arzis* were produced. In only one of these was the daughter expressly excluded in terms, though the inference to be drawn from the others is that the daughter was to be excluded.

Some six judgments were quoted in cases in which the custom was upheld, one at least being connected with this very village.

On the other hand the defendant also called witnesses who quoted 24 instances (some 4 or 5 from this very village) in which the daughter had inherited her father's estate, one being in the very family of the parties. *Khewats* were produced in support of this oral evidence to show that the instances were genuine, and not imaginery.

Several judgments have also been quoted in cases in which it was held that the custom did not exist, the latest being that in First Appeal No. 173 of 1912 [*Musammat Bhagwani* v. *Khushi Ram* (1), to which I myself was a party] decided on 16th June 1914.

In regard to the claim that the plaintiffs are *Punjabi Jats* (among whom the custom prevails) in that they came from the Delhi Division, I need only point out that prior to the Mutiny Record of 1857 the Delhi Division had never at any time formed part of the Punjab. Till then under the British Rule it was part of these Provinces and as far as can be discovered from historical records, it was not at any time included in the Punjab. What is now called the Punjab Province includes a considerable area outside the Punjab proper. *Jats* who lived in the Delhi District prior to the Mutiny were not and could not have been *Punjabi Jats* at that time. The *Balayan Jats* settled in the Meerut Division long long prior to the Mutiny. The claim to be called *Punjabi*

(1) 24 Ind. Cas. 982

Jats has no real basis in history. The lower Court started with a presumption that being *Punjabi Jats*, the *Balayan Jats* brought with them their own customs from the Punjab, but they came not from the Punjab. Taking the evidence accepted by the lower Court the case is

(1) that 36 instances one way and 24 the other way have been established;

(2) that there are decisions in cases both ways;

(3) that 15 *Wajib-ul-arzs* of the year 1863 contain entries which support the plaintiffs and at least go to show that even if there was no universal custom, at least there was a strong feeling among the *Jats* of this Province, in the 15 villages, that daughters should not be allowed to inherit.

But it must be proved that the custom is at least both immemorial and invariable before the Courts can uphold it, as it is at variance with the rule of Hindu Law. It is impossible to say in the state of the evidence that either of these two necessary qualifications has been proved, when we find that in so large a proportion of instances the daughters have actually inherited within the memory of man.

The evidence taken, as it stands, is clearly insufficient to establish this custom.

I allow the appeal, set aside the decree of the Court below and restore that of the Court of first instance. The appellant will have her costs in both this and the lower Appellate Court, including in this Court-fees on the higher scale.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 615 OF 1913.

October 23, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

MAHALINGA SUNDARA THEVAN—DEFENDANT—APPELLANT

versus

KRISHNA THEVAN, MINOR, BY MOTHER AND GUARDIAN, IRULAYI MARATHI, AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—"Heard and finally decided"—Compromise—Relief claimed in plaint not dealt with in compromise—Fresh suit, whether barred—Cause of action—Estoppel by judgment.

When a matter was not "heard and finally decided" in a suit but a decree was passed on the basis of a compromise agreement, the reliefs claimed in the plaint but not included in such a decree, should not be deemed to have been refused so far as to bar a fresh suit for the said reliefs, if the cause of action in the succeeding suit had not arisen on the date of presentation of the plaint in the prior suit.

Minalal Shadiram v. *Kharsetji, Kharsetji* v. *Minalal Shadiram*, 30 B. 395; 8 Bom. L. R. 296; *Rajah Kumara Venkata Perumal Raja Bahadur* v. *Thatha Ramasamy Chetty*, 9 Ind. Cas. 875; 35 M. 75 at p. 83; (1911) 1 M. W. N. 290, 9 M. L. T. 487; 21 M. L. J. 709, followed.

There can be an estoppel by judgment in a consent decree only when the question raised by the subsequent suit was present to the minds of the parties and was actually dealt with by the consent decree. In all these cases the question is whether the parties did intend that the question at issue should be finally settled between the parties by the consent decree, and did the consent decree so actually settle that question.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Ramnad at Madura, in Appeal Suit No. 958 of 1911, preferred against that of the District Munsif of Manamadura, in Original Suit No. 623 of 1910.

Mr. *N. H. Vaidyanatha Aiyar*, for Mr. *C. V. Ananthakrishna Aiyar*, for the Appellant.

Mr. *C. S. Venkatachariar*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—The contention that under the compromise arrangement in the former suit, the 2nd plaintiff's vendor transferred his right as owner to the defendant cannot be upheld. The said compromise petition merely allowed the defendant to redeem the 2nd plaintiff's vendor (first mortgagee of both items Nos. 1 and 2) and did not transfer to the defendant the rights obtained by the 1st mortgagee as the purchaser of the mortgagor's right, a purchase not binding on the defendant so far as his right to redeem the 1st mortgage was concerned. The decree also does not, in terms, convey the 1st mortgagee's interest *as such owner of the equity of redemption* to the defendant.

It is, however, argued that the 1st mortgagee ought to have insisted on the relief of the redemption of item No. 2 from the defendant being given to him in the former suit, that that relief should, therefore, be

deemed to have been refused to him under Explanation 5 to section 11 of the Civil Procedure Code and that by such refusal he and his vendee, the second plaintiff (who stands in his shoes), are barred from bringing the present suit for that relief.

This ingenious contention as *res judicata* was not set up in the written statement in the first suit, did not form the subject of any issue in the present suit and was not raised in the grounds of appeal to the lower Appellate Court. Nor do I think that any of the grounds in the memorandum of second appeal raises the question. Even if the defendant is entitled to argue it before us, I am not satisfied that when a matter was not "heard and finally decided" (see section 11, Civil Procedure Code) in a suit but a decree was passed on the basis of a compromise agreement, the reliefs claimed in the plaint but not included in such a decree should be deemed to have been refused so far as to bar a fresh suit for the said reliefs, if the cause of action in the succeeding suit had not arisen on the date of the presentation of the plaint in the prior suit. In *Minalal Shadiram* v. *Kharsetji, Karsetji* v. *Minalal Shadiram* (1), it is said on page 408: "The lower Court was also wrong in holding that the defendant is barred by section 13 of the Civil Procedure Code" (present section 11) "from raising the questions of fraud or wager. . . . . In Suit No. 105 of 1897 *there was no hearing and disposal of any matter in issue and the provisions of section 13 have, therefore, no application.* It has, however, been argued that the consent decree . . . . . operates as an estoppel by judgment. . . . . *but when the facts of the case and the wording of the Purshis,*" (that is, the application for the passing of the consent decree) "above set out, *are borne in mind, the reason and the scope of the consent decree at once become apparent.*"

The above case is quoted with approval in the judgment of this Court in *Rajah Kumara Venkata Perumal Raja Bahadur* v. *Thatha Ramasamy Chetty* (2), and the learned Judges proceed to say: "What then is the test for determining whether there is an estoppel in any particular case in consequence of a decree passed on a compromise? In our opinion the answer must depend on the answer to the question 'Did the parties decide for themselves the particular matter in dispute by the compromise?' and was the matter expressly embodied in the decree of the Court passed on the compromise or was it necessarily involved in, or was it the basis of, what was embodied in the decree?' For settling this point it would be legitimate, and sometimes necessary, to look into the pleadings between the parties in the suit terminated by the compromise decree." Then at pages 85 and 86, the learned Judges say: "What the Court has to do in determining with respect to what matter each of the parties to a compromise decree is estopped, is to find out what it was that the parties *agreed to* in the previous action; and for this purpose it would not be enough merely to see what was the relief granted in the decree of the Court, but it would be necessary also to examine what was the basis on which it was granted." The present suit is not for the same relief as in the former suit (which was brought *for the redemption of item No. 2 alone* on payment of what was due to the defendant on the *second mortgage of item No. 2*) but is brought for *redemption of both items Nos. 1 and 2 on payment of what was due to the defendant on the 1st mortgage of items Nos. 1 and 2 discharged by him in pursuance of the compromise decree in the first suit and of what was due to him on the 2nd mortgage of item No. 2.* "The basis on which" the former decree "was granted" was clearly the following: that if the defendant pays up to the 1st mortgagee (the plaintiff in that case) the mortgage amount, he (the defendant) shall become the mortgagee of items Nos. 1 and 2 for that amount so paid, while remaining the 2nd morgagee of item No. 2 alone for the 2nd mortgage amount. His own liability to be redeemed as a person holding rights as mortgagee in those two capacities after he redeems the first mortgage, was not intended to be finally decided and was not decided by the compromise decree in the former suit. It was only in case he did not pay up the 1st mortgage amount that his liability to allow the redemption of item No. 2 alone

(1) 30 B. 395; 8 Bom. L. R. 296.
(2) 9 Ind. Cas. 875; 35 M. 75 at p. 83; (1911) 1 M. W. N. 200; 9 M. L. T. 487; 21 M. L. J. 709.

was intended to be decided, but as he did pay up the 1st mortgage, his said contingent liability under the former decree never became an actual enforceable liability under that decree. To borrow the language of Abdur Rahim and Krishnasawmy Iyer, JJ., in *Hukdar Syed Bacha Saheb* v. *Karuppana Pillay* (3), "Does what is decided" in the former suit "involve a decision" as to the plaintiff's right after the defendant redeemed the first mortgage? No such decision negativing the plaintiff's rights as under his Court auction purchase of the mortgagor's right is involved in the decree passed on this compromise agreement.

There is, therefore, no force in the contention that the present suit is barred on account of estoppel by the judgment or the decree in the former suit.

The second appeal fails and is dismissed with costs.

NAPIER, J.—I entirely concur. I agree with my learned brother that we should follow *Rajah Kumara Venkata Perumal Raja Bahadur* v. *Thatha Ramasamy Chetty* (2) as correctly laying down the principles on which compromise decrees should be interpreted.

Appeal dismissed.

(3) 8 Ind. Cas. 261; (1911) 1 M. W. N. 69 at p. 70; 8 M. L. T. 432, 21 M. L. J. 449.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 885 OF 1910.

February 13, 1915.

Present:—Mr. Justice Shah Din and Mr. Justice Rossignol.

Musammat RUKIA AND OTHERS—DEFENDANTS—APPELLANTS

versus

DUNGAR MAL AND OTHERS—PLAINTIFFS AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Mortgagee in possession—Mortgage to terminate ipso facto on a certain date—Mutation of redemption—Suit for possession by mortgagee—Condition making mortgagor liable for rent due from village tenants, meaning of.

A mortgage-deed executed on the 25th February 1895, contained an express stipulation to the effect that the mortgagees should remain in possession up to the 15th July 1907, on which date the mortgage was to determine, without the payment of any further sum, and that the mortgagors should be liable for any amount of rent left due to the mortgagees from the village tenants. In 1908 the Revenue Tahsildar at the instance of the mortgagors ordered a mutation of redemption. On the 7th June 1909, the plaintiffs-mortgagees instituted a suit for possession of the mortgaged area, on the allegation that no redemption could be made until the sum due by the mortgagors on account of arrears of rent had been made good to them

Held, (1) that the mortgage-deed did not contemplate that rent due from the mortgagors as tenants should be secured upon the mortgaged property and that as a large portion of the sum claimed by the plaintiffs was made up of rent alleged to be due not by the village tenants, but by the mortgagors themselves in their capacity of tenants of the mortgagees, the plaintiffs could not get a decree for possession on the strength of the stipulation in the mortgage-deed;

(2) that the accounts put in by the plaintiffs had not been proved and the suit must, therefore, be dismissed.

First appeal from the decree of the District Judge, Gurgaon, dated the 27th May 1910, decreeing the claim.

The Hon'ble Mr. *Muhammad Shafi*, K. B., for the Appellants.

Mr. *Manohar Lal*, for the Respondents.

JUDGMENT.—This case arose from a mortgage of the land in dispute executed on the 25th February 1895. The mortgage debt was Rs. 5,500 and it was stipulated that the mortgagees should remain in possession up to the 15th July 1907, on which date the mortgage was to determine without the payment of any further sum. The immediate cause of the litigation occurred in 1908 when the Revenue Tahsildar, at the instance of the mortgagors, came to the conclusion that the mortgage on the land had determined by the lapse of time stipulated and ordered a mutation of redemption. More than a year later, on the 7th June 1909, the plaintiffs-mortgagees instituted this suit for possession of the mortgaged area, on the allegation that Rs. 4,616-1 were still due by mortgagors on account of arrears of rent and that no redemption could be made until that sum had been made good to them. The District Judge has given the plaintiffs-mortgagees a decree for possession until Rs. 4,616-1 have been paid to them, and this appeal is from that decree.

Before us the appellants' Counsel has argued that the conditions of the mortgage were inequitable and unconscionable, that as a fact there were no arrears of rent due to the mortgagees, that the plaintiffs have not

proved that the amount claimed by them was in fact due, and that, even if it was due, they were not for that reason entitled to retain possession of the land until that sum was paid. Finally, it is argued that the conditions of the mortgage constituted a clog on the equity of redemption and cannot legally be enforced. We have considered the conditions of the mortgage-deed very carefully and have come to the conclusion that they were not unconscionable or oppressive. It would appear that even before this mortgage-deed of 1895 was executed the land was already in the possession of the plaintiffs as mortgagees under an earlier mortgage-bond. Under the mortgage-bond now in dispute the mortgagees became liable for the Government revenue and the only liability undertaken by the mortgagors was in respect of any land that might become *uftadah* and in respect of defaults in payment of rent made by tenants of the village. As the mortgagees dwelt in a village other than that in which the mortgaged property was situate and as the mortgagors reside in the village where the land is situate, it was only natural that the mortgagees should have some guarantee that the mortgagors would aid them in securing a proper return on their investment. Clause 3 of the mortgage-deed runs as follows:—"If any amount of rent is left due to the mortgagees from the village tenants on account of the latter's being poor or by reason of their deserting the land, we, all the mortgagors, shall be liable therefor." Now it appears that a large portion of this sum of Rs. 4,616-1 in respect of which the plaintiffs now sue for possession, is made up of rent alleged to be due not by the village tenants, but by the mortgagors themselves in their capacity of tenants of the mortgagees. We do not consider that it was contemplated by the mortgage-deed that rent due from the mortgagors as tenants should be secured upon the mortgaged property. No doubt the mortgagees at that time considered that they could always recover their rent from the mortgagors by the usual rent suit in a Revenue Court. The position as regards the tenants of the village was, however, different, because village tenants have little or no property of their own and it was for this reason, we take it, that the mortgagors became, as it were, surety for the payment of the rent by the village tenants. Viewed in this light the stipulation in the mortgage-deed did not warrant the grant to the plaintiffs of a decree for possession until arrears due by the mortgagors themselves have been paid, although such a decree might be granted until such time as the mortgagors shall pay the arrears due by the village tenants.

It remains, then, to consider what sums are still due as arrears of rent (1) by the mortgagors themselves and (2) by the village tenants. In order to prove this point the plaintiffs rely upon two sets of evidence: (1) oral evidence that discussion took place between the parties and that the balance now in suit was admitted by the defendants to be due; and (2) *bahis* purporting to have been kept by the plaintiffs. To the oral evidence we are unable to attach any importance. If, as is alleged, an agreement between the parties had really been arrived at, we should expect some admission reduced to writing. *Secondly*, it is remarkable that the admission is not referred to in the plaint. *Thirdly*, though the parties are said to have reached this agreement in June 1907, no mention whatever was made of it during the mutation proceedings in 1908. As for the *bahis*, it is noteworthy that they were put in only at a late stage of the suit, *viz.*, on the 16th or 17th of December 1909, and that we can find on the record no evidence that these *bahis* were formally proved. The *bahis* were produced by one of the original mortgagees who, at the time of the suit, had divested himself of the share of the mortgage and was no longer concerned with it. Nevertheless he produced the *bahis* on which the plaintiffs' case is based, but he did not depose that he had written the *bahis*; and beyond certain loose statements of the mortgagees' agent, Puran, that the *bahis* had been written up from his dictation by one or other of the mortgagees, there is no proof at all who wrote these *bahis*. The *bahis* themselves do not constitute a regular system of accounts and it is worthy of remark that though the mortgagees have separate *bahis* of their own, the income from this mortgage, which is alleged to have been divided amongst them, finds no place in their own private *bahis*. It is, therefore, impossible to check the entries in the *bahis* produced in this case by comparison with the entries in the private *bahis* of the mortgagees. We

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must, therefore, come to the conclusion that the accounts put in by the plaintiffs-mortgagees have not been proved, and this is sufficient to decide the appeal. We would, however, further note that the accounts produced show that some of the items of arrears are of considerable value and we think it peculiar that the plaintiffs neither brought a suit against the defaulters for the recovery of these arrears of rent nor even sent notice to them to demand payment: and we regard this omission as all the more peculiar in that we find that the mortgagees' agent on at least two occasions did recover rent from defaulters by a suit in the Revenue Courts.

In conclusion we are of opinion that in all probability some rent was due to the mortgagees, but in view of the fact that the *bahis* have not been formally proved by anybody and particularly that none of the plaintiffs has gone into the witness-box to support the accounts produced by statement on oath, we are forced to hold that the plaintiffs have failed to prove the exact sum which is outstanding. On these grounds we accept the appeal and dismiss the suit, but in the circumstances we direct that parties bear their own costs throughout.

Appeal accepted.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL No. 431 OF 1912.
February 1, 1915.
Present:—Mr. Justice Tudball and Mr. Justice Rafique.
Musammat AMINA BIBI AND OTHERS—DEFENDANTS—APPELLANTS
versus
Musammat NAJMUNNISSA BIBI—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 62, applicability of—Money had and received—Suit by some heirs on mortgage—Decree in favour of them and property purchased by them—Other heir, right of, to realize his share—Limitation.

M, a Muhammadan, died leaving his widow, *N*, and other heirs. The other heirs brought a suit on a mortgage in favour of the deceased making *N* a defendant. They obtained a decree and in its execution purchased the properties themselves:

Held, that the suit by *N* against those heirs who had recovered the mortgage-debt to realize her share of the debt was governed by Article 62 of the Limitation Act, as the suit was one for money received and had by the defendant for the plaintiff's use.

Umeidanat Ali Khan v. *Wilayat Ali Khan*, 19 A. 169, A. W. N. (1897) 34; *Sithamma* v. *Narayana*, 12 M. 487, *Mahomed Riasat Ali* v. *Hasin Bann*, 21 C. 157, 20 I. A. 155, *Mahomed Wahib* v. *Mahomed Ameer*, 32 C. 527, 1 C. L. J. 167, referred to

First appeal from the decision of the Officiating Subordinate Judge of Gorakhpur, dated the 24th August 1912.

The Hon'ble Mr. *Abdul Raof* (with him the Hon'ble Dr. *Sunder Lal*), for the Appellants.

Mr. *B. E. O'Conor* (with him Mr. *Iqbal Ahmed*), for the Respondents.

JUDGMENT.—This and the connected Appeal No. 436 of 1912, arise out of one suit being cross-appeals from the same decree. The main facts are not in dispute and are as follows:—

Sheikh Minnat Ullah died leaving as his heirs his widow, the present plaintiff, and his father, Khadim Hus'ain. Under Muhammadan Law, the widow inherited a ¼th share in his estate and the other 3/4ths went to the father. The latter died subsequently, leaving the present six defendants as his heirs.

Under a mortgage-deed, dated 14th February 1891, Nasrat Ullah and *Musammat* Karamat Bibi borrowed Rs. 7,296 from Minnat Ullah.

After the death of Khadim Hussain, the first defendant, *Musammat* Amina Bibi, his widow, obtained a succession certificate in regard to this debt due from the mortgagors.

Then she and the remaining defendants jointly sued to recover the mortgage debt, impleading the present plaintiff as a *pro forma* defendant, admitting that she was entitled to a ¼th share but alleging that she refused to join as plaintiff.

On 14th May 1903, they obtained a decree for the recovery of Rs. 17,168-8-0 *plus* future interest at 9 per cent. per annum from the date of suit upto the date of payment. In addition to this they were awarded their costs.

They put the decree into execution.

Thereupon the present plaintiff applied to the Court to be added to the proceeding as a decree-holder. To this the decree-holders

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naturally objected as she was not a decree-holder and stated that they would pay her ¼th of the amount recovered after deducting the costs of the suit and execution proceedings.

Her application was disallowed on the 19th February 1904.

The mortgaged property was put to sale and sold for Rs. 23,590. The decree-holders obtained sanction to bid at the auction.

According to the statements in the plaint and the written statement in this suit, the property was purchased by the defendants Nos. 1 to 3, but it is stated before us that the property was knocked down to all the defendants and that then the other defendants withdrew, saying that the defendants Nos. 1 to 3 were the purchasers. This is of little consequence.

The amount of the debt itself due under the decree inclusive of interest upto the date of sale was Rs. 22,205-13, so that the purchase was for a sum of Rs. 1,384-13-0 in excess of this. The costs of the suit and execution proceedings amounted to a little *less* than 1,384-13-0. The purchasers applied under Order XXI, rule 72 that the purchase-money and the amount due under the decree might be set off against each other and satisfaction of the decree entered up. This was allowed by the Court and they paid into Court the small amount which was due on their bid over and above the total amount of the decree.

The sale was confirmed on 15th July 1906. The present suit was brought by the plaintiff on 1st June 1912 against all the defendants.

She sued in the alternative for two reliefs. Primarily she sought to recover Rs. 8,562-3-6, being Rs. 5,551-7-4, her ¼th share of Rs. 22,205-13-0, *plus* 3,010-12-2, interest from 21st May 1906, the date of the auction-sale upto the date of suit.

The date on which the cause of action arose was given as 15th July 1906 the date of the confirmation of the sale.

Apparently in apprehension that the date on which the cause of action arose might be taken to be the date of the sale (21st May 1906), she alleged that the defendants Nos. 1 to 3 had been absent from India on a pilgrimage to Mecca from September 1911 to March 1912 (some six months) and that this period should be allowed to her for the purpose of calculating the period of limitation.

In the alternative she pleaded that if the first relief could not be granted, then she might be awarded possession of a ¼th share in the property (valued at Rs. 5,897-8-0) and be granted mesne profits.

The defendants among other pleas urged

(1) that the suit for a ¼th share of the money was barred by limitation;

(2) that the plaintiff was not entitled to recover a share in the property purchased;

(3) that the defendants Nos. 4 to 6 were in any case not liable, as they had neither recovered the money nor purchased the property.

The Court below held

(1) that the money claim was not barred by limitation;

(2) that the defendants Nos. 4 to 6, not having received the plaintiff's share of the decretal money or purchased the property in lieu of the decretal money, were not liable to pay anything to the plaintiff.

It came to no decision in regard to the claim for a share in the property.

It gave the plaintiff a simple money decree, disallowing a part of the claim for interest.

The defendants Nos. 1 to 3 have appealed, and the point pressed is that the suit for money is barred by limitation as Article 62 applies.

The plaintiff has also appealed as against all the defendants, and the sole point she takes is that she is entitled to all the interest she claimed; she does not on her appeal claim that she is entitled to a decree for possession of the ¼th share in the property.

We take first the question of limitation. The plea taken is that Article 62 of the Limitation Act applies, and not Article 120 as applied by the Court below, to the money claim.

In our opinion Article 62 clearly applies. The suit is clearly on the face of it one for money had and received by the defendants for the plaintiff's use. The Court below based its decision that Article 120 applied, on the authority of the ruling reported as *Umardaraz*

Ali Khan v. *Wilayat Ali Khan* (1). The head-note in the report is, we think, misleading.

In that case one heir of a Muhammadan recovered a debt due to her deceased husband. The other heirs sued to recover their shares thereof from the widow. In respect to this claim the Court of first instance applying Article 120 held that the suit was barred by limitation, it having been brought more than six years after the cause of action arose.

The plaintiff appealed and urged that Article 123 applied. This Article governs a suit for a legacy or for a share of a residue bequeathed by a testator or for a distributive share of the property of an intestate and allows a period of twelve years.

A Bench of this Court repelled this. It held that Article 123 refers to a suit in which a plaintiff seeks to obtain his share from a person who, either as an executor or an administrator, represents the estate of a deceased person and is under a legal obligation to distribute shares to those entitled to them and that the suit before them was not one of such a nature. They quoted the ruling in *Sithamma* v. *Narayana* (2). They then observed: "In a recent case decided by their Lordships of the Privy Council, *Mahomed Riyasat Ali* v. *Hasin Banu* (3), which was a suit of a nature similar to the present, their Lordships refused to apply Article 123 and held the claim to be governed by Article 120."

Nowhere in the judgment did the Judges, who decided this case, say that Article 120 was the proper Article to apply, though prehaps this might be inferred to be their opinion from the passage quoted above. Article 62 was not mentioned in the judgment nor apparently was the question now before us discussed at the hearing. For the purpose of that appeal it was unnecessary to discuss or decide whether Article 62 or Article 120 applied. In either case the suit was barred by limitation as having been brought more than six years after time. *The only point decided was that Article 123 did not apply.*

In the case of *Mahomed Riasat Ali* v. *Hasin Banu* (3), the plaintiff sued to recover the estate of her deceased husband from the latter's brother, Riyasat Ali, who had taken possession of it. She based her title on a special custom. The estate consisted of both moveable and immoveable properties. Their Lordships of the Privy Council held in regard to the cash and moveables wrongfully seized by the defendant, that neither Article 123 nor Article 49 applied but that Article 120 applied. In regard to Article 49 their Lordships remarked: "This latter Article does not appear to be applicable to a suit to establish a right to inherit the property of a deceased person." It is obvious that the present suit is not one to establish a right of inheritance.

The plaintiff's right to a ¼th share in the money in suit has not at any time been disputed. On the contrary, it has always been openly admitted by the defendants who, in the execution proceedings, when they objected to the plaintiff being brought on the record as a decree-holder, stated that they would pay to the plaintiff her ¼th share in the amount recovered from the judgment-debtor after deduction of costs.

When the amount of the decretal debt was set off in part against the amount of the defendants' bid at the auction, this was done as a matter of convenience and it was as if the defendants Nos. 1 to 3 had paid in the amount of their bid and had then with defendants Nos. 4 to 6 recovered the amount due under the decree, and we have no hesitation, on the facts of the suit before us, in holding that Article 62 applies. The money was received by the defendants for the plaintiff's use. The decision in *Mahomed Wahib* v. *Mahomed Ameer* (4) supports us.

It is urged that section 10 of the Limitation Act applies and that there is really no period of limitation for such a suit as the present. It is clear, however, that section 10 only applies to express trusts and not to circumstances such as those of the present suit.

It is also pleaded that if the money claim be held barred by time, then the Court ought to give the alternative relief, *i. e.*, possession of a ¼th share in the property. In the first place we must point out that though the plaintiff has appealed, she has not appealed on this point at all. In the next

(1) 19 A. 169; A. W. N. (1897) 184.
(2) 12 M. 487.
(3) 21 C. 157; 20 I. A. 155.
(4) 32 C. 527; 1 C. L. J. 167.

place we fail to see that she is equitably entitled to a ¼th share in the property. She was not a co-decree-holder, nor did the defendants Nos. 1 to 3, put the decree into execution to recover only a sum of money in the whole of which the plaintiff had a ¼th share. The money recoverable by the decree included the costs of the suit and execution proceeding. The property was purchased for a sum of money greater even than the full amount of the decree. Moreover, in equity the defendants were entitled to recoup to themselves the costs incurred in obtaining the succession certificate. Moreover, the amount due under the decree was set off only in part against the money due from the defendants-purchasers under their bid at auction. The purchase was made on behalf of only three of the decree-holders and not on behalf of all. We, therefore, hold that the plaintiff has no cause of action to recover a ¼th share in the property.

The plaintiff was entitled to recover a ¼th share in the decretal debt after deduction of all expenditure incurred legitimately by the defendants in recovering the debt. She waited for six years and nine days after the date of the sale before she sued, though her right had been admitted, and has only herself to blame for the result of her own delay.

The suit is barred by limitation. We allow the appeal and dismiss the suit with costs in both Courts. Costs in this Court will include fees on the higher scale.

Appeal allowed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 3453 OF 1910.

May 13, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

SAILAJA PROSAD CHATTERJEE AND OTHERS—DEFENDANTS—APPELLANTS

versus

JADU NATH BOSE—PLAINTIFF—RESPONDENT.

Mortgage by administrators erroneously appointed by competent Court, if operative and binding on estate—Probate and Administration Act (V of 1881), s. 90—Interest, high rate of—Powers of Court—Interest not specified in petition for sanction of mortgage.

All acts done by an executor or an administrator in the due and legal course of administration are valid and binding, even though the letters issued by the Court are afterwards revoked or the incumbent discharged from his trust.

A mortgage granted by the administrators, though erroneously appointed as such with the sanction of the District Judge, to satisfy a debt of the estate which the executor himself was compellable to pay, is operative and binding on the estate.

Where in an application by an administrator to the District Judge for sanction to mortgage a property the principal amount required was mentioned, but no mention was made about interest and when the deed was executed, the administrator covenanted to pay compound interest at 30 per cent per annum.

Held, that the claim for payment of interest at such a high rate was unreasonable.

Section 90 of the Probate and Administration Act (V of 1881) authorizes an administrator to grant a mortgage of the immoveable property vested in him *only* with the previous sanction of the Probate Court, and this implies a sanction by the Court of all the essential elements of the mortgage transaction.

Appeal from the decree of the District Judge of Bankura, dated the 30th July 1910, affirming that of the Sub-Judge of that place, dated the 25th May 1909.

Babus *Bepin Behary Ghose* and *Khetra Mohan Sen*, for the Appellants.

Babu *Monmotha Nath Roy*, for the Respondent.

JUDGMENT.—This is an appeal by some of the defendants in a suit to enforce a mortgage security. The substantial question in controversy between the parties is, whether the mortgage is operative upon the property now in the hands of the appellants. The circumstances under which the mortgage was created are not in dispute at this stage and may be briefly stated. The property formed part of the estate of one Durgadas Chatterjee, who made a testamentary disposition on the 6th April 1885. The testator died in 1890, and on the 8th December of that year probate was granted to his eldest son, Annada Prasad Chatterjee, who was named as the executor in the Will and figures as the first defendant in this litigation. On the 20th February 1894, the widow of the testator and one of his grandsons, who are the second and third defendants respectively in this suit, applied to the Probate Court for removal of the executor on the ground of his misconduct and for revocation of the probate issued to him. On the 19th July 1894, the probate was revoked and the

appointment of the first defendant as executor was cancelled. On the 17th August 1894, the Probate Court appointed the widow and the grandson as joint administrators and four days later issued to them Letters of Administration (inaccurately described in the order-sheet as "probate") with copy of the Will annexed. On the 10th September 1894, the executor whose apppointment had been revoked, lodged an appeal in this Court against the order of the District Judge. On the 31st July 1896, the appeal was allowed and the order of the District Judge reversed on the ground that the alleged misconduct and mismanagement did not constitute a just cause for removal of an executor under clause 4 of section 50 of the Probate and Administration Act: *Annoda Prosad Chatterjee* v. *Kalikrishna Chatterjee* (1). Thereupon, the probate originally issued to him, which had been recalled and cancelled, was re-issued to him by the District Judge on the 19th February 1897, pursuant to an order made in that behalf on the 11th February 1897. Meanwhile, on the 26th April 1895, in execution of a decree for money against the executor, the disputed property was sold and was purchased by Pitambar Chatterjee, now represented by the appellants. The decree had been obtained by a co-proprietor of the estate in a suit for contribution in respect of revenue payable to Government by all the proprietors. The administrators, who were in possession of the estate at the time of the sale, applied to the District Judge on the 4th May 1895 for permission to raise money by mortgage of part of the estate with a view to have the sale set aside under section 310A of the Civil Procedure Code of 1882. They represented—and the accuracy of their statement has not been called in question—that the property was worth more than Rs. 1,000, and that if the sale, which had taken place for Rs. 495 only, was allowed to stand, serious loss would result to the estate. The District Judge sanctioned the mortgage and directed that the very property, which would thus be saved, be given by way of security. The plaintiff thereupon advanced Rs. 550 to the administrators, who applied the money for cancellation of the sale and on the 21st May 1895, executed in his favour the mortgage now sought to be enforced, by which they undertook to re-pay the loan on the 12th April 1893. On the 21st April 1898, *i. e.*, after the executor had been restored to his office as the result of the appeal to this Court, the disputed property was sold in execution of a money decree against him as executor of the estate and was purchased by the decree-holders who subsequently transferred the same to Pitambar Chatterjee, predecessor of the present appellants on the 29th December 1898. On the 9th April 1908, the plaintiff commenced this litigation to enforce his security and he joined as defendants eleven persons, namely, the executor as the first defendant, the administrators as the second and third defendants, and the representatives of the purchaser as the remaining defendants. The claim was contested by the last-named defendants only, on the ground that the mortgage was inoperative, because granted by administrators erroneously appointed as such. The Courts below have concurrently overruled this defence, and have decreed the suit. On the present appeal, the decree of the District Judge has been challenged on two grounds, namely, *first*, that the mortgage granted by the administrators does not bind the estate, and, *secondly*, that as the provision for payment of compound interest at a high rate was not sanctioned by the District Judge, the claim for interest cannot be sustained.

The first point taken on behalf of the appellants raises the question of the effect of revocation of a Probate or Letters of Administration, upon which there has been some divergence of judicial opinion. The effect of revocation of a grant of Probate or Letters of Administration has been made to depend mainly upon whether the grant was void *ab initio* or merely voidable. In *Abram* v. *Cunningham* (2), it was decided that where administration is granted on concealment of a Will which appointed executors, the grant is void from its commencement, and all acts performed by the administrator in that character are equally void and cannot be made good, even though the executor should afterwards appear and renounce. But in *Sands and Peckham's*

(1) 24 C. 95.

(2) (1677) 2 Lev. 182; 83 E. R. 508.

case (3); it was held that if the administrator had paid funeral expenses, debts, or legacies, which the law forced the executor to pay, the administrator, in an action against him by the executor, should recoup so much in damages, because he was compelled to pay it, and the true executor had no prejudice by it, for as much as he himself would have been bound to pay it. Again, from *Graysbrook* v. *Fox* (4), it appears that in an action by the true executor against the purchaser of goods sold to him by the administrator, the sale is indefeasible, if made to discharge the funeral expenses or the debts which the administrator or executor was compellable to pay. Where, however, the act in question is one which the administrator was not compellable to do, but is a voluntary act on his part, it has been sometimes said that it is simply void and no title is thereby conferred on a purchaser [*Hewson* v. *Shelley* (5)] or mortgagee [*Ellis* v. *Ellis* (6)] from him, and the vendor is also liable in damages in an action by the true executor : *Wolley* v. *Clark* (7). In *Boxall* v. *Boxall* (8), it was held that where the Will does not appoint an executor, the repealed grant obtained by suppressing the Will is not void *ab initio*, and, therefore, a sale under it was held to be a valid transaction. But wherever the grant of administration is voidable only, as where it has been granted to a party not next of kin, or where the executor having acted and the Court, not knowing it, committed administration to another, or without citing the necessary parties, all lawful acts done by the first administrator are deemed valid as against the subsequent administrator: *Packman's* case (9) *Blackborough* v. *Davis* (10).

It is worthy of note that the earlier cases to which we have referred were criticised by Lord Redesdale in *Doyle* v. *Blake* (11), and a view more favourable to the rights of the *bona fide* transferee for value without notice has been taken in modern decisions to which we shall now refer. Thus in *Debendra Nath* v. *Administrator-General of Bengal* (12), where the Judicial Committee affirmed the decision of the majority in *Debendra Nath* v. *Administrator-General of Bengal* (13), Lord Macnaghten observed that so long as the Letters of Administration remained unrevoked, the person in whose favour the grant had been made was to all intents and purposes administrator and his receipts were valid discharges for all moneys received by him as administrator. The full significance of this observation is appreciated when it is borne in mind that the Letters of Administration had been obtained by fraud and by suppression of the fact that the deceased had left a Will. A similar view had been previously indicated by Woodroffe, J. in *Gopal Das* v. *Budree Das* (14), which may be difficult to reconcile with the *obiter dictum* in *Prayrag Raj* v. *Gonkaran Pershad* (15), and was subsequently adopted by Neville, J., in *Craster* v. *Thomas* (16). It will be observed that in the case last mentioned the administration had been granted, notwithstanding the existence of a Will which had been kept back from the Court, and it was thus precisely a case in which it might be argued with plausibility that the grant was void *ab initio* ; yet the Court held that the grant was voidable and not void. Consequently, if the view is maintained that a grant of administration made by a competent Court, though erroneously, is voidable, that is, operative till it has been revoked by that Court or set aside by a superior Tribunal, there is no room for controversy that the mortgage in suit is binding upon the estate. But even if we take a more restricted view, namely, that adopted by Walsh, J., in *Graysbrook* v. *Fox* (4), the mortgage is clearly indefeasible, because it was created to satisfy a debt of the estate which the executor himself was compellable to pay. The executor had failed to pay the

(3) (1560) Cited in 1 Plowden 282; 75 E. R. 432.
(4) (1562) 1 Plowden 275; 75 E. R. 419.
(5) (1913) W. N. 246.
(6) (1905) 1 Ch. 613; 74 L.J. Ch 296, 53 W. R. 617; 92 L. T. 727.
(7) (1822) 5 Barn. and Ald. 744; 24 R. R. 546; 1 Dowl. & Ry. 409; 106 E. R 1363.
(8) (1884) 27 Ch. D. 220, 53 L. J. Ch. 838; 51 L T. 771; 32 W. R. 896.
(9) (1596) 6 Coke 18b; 77 E. R. 281.
(10) (1702) 1 P. Wms. 41 at p. 43; 24 E. R. 283.
(11) (1804) 2 Sch. and Lef. 231 at p. 237; 9 R.R. 76.

(12) 35 I. A. 109; 35 C. 935; 12 C. W. N 802; 8 C. L J. 94; 10 Bom L R 648; 18 M. L. J. 367; 4 M. L. T. 21; 14 Bur. L. R. 197.
(13) 33 C. 713; 3 C. L. J. 422 (F.B.); 10 C.W.N. 673.
(14) 33 C. 657; 10 C. W. N. 662.
(15) 6 C. W. N 787.
(16) (1909) 2 Ch. 348; 78 L. J. Ch. 734; 101 L. T. 66; 25 T. L. R 659.

Government revenue due, which had thereupon been satisfied by one of the joint proprietors of the estate. The executor thereafter did not reimburse the co-proprietor, who was consequently constrained to sue and to obtain a decree. Even then the executor did not satisfy the judgment-debt. Execution followed, with the result that a valuable property was sold for an inadequate price. Under these circumstances, the administrators, with the sanction of the District Judge, raised a loan and saved the property which it was their paramount duty to do. They did nothing beyond what it would have been obviously incumbent upon the executor to do for the protection of the estate, if he had been in possession at the time, and we are unable to discover any conceivable principle of justice, equity and good conscience to support the contention that the mortgage was *ab initio* void, because granted by administrators erroneously appointed by the Probate Court. It may be added that the more liberal view indicated above has been adopted in the American Courts, where it has been ruled that all acts done by an executor or an administrator in the due and legal course of administration are valid and binding, even though the letters issued by the Court are afterwards revoked or the incumbent discharged from his trust: *Bigelow* v. *Bigelow* (17), *Foster* v. *Brown* (18), *Fisher* v. *Bassett* (19). But reference has been made to a dictum in *Boxall* v. *Boxall* (8), that if a grant is reversed by a Court of Appeal it must be deemed void *ab initio*, though revocation takes effect only from the time of the recall, and it has been argued that all intermediate acts of the executor or administrator, pending an appeal which results in a reversal of the former sentence, are void, because, it is said on the strength of a dictum in *Price* v. *Parker*, (20), the appeal suspends the former sentence, which, on its reversal, places all the parties in the position which they would have occupied if it had never existed. This contention does not appear to be well founded on principle, and cannot, at any rate, be applied to the Indian system of law which explicitly recognises the doctrine that an appeal does not operate as a stay of proceedings under the decree or order challenged by way of appeal (Order XLI, rule 5, of the Civil Procedure Code, 1908). It is worthy of remark that in the Courts of the United States, although in some cases [*State* v. *William* (21), *Muirhead* v. *Muirhead* (22)] the view has been maintained that an appeal suspends the operation of a decree and leaves the executor or administrator in office as before, there is respectable authority for the contrary opinion that an appeal by an executor from an order revoking Probate of the Will does not continue the powers of the executor pending the appeal: *Harney* v. *Scott* (23), *Crozier's estate* (24), *In re Marsh* (25). But the appellants are in a further difficulty in the present case. The executor was actually removed and the administrators were placed in possession long before the appeal was preferred; consequently, there is no room for the application of the doctrine that the appeal suspended the operation of the order for revocation. We may add that in systems where the view is maintained that an appeal against an order of revocation suspends the operation of the order, practical difficulty in the management of the estate is avoided by the appointment of an administrator *pendente lite*, and plainly no question could arise as to the legality of the mortgage in suit, if the administrators here are deemed to have been in essence at least administrators *pendente lite*. We need not, however, have recourse to what might be called a fiction and, for the reasons previously assigned, we hold that the mortgage granted by the administrators with the sanction of the Probate Court bound the estate.

The second point taken on behalf of the appellants raises the question of the validity of the claim for interest. In the application to the District Judge for sanction of the proposed mortgage, the principal amount required to be raised was stated as Rs. 550, but no mention was made about interest. When the deed was executed by the administrators, they covenanted, however, to pay compound interest at Rs. 30 per cent.

(17) (1829) 19 Am. Dec. 591, 4 Ohio 138.
(18) (1829) 19 Am. Dec. 672; 1 Bailey's Law, 221.
(19) (1837) 33 Am. Dec. 227; 9 Leigh 119.
(20) (1641) 1 Lev. 157, 83 E. R. 347.

(21) (1850) 9 Gill 172.
(22) (1847) 8 Sm. and M. 211.
(23) (1859) 28 Mo. 383.
(24) (1884) 65 Cali. 332, 4 Pac. 109.
(25) (1903) 55 Atl. 299.

per annum with half-yearly rests. Under section 90 of the Probate and Administration Act, an administrator is authorised to grant a mortgage of the immoveable property vested in him, only with the previous permission of the Probate Court. This implies a sanction by the Court of all the essential elements of the mortgage transaction, and there is no room for doubt that, from the point of view of the burden imposed on the estate, the provision for payment of interest may be even more effective than the principal amount of the loan required to be raised. See *Ganga Pershad Sahu* v. *Maharani Bibi* (26), *Thakur Prasad* v. *Gauripat Rai* (27), which arose on the corresponding provisions of the Guardians and Wards Act, XL of 1858, section 18, and VIII of 1890, section 29. See also *Abhiram Pal* v. *Mukunda Lal Dutt* (28), *Roy Radha Kishen* v. *Nauratan Lall* (29), *Nemai Chand Adhya* v. *Mir Golam Hossein* (30). In the case before us, the clause for the payment of compound interest at a high rate was manifestly unreasonable, and the lender obviously made the best of the embarrassing situation in which the administators found themselves. We accordingly reduce the interest to simple interest at 9 per cent. per annum and we do so partly in view of the fact that the mortgagee has waited till very nearly the last day of the period of limitation, clearly with the object that the claim for interest may reach the maximum possible amount. Such interest as we allow is recoverable from the date of the mortgage and must be added to the mortgage-money as was done by the Judicial Committee in *Chajjmal* v. *Brij Bhukan Lal* (31). The decision in *Moti Singh* v. *Ramohari Singh* (32) is clearly distinguishable, as there was no covenant at all for payment of interest *post diem* in that case, and the amount allowed, though added to the mortgage dues, was treated as damages, a distinction not always recognised: *Gordillo* v. *Wegueliu* (33).

The result is that this appeal is allowed in part, the decree of the District Judge discharged, and, in lieu thereof, the usual mortgage decree made in favour of the plaintiff for Rs. 1,502-14-0, namely, Rs. 550 as principal and Rs. 952-14-0 as interest thereon at 9 per cent. per annum from the 21st May 1895 to the 21st August 1914, which we fix as the date for redemption. The plaintiff will also be allowed his costs in the Court of first instance on the sum now decreed, such costs to be ascertained in this Court and added to the mortgage dues. If the decretal amount is not paid on or before the 21st August 1914, it will carry interest at 6 per cent. per annum from that date and the mortgaged property will be sold in due course for realisation thereof. The defendants will not be personally liable for any portion of the decretal amount. Each party will pay his own costs of the appeal to the Disirict Judge as also of the appeal to this Court.

We are informed that the mortaged property has been sold in execution of the decree not set aside and has been purchased by the decree-holder. The effect of our order will be that the sale will stand annulled from this date, and the property will be re-sold, if occasion arises, in execution of the decree now made: *Set Umedmal* v. *Srinath Ray* (34); *Chandan Singh* v. *Ram Deni Singh* (35). We do not, however, now determine what restitution the decree-holder may be liable to make, if he took possession of the property by virtue of his purchase at the sale now cancelled; that question must be determined by the execution Court if an appropriate application is made in that behalf by the party interested: *Raghu Singh* v. *Shew Prosad* (36), *Beni Madho Singh* v. *Pran Singh* (37).

Appeal partly allowed.

(26) 12 I. A. 47; 11 C. 379; 4 Sar. P. C. J. 621; 9 Ind. Jur. 158.
(27) 30 A. 188; A. W. N. (1908) 75; 5 A. L. J. 280.
(28) 5 C. L. J 542 at p. 548.
(29) 6 C. L. J. 490 at p. 521.
(30) 3 Ind Cas. 353; 37 C. 179; 11 C. L. J. 317; 14 C. W. N. 535.
(31) 22 I. A. 199; 17 A. 511; 6 Sar. P. C. J. 624.
(32) 24 C. 690; 1 C. W. N. 487.
(33) (1877) 5 Ch. 287; 46 L. J Ch. 601; 36 L. T. 206; 5 W. R. 620.
(34) 27 C. 810; 4 C. W. N. 692.
(35) 31 C. 490.
(36) 17 Ind. Cas. 121; 16 C. L. J. 135.
(37) 14 Ind. Cas. 456; 15 C. L. J. 187.

JOKHAN CHAUBEY *v.* MAHESH SINGH.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 11 OF 1913.

January 4, 1915.

Present:—Mr. Justice Piggott.

JOKHAN CHAUBEY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MAHESH SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 22—Land held on service tenure—Rent-free grant—Succession—Hindu Law of inheritance—Pleadings—Practice.

Land held on a service tenure is a rent free grant, and its descent is governed by the ordinary Hindu Law of inheritance and not by section 22 of the Agra Tenancy Act.

The mere fact that the plaintiffs did not admit themselves to be entitled to possession of the land in suit as a service tenure, should not disentitle them to a decree for recovery of possession of the land as a service tenure holding, provided that such right is established on the evidence.

Second appeal from the decision of the District Judge of Jaunpur.

Mr. *Durga Charan Banerji*, for the Appellants.

Mr. *Gokul Prasad*, for the Respondents.

JUDGMENT.—This was a suit for a declaration of title, or in the alternative for recovery of possession, in respect of a certain plot of land, and also for damages with regard to a sugar-cane crop standing on the said land which is alleged to have been wrongfully removed by the defendants. The Court of first instance decreed the claim for damages and apparently intended to find for the plaintiffs on the question of title, but somewhat curiously remarked that it was unnecessary to give the plaintiffs any further relief inasmuch as the plaintiffs' Pleader had made a statement to the effect that his clients were actually in possession. The result naturally was that both parties appealed to the Court of the District Judge. That Court found against the plaintiffs on the question of title and also with regard to the claim for damages; it, therefore, dismissed their suit altogether. Inasmuch, however, as the learned District Judge had two appeals before him there have been two appeals filed by the plaintiffs before this Court. When this appeal came before me for hearing in the month of June last, I found it necessary to remit an issue to the lower Appellate Court. This issue came for decision before another learned Judge, not the one who decided the appeal in the first instance, and it is not altogether easy to reconcile the finding returned on the remanded issue, with certain findings recorded by the learned Judge whose decree is now under appeal. It seems to me, however, that I am bound in second appeal to give effect as far as possible to the findings of fact originally recorded by the lower Appellate Court as well as to the finding returned upon the remanded issue. I take it accordingly to be established that the plot of land in suit was at one time held rent free by Puranwasi Hajjam upon a service tenure. The right enjoyed by him has since descended by inheritance, assuming that its descent is governed by the ordinary Hindu Law, to the plaintiffs Musai and Chaturi. Musai has mortgaged one-half share with possession to the plaintiff Jokhan Chaubey. These plaintiffs obtained possession over the plot in suit and were in possession at any rate during the years 1313, 1314 and 1315, *Fasli*, that is to say, for a period which came to an end in the month of September 1908. Their possession was constructive, the land being in the actual occupation of their subtenant, Jita. I must take it that this subtenant was ejected by the defendants-respondents, who are *zemindars* of the village, somewhere about the end of the year 1908 A. D. and that the sugar-cane crop in respect of which damages were claimed was actually grown by these defendants-respondents, or some of them. The plaintiffs Jokhan and Chaturi took formal proceedings in ejectment against Jita during the year 1909, obtained a decree against him, to which the present respondents were not parties, and were put in formal possession in the month of March 1910, after having been made to pay to Jita Rs. 30, as compensation on account of the sugar-cane crop already mentioned. They have brought the present suit on the ground of interference on the part of the defendants-respondents with their right to actual possession. I must take it that their cause of action accrued after the close of the year 1315 *Fasli*, that is to say, after the month of September 1908.

The first question which has been argued before me to-day is whether the plaintiffs Musai and Chaturi were in fact entitled to succeed to the rights of Puranwasi Hajjam, the rent-free holder of the land in suit. This involves the question whether succession to

Puranwasi's right is governed by the ordinary Hindu Law or by the special provisions of section 22 of the Tenancy Act (Act II of 1901). That section applies only to various classes of tenants, and by definition a tenant does not include a rent-free grantee, and a rent-free grantee does include a person who holds land on a service-tenure. I must, therefore, accept the finding of the lower Appellate Court on the remanded issue and hold that Puranwasi's right devolved in accordance with the ordinary Hindu Law, and, therefore, passed to the plaintiffs Chaturi and Musai. The present possession of the defendants-respondents, I must hold to have been violent and unlawful. It has been contended on their behalf, in the first place, that a service-tenure is in its essence non-transferable, so that the mortgage in favour of Jokhan is unlawful, and further, that the plaintiffs should in no case be given a decree for recovery of possession as service-tenure-holders, seeing that in their plaint the plaintiffs do not claim title as such but described the land in suit as forming a *haqiat mutfarrika*, whatever that expression may be understood to mean. I find that in the plaint the land in suit was described as ancestral *muafi* of Puranwasi Hajjam. I am not prepared to hold that the mere fact that the plaintiffs did not admit themselves to be entitled to possession of the land in suit as a service-tenure, that is to say, subject to certain conditions of service, should disentitle them to a decree for recovery of possession as service-tenure-holders, provided that such right is established on the evidence. The question of the transfer in favour of Jokhan does not, in my opinion, affect the determination of the present suit. It applies in any case to one-half of the land in suit only. The transfer by way of mortgage would leave the original tenure-holders still liable for, and capable of rendering, the service subject to which the tenure was granted. In any case, even supposing that by reason of the transfer in favour of Jokhan, or of the devolution of Puranwasi's rights by inheritance through the female line, the *semindars* of the village were no longer able or willing to receive from Musai and Chaturi, as tenure-holders, the services for the sake of which the rent-free holding was originally granted, that circumstance would not entitle them to enter into possession of the land in suit otherwise than by means of a suit for resumption. The rent-free-holders are, in my opinion, entitled to be re-instated in possession as such, because their right to such possession has not been terminated by the means provided by law. I am, therefore, of opinion that the plaintiffs are entitled to a decree for possession. I cannot give them a decree for damages in view of the finding recorded by the lower Appellate Court with regard to the sugar-cane crop in dispute. That is a finding of fact and no valid ground has been shown for disturbing it in second appeal. The plaintiffs may have been unfortunate in this respect, in so far as it would appear that they were actually made liable to pay compensation for this crop to Jita; but that order was passed in a suit to which these defendants-respondents were not parties and is not binding upon them. The result is that I so far accept this appeal that I decree the plaintiffs' alternative claim for recovery of possession in respect of the land in suit, and dismiss the rest of their claim. The parties will pay and receive costs throughout in proportion to failure and success.

Decree modified.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 36 OF 1914.

December 15, 1914.

Present:—Mr. Lindsay, J. C.

JANKI PRASAD AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BAL MAKUND AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 104 (1)—Reference to arbitration, application for—Court finding one of defendants unwilling to refer—Order rejecting application for reference, whether appealable.

Where an application for reference to arbitration is made in a pending case and the Court, finding one of the defendants unwilling to have the case sent to arbitrators, rejects the application, despite the plaintiff's readiness to discharge the unwilling defendant from the array of parties, no appeal lies form such an order of rejection.

Appeal against the order of the Subordinate Judge, Gonda, dated the 17th August 1913.

Babu *Surendra Nath Roy*, for the Appellants.

Babu *Hari Kishen Dhaon*, for the Respondents.

JUDGMENT.—A preliminary objection is taken to the hearing of this appeal, and in my opinion the objection must be allowed. The facts are that the plaintiffs, who are the appellants here, brought a suit against eight persons for partition of joint family property. One of the defendants in that case was *Musammat* Lekhraji, defendant No. 5, who is one of the widows of a man named Gokul Prasad. The case having been brought into Court, there apparently was some notion of having it referred to arbitration and an application for reference to arbitration was presented to the Subordinate Judge. When the Subordinate Judge came to examine the question as to whether the parties agreed to the reference, he found out that *Musammat* Lekhraji was not willing to have the case sent to arbitrators. The plaintiffs tried to meet this position and asked for the discharge of *Musammat* Lekhraji from the array of parties. The Subordinate Judge refused to do this. He, therefore, rejected the petition asking the Court for reference. It is this order of the Subordinate Judge which is brought here in appeal, and I am unable to find that an order like this comes within section 104, sub-section (1), of the Code of Civil Procedure. The learned Counsel for the appellants has tried to convince me that the order against which he is appealing is one falling under section 104, sub-section (1), clause (*d*), but that cannot be so. It seems to me perfectly clear that the order referred to in clause (*d*) is an order passed in proceedings taken under paragraph 17 of the second Schedule to the Code of Civil Procedure, that is to say, a case in which the parties having agreed out of Court to submit a case to arbitration the Court is asked to file the agreement. Then again it is said that the order was one under section 104, sub-section (1), clause (*e*), but here again the appellants are met with the difficulty that a suit such as is described in clause (*e*) presupposes that there has been an agreement to refer. The trouble for the appellants in this case is that there has been no agreement to refer, because *Musammat* Lekhraji declined to entertain the proposal to have the case submitted to arbitration. The point seems to me to be a clear one. I hold that no appeal lies and direct that the appeal be dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 476 OF 1913.

December 1, 1914.

Present:—Mr. Justice Scott-Smith.

SAHAB DIN AND OTHERS—PLAINTIFFS—PETITIONERS

versus

DASWANDHI BEG AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Courts Act (III of 1914), s. 40 (3)—Refusal to grant certificate on insufficient grounds—Revision.

Ordinarily no revision lies from an order of lower Appellate Court refusing to grant a certificate under section 40 (3) of Act III of 1914, but where it has been refused on the ground that no general question of custom etc. is involved, the Chief Court can exercise its revisional power and remand the application to obtain the certificate for redecision.

Petition, under section 70 of Act XVIII of 1884, for revision of the decree of the Divisional Judge, Sialkot Division, dated the 4th March 1913, confirming that of the Subordinate Judge, first Class, Sialkot, dated the 22nd March 1914, dismissing the claim.

FACTS.—The order of the Divisional Judge referred to in the judgment was in the following terms:

"I could not legally grant a certificate in this case. No general finding on any question was given. All I found was that under the entry on the *shajra nasab* of this particular village in question. The case will hardly form a precedent.

"The certificate is refused."

Mr. *Asquith*, for the Petitioners.

Lala *Hukam Chand*, for the Respondents.

JUDGMENT.—This is an application for revision of the order of the Divisional Judge, Sialkot, refusing to grant a certificate under section 40 (3) of the Punjab Courts Act. Mr. Hukam Chand, for the respondents, raises a preliminary objection that no revision lies. I agree with him that ordinarily no revision lies from an order of lower the Appellate Court refusing to grant a certificate,

but in the present case the Divisional Judge appears to have refused a certificate on the ground that he could not legally grant it. His words are, "I could not legally grant a certificate in this case. No general finding on any question of custom was given." There occurs an incomplete sentence which apparently means that the decision was based upon an entry on the *shajra nasab* of the particular village in question. What the Divisional Judge seems to have meant was that he could not give a certificate in this case because no general question of custom was involved, but only a general question of custom as existing in one village. The power to grant a certificate, however, is not limited in any way in the Punjab Courts Act. In the present case the question is whether a gift to a daughter in the presence of the first cousins of the donor was valid by custom, and the case certainly appears to me to be one to which sub-section (3) of section 40 is applicable. The Divisional Judge had power to grant a certificate.

I, therefore, allow the revision and setting aside his order remand the case to him for a fresh order upon the application of the petitioners. No order as to costs.

Revision allowed.

Case remanded.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2376 OF 1913.

November 11, 1914.

Present:—Mr. Justice Shah Din.

MULA—PLAINTIFF—APPELLANT

versus

HOSHIARA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Punjab Courts Act (I of 1912), s. 40—Appeal, Second—Application for certificate to appeal made after 30 days—Question of custom mixed with law—Certificate refused—Second appeal, whether lies to Chief Court.

Where a certificate to appeal on the question of custom is not granted, no second appeal lies to the Chief Court and it is immaterial on what ground the same is refused.

Second appeal from the decree of the Divisional Judge, Hoshiarpur Division, dated the 1st August 1913, reversing that of the Munsif, second Class, Nurpur, District Kangra, dated the 28th January 1913, dismissing the claim.

Rai Bahadur Bakshi *Sohan Lal*, for the Appellant.

Mr. *N. C. Mehra*, for the Respondents.

JUDGMENT.—The question which is involved in this case is one of usage or custom and since the Divisional Judge has declined to grant a certificate, no second appeal lay to this Court under section 40 of the Punjab Courts Act I of 1912, which was in force when this appeal was filed. The appellant's Pleader says that Divisional Judge did not understand the full import of the question involved in the case which was one of special custom governing gifts made by fathers-in-law to their sons-in-law in the nature of *sankalp* on the occasion of their marriages among Rajputs of Tahsil Nurpur in the Kangra District, and that he has refused the certificate thinking that the gift in dispute stands on the same footing as an ordinary gift made by a Rajput father-in-law to his son-in-law in respect of his ancestral property. The judgment of the Divisional Judge shows, however, that he has not misunderstood the question which he was called upon to decide and the ground on which he has refused the certificate is that the application for grant of certificate was barred by limitation. The certificate having been refused no second appeal lies to this Court and I dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

FIRST CIVIL APPEALS NOS. 58 AND 59 OF 1912.

December 2, 1914.

Present:—Sir John Edward Power Wallis, Offg. Chief Justice, and Mr. Justice Seshagiri Aiyar.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL THROUGH THE COLLECTOR OF MALABAR—DEFENDANT—APPELLANT IN BOTH

versus

IN A. S. No. 58 OF 1912

A. COCKCRAFT—PLAINTIFF—RESPONDENT.

IN A. S. No. 59 OF 1912

T. J. McCLOUGHIN—PLAINTIFF—RESPONDENT.

Tort—Suit against Secretary of State—Negligence of servants, liability for—Acts done by Sovereign in his Sovereign capacity—Maintenance of roads, whether function of Government—Government of India Act, 1833, 3 and 4 William IV, Ch. 85, s. 4.

SECRETARY OF STATE v. A. COCKCRAFT.

The maintenance of roads is one of the functions of Government and though that function may be delegated to Municipalities and Local Boards still it is a Sovereign function, especially where the road is maintained for military purposes, and the Secretary of State for India in Council exercising such Sovereign function will not be made liable for injuries sustained by a person coming against a heap of gravel stored on the road by a contractor, as it cannot be said to have been done in the conduct by Government of undertakings which might have been carried on by private persons.

P. & O. S. N. Company v. *Secretary of State for India*, (1861) Bourke's Rep (Part VII) 166; 5 B. H. C. R. App. 1 and *Ross* v. *Secretary of State for India*, 19 Ind. Cas. 353; 24 M. L. J. 429; (19 3) M. W. N. 758; 37 M. 55, followed.

Farnell v. *Bowman*, 12 A. C. 643, 56 L. J. P. C. 72; 57 L. T. 818; *Attorney-General* v. *Weymss*, 13 A. C. 192; 57 L. J. P C. 62; 58 L. T. 358; *Parnaby* v. *Lancaster Canal Co.*, 11 A. & E. 223; 3 P & D. 162; 9 L. J. Ex. 338; 1 Railw. Cas. 696; 113 Eng. Rep. 400 and *Mersey Docks Trustees* v *Gibbs*, 1 H. L. 93; 11 H. L. Cas. 686; 35 L. J. Ex 225, 12 Jur. (N s.) 571; 14 L. T. 677; 14 W. R. 872; 11 E. R. 1500; 145 R. R. 385, distinguished.

Per *Wallis, C. J.*—A distinction exists between acts done by Government in the exercise of its Sovereign powers and conduct by Government of undertakings which might have been carried on by private persons.

Per *Seshagiri Aiyar, J.*—The maintenance of highways is one of the Sovereign functions of Government and where the injury caused is not due to negligence resulting from the exercise of other than Sovereign or Administrative functions, the Government are not liable.

Obiter dicta.—(1) The ordinary rule that States and Sovereigns are liable for damages occasioned by the negligence of their officers, does not apply to the Secretary of State who is subject to the same liability as the East India Company was.

Secretary of State for India in Council v. *Moment*, 18 Ind. Cas. 22; 13 M. L. T. 53; 17 C.W.N. 169; (1913) M. W. N. 45; 15 Bom. L. R. 27; 11 A. L. J. 49; 17 C. L. J. 194; 6 Bur. L. T. 1; 24 M L. J. 459; 40 C. 391; 7 L. B. R. 10 (P. C.); 40 I. A. 48 and *P. & O. S. N. Company* v. *Secretary of State for India*, (1861) Bourke's Rep. (Part VII) 166; 5 B. H. C. R. App. 1, followed.

(2) The rule that actions against the Sovereign must be limited only to such actions for which a remedy exists by the petition of right does not apply to subjects residing out of the United Kingdom, to whom the general rule as to liability for torts dependent upon the particular dominion applies.

Hetthewage v. *Queen's Advocate*, 9 A. C. 571; 53 L. J. P. C. 72; 51 L. T. 401, followed.

(3) The Government departments and public officers and servants are liable for the wrongful acts of their servants in all cases where satisfaction can be had out of the revenues of the State.

Lane v. *Cotton*, 1 Ld. Raym. 646 at p. 650; 91 E. R. 1332; *Bambridge* v. *Postmaster-General*, (1906) 1 K. B. 178; 75 L. J. K B. 366, 94 L. T. 120, 54 W. R. 224; 22 T. L. R. 70 and *Raleigh* v. *Goschen*, (1898) 1 Ch. 73; 67 L. J. Ch. 59, 77 L. T. 429, 46 W. R. 90, 14 T L. R. 36, followed.

(4) By section 4 of 3 and 4 William IV, Chapter 85, the right to carry on business for the benefit of the State was recognised.

Where the East India Company exercised Sovereign rights, they were generally exempt from liability to be sued in the Municipal Courts, but with reference to transactions which, though carried on for public purposes and for the public benefit, were of such a nature as could have been undertaken by private individuals or by a trading corporation, they were governed by laws regulating private rights.

Dhackjee Dadajee v. *East India Company*, 2 Morley's Digest 307; 4 Ind. Dec. (o. s.) 587; *Secretary of State for India* v. *Bari Bhanji*, 5 M. 278; 6 Ind. Jur 402 and *Bank of Bengal* v. *The United Company*, 1 Ind. Dec. (o. s) 489, Bignell's Rep. 87.

(5) The line of demarcation between Sovereign powers and powers exercisable by private individuals is that in the one case no question of consideration comes, whereas the essence of the other is that some profit is secured or some special injury is inflicted in the exercise of individual rights.

Parnaby v. *Lancaster Canal Co*, 11 A. & E. 223; 3 P. & D. 162; 9 L. J. Ex. 338; 1 Railw. Cas. 696, 113 E. R. 400; *Mersey Docks Trustees* v. *Gibbs*, 1 H. L 93; 11 H. L. Cas. 686; 35 L. J. Ex. 225; 12 Jur. (N. S.) 571, 14 L. T. 677; 14 W. R. 872 and *Coe* v. *Wise*, 1 Q. B. 711; 7 B. & S 831; 14 L. T. 891; 14 W. R. 865, 37 L. J. Q. B. 262, followed.

(6) Where the sole object of Government in carrying out a project is the public good and no idea of profits is in contemplation, *prima facie* the business cannot be said to have been done in the discharge of private duties, but only in the exercise of administrative powers vested in the State or Sovereign.

Appeals against the decrees of the District Court of North Malabar, in Original Suits Nos. 17 and 21 of 1910, respectively.

The Government Pleader, for the Appellant.

Mr. *T. Narasimha Aiyangar*, for the Respondents.

JUDGMENT.

WALLIS, C. J.—These are suits against the Secretary of State for India in Council to recover damages for injuries sustained by the plaintiffs in a carriage accident, which is alleged to have been due to the careless stacking of gravel on a road which is alleged in the plaints to be a military road maintained by the Public Works Department. The defendant pleaded a general denial of liability, and also, among other things, that he was not responsible as the gravel was stacked by a contractor under the Public Works Department. No issue was framed as to the general denial of l ability even if the facts were as stated in the plaints, nor was such a defence pressed at the trial. On appeal, however, it has been contended that the plaints disclose no cause of action, and that on this ground the

suits should have been dismissed, and in support of this contention the case of the *P. and O. S. N. Company* v. *Secretary of State for India* (1) is mainly relied on. I have so recently considered this case in *Ross* v. *Secretary of State* (2) that I will merely say that, though it only decides that the East India Company was liable for the negligent acts of its servants done in the course of their employment when such acts were done in the conduct by the Company of undertakings which might have been carried on by private individuals without any delegation of Sovereign powers, yet it is also authority for the position that in respect of acts done by the Company in the exercise of its Sovereign powers it could not have been made liable for the negligence of its servants in the course of their employment. The authority of this decision, in my opinion, is not affected by cases such as *Farnell* v. *Bowman* (3) and *Attorney-General of Straits Settlement* v. *Wemyss* (4), or such as *Parnaby* v. *Lancaster Canal Company* (5) or *Mersey Docks Trustees* v. *Gibbs* (6), because in all these cases the liability of the defendants depended on the terms of a particular Statute and was merely a question of construing that Statute. This test, however, is inapplicable to the Sovereign powers of the East India Company, which were not conferred upon it by Statute but were derived from the Native Rulers of India, though, no doubt, held subsequently after some controversy to have been acquired by the Company in trust for the Crown and to be subject to the authority of Parliament. The view taken in the *P. and O. S. N. Company* v. *The Secretary of State* (1) would rather seem to have been that in the exercise of the Sovereign powers so acquired, the Company was *prima facie* entitled to the immunities of a Sovereign. It is, however, unnecessary to consider the question further on the present occasion and I abstain from doing so.

(1) (1861) Bourke's Rep. (Part VII) 166; 5 B. H. C. R. App. 1 at p. 15.

(2) 19 Ind. Cas. 353; 37 M. 55; 24 M. L. J. 429; (1913) M. W. N. 758.

(3) 12 A. C. 643, 56 L. J. P. C. 72; 57 L. T. 318.

(4) 13 A. C. 192; 57 L. J. P. C. 62; 58 L. T. 358.

(5) 11 A. & E. 223; 3 P. & D. 162; 9 L. J. Ex. 338; 3 Railw. Cas. 696; 113 E. R. 400.

(6) 1 H. L. 93; 11 H. L. Cas. 686; 35 L. J. Ex. 225; 12 Jur. (N. S.) 571; 14 L. T. 677; 14 W. R. 872; 11 E. R. 1500; 145 R. R. 385.

The only question now open seems to be, whether the acts complained of can be said to have been done in the conduct by Government of undertakings which might have been carried on by private persons. There is a decision to the contrary of Fletcher, J., on facts closely resembling the present case in *Mc Inerny* v. *Secretary of State for India* (7), and apart from authority I have come to the same conclusion. I think the provision and maintenance of roads is one of the functions of Government, though in India it is now largely delegated by Statute to Municipalities and Local Boards, just as in England it was imposed first upon the parishes and then on statutory bodies created by Parliament. And the case seems to be all the stronger where the road in question is a military road, as is alleged in the plaints here. As the point was not taken at the trial, the decrees must be reversed and the suits dismissed without costs.

SESHAGIRI AIYAR, J.—The facts of these cases are not in dispute in this appeal. The plaintiff's carriage was capsized by one of its wheels running over a heap of gravel carelessly stacked on the road by a contractor under the Public Works Department of the Government of Madras. This road is a military road, and it apparently leads to the barracks where soldiers are quartered. The plaintiff sustained injuries. He sues the Secretary of State for India in Council for damages on the ground that the accident to him "was entirely due to the gross negligence and carelessness displayed by their (the Government's) servants."

The defendant denied carelessness on his part and the liability to pay damages. Several subsidiary pleas relating to contributory negligence, etc., were raised. The learned Government Pleader does not rely on them in this Court.

The District Judge awarded Rs. 1,000 as damages in Original Suit No. 17 of 1910 and Rs. 250 in Original Suit No. 21 of 1910. The Government have appealed. It was contended for the appellant that the Secretary of State in Council cannot be sued for a tort committed by any of the servants of the Crown. It is necessary to examine the scope and limitations of this contention.

It is true that ordinarily States and

(7) 13 Ind. Cas. 370; 38 C. 797.

Sovereigns are not liable for damages occasioned by the negligence of their officers or of persons employed in their service (see 16 Halisbury's Laws of England, section 633, and 38 Encyclopædia 472). But this rule has no application to the Secretary of State for India. Under 21 and 22 Victoria, Chapter 106, the Secretary of State is under the same liability as the East India Company were subject to. The Judicial Committee of the Privy Council have laid down in *Secretary of State for India in Council* v. *Moment* (8) that the extent of this liability has been correctly stated in *P. and O. S. N. Company* v. *Secretary of State for India* (1). It becomes necessary, therefore, to see whether under that ruling the present action could have been maintained against the East India Company. Before dealing with that point, I shall clear the ground by pointing out that the analogy of the Crown in England has no application to the Secretary of State. In *Farnell* v. *Bowman* (3), it was pointed out by the Privy Council that subjects of the Empire residing in the colonies are not restricted in suing the Local Governments to such actions only as found a remedy in the petition of rights in England. In an earlier case [*Hetteihcage* v. *Queen's Advocate* (9)] Lord Blackburn, while holding that a subject of the Ceylon Government was entitled to sue the Governor in the Municipal Courts on a breach of contract, intimated that actions *ex delicto* would not lie. Sir Barnes Peacock in *Farnell* v. *Bowman* (3) points out that this dictum should be read as interpreting the Ceylon Ordinances and not as a general proposition that Colonial Governments are not liable for torts. In *Attorney-General* v. *Wemyss* (4), which was an appeal from the Straits Settlements, it was held by the Judicial Committee that the Crown is liable to pay damages for trespass to immoveable property. It is, therefore, evident that the principle that the Crown can be sued only for remedies contemplated by the petition of right is confined in its operation to the United Kingdom; and that general liability for torts is dependent upon the law of the particular dominion wherein the action is instituted.

I may also dispose of another objection to jurisdiction on the ground that "Government Departments, Public Officers and servants of the Crown cannot be made liable for the wrongful acts of their subordinates." This rule, as pointed out in *P. and O. S. N. Company The Secretary of State for India* (1), and in *Lane* v. *Cotton* (10) only relates to the personal liability of the officers sued. But where satisfaction can be had from the revenues of the State, this objection cannot prevail. [See *Bainbridge* v. *Postmaster-General* (11), *Raleigh* v. *Goschen* (12).]

The main point for consideration is whether the present action could have been successfully maintained against the East India Company. We are only concerned with the position of that Company when the India Councils Act was passed. After 3 and 4 William IV, Chapter 85, the Company held the British possession in India for the King of England. By section 4 of that Act, the right to carry on business for the benefit of the State was recognised. The monopoly in salt and opium is referred to by Sir Barnes Peacock as coming under this section. The Company had, therefore, two distinctive functions which are even to-day exercised by the Government of India. In so far as the Company exercised Sovereign rights, they were generally exempt from liability to be sued in the Municipal Courts. But with reference to transactions which, though carried on for public purposes and for the public benefit, were of such a nature as could have been undertaken by private individuals or by a trading Corporation, they were governed by laws regulating private rights and obligations. Even in regard to the exercise of Sovereign functions the immunity is subject to exceptions. As the Chief Justice points out in *Dhackjee Dadajee* v. *The East India Company* (13): "An action of trespass will lie against a Corporation, and especially against the East India Company, if, assuming to act in their political capacity,

(8) 18 Ind. Cas. 22, 40 I. A. 48; 13 M. L. T. 53, 17 C. W. N. 169; (1913) M. W. N. 45; 15 Bom. L. R. 27; 11 A. L. J. 49; 17 C. L. J. 194; 6 Bur. L. T. 1; 24 M. L. J. 459; 40 C. 391; 7 L. B. R. 10 (P. C.).

(9) 9 A. C. 571; 53 L. J. P. C. 72; 51 L. T. 401.

(10) 1 Ld. Raym 646 at p. 650; 91 E. R. 1332.

(11) (1906) 1 K. B 178, 75 L. J. K. B. 366; 94 L. T. 120; 54 W. R. 221; 22 T. L. R. 70.

(12) (1898) 1 Ch. 73; 67 L. J. Ch. 59; 77 L. T. 429; 46 W. R. 90; 14 T. L. R. 36.

(13) 2 Morley's Digest 307 at p. 317; 4 Ind. Dec. (o. s.) 587 at p. 597.

they commit a trespass by having ordered it, or by recognizing it when done for their benefit, as much as trespass would lie against the Governor of a Colony, who, assuming to act in his political capacity, should commit a trespass." Another exception is that if the State by its Legislature prescribes the limits or conditions under which executive acts are to be performed, a liability may arise for transgressing those limits or conditions: *The Secretary of State for India* v. *Hari Bhanji* (14). Mr. T. Narasimha Aiyangar suggested another limitation with reference to the observations of the learned Chief Justice in *Bank of Bengal* v. *The United Company* (15), that whenever a State has been benefited by the wrongful act of its servants, it is liable to be sued for the restitution of the profit unlawfully made.

The present case is not covered by any of these exceptions. The learned Government Pleader argues that in making roads like the one in question, the Government was acting in its Sovereign capacity and that consequently the exemption recognised in *P. & O. S. N. Company* v. *Secretary of State for India* (1) applies. The proposition is thus stated in that judgment:—"But where an act is done, or a contract is entered into, in the exercise of powers usually called Sovereign powers, by which we mean powers which cannot be lawfully exercised except by Sovereign, or private individual delegated by a Sovereign to exercise them, no action will lie." In *Moodalay* v. *Morton* (16) referred to in *P. & O. S. N. Company* v. *The Secretary of State for India* (1), the Master of Rolls has thus drawn a distinction between Sovereign powers and powers exercisable by individuals. [*Moodalay* v. *Morton* (16)]. The line of demarcation seems to be that in the one case no question of consideration comes in, whereas the essence of the other is that some profit is secured or some special injury is inflicted in the exercise of the individual rights. Sir Barnes Peacock recognises that it is difficult to determine in individual instances whether the act complained of was done in pursuance of Sovereign rights or not. The mere fact that a duty is undertaken in the interests of the public will not make it a Sovereign act. It has been decided that Corporations entrusted by Statute with the execution of public duties and in receipt of tolls or dues for such purposes are liable for acts of negligence on the part of their servants. *Parnaby* v. *Lancaster Canal Company* (5). This principle was elaborated in great detail by Justice Blackburn in *Mersey Docks Trustees* v. *Gibbs* (6). In delivering the unanimous opinion of the Judges consulted in that case, Lord Cranworth (Lord Chancellor) and Lord Westbury, in accepting the opinion, say that the fact that tolls are levied for the public benefit is not an answer to an action for negligence caused by a servant. [*See also Coe* v. *Wise* (17).] The position of the East India Company is not very dissimilar to that of the Company whose liability was discussed by Mr. Justice Blackburn. At first I was inclined to think that the present case was covered by that decision. But the Judicial Committee have held that the law was correctly laid down by Sir Barnes Peacock in *P. & O. S. N. Company* v. *Secretary of State for India* (1). In that case, the learned Chief Justice specifically exempts cases in which the Sovereign delegates to a private individual (a Company will be in the same position) his Sovereign powers. Consequently, the only question open for argument is whether in making and repairing the road in question, the Government acted in the exercise of private rights. The cases quoted by Mr. Narasimha Aiyangar, in which the Secretary of State was held liable for the negligence of a servant employed in a State Railway, cannot afford much assistance in this case. A State Railway is managed by the Government for commercial purposes, although it secures considerable benefit to the public. I have felt doubts whether the maintenance of the military road is done in the exercise of Sovereign functions. The absence of any profit, the securing of the public benefit alone, are some indicia of the act having been done in the public capacity. Mr. Narasimha Aiyangar has been unable to draw our attention to any authority which

(14) 5 M. 273, 6 Ind. Jur. 402.
(15) 1 Ind. Dec. (o. s.) 489, Bignell's Rep. 87.
(16) 1 Bro. C. C. 469, Dick 652, 25 E. R. 1245.
(17) 1 Q. B. 711; 7 B. & S. 831; 14 L. T. 691, 14 W. R. 866, 37 L. J. Q. B. 262.

defines Sovereign functions. The policing of a Province, the constitution and control of the various departments of the State may be instances of the exercise of Sovereign rights. But where the sole object of the Government in carrying out a project is the public good and no ideas of profit are in contemplation, *prima facie*, the business cannot be said to have been done in the discharge of private duties, but only in the exercise of administrative powers vested in the State or Sovereign.

As I felt some doubts regarding the correctness of this position, I examined the American Law to find out under what category of duties the maintenance of roads comes in. It seems clear from the passages I shall refer to that the laying of roads is a Governmental or Sovereign function. Questions of this kind are considered in America with reference to the liability of Municipal Corporations for the negligence of their servants. The right to sue Municipal bodies in India may not rest on the same considerations as in America. Much will depend upon the legislative enactment which has brought these institutions into existence. And as pointed out in *Secretary of State for India* v. *Hari Bhanji* (14), the measure of exception from liability of Boards and Municipalities will depend upon how far their powers are defined by the Act constituting them. Apart from these special considerations, the authorities in America indicate definitely and clearly that the maintenance of roads is carried on in the exercise of public functions and that consequently negligence in relation to them will not be actionable.

In 28 Encyclopædia at page 834 it is pointed out that there are three modes of establishing a public highway: (*a*) "by the State in the exercise of its Sovereign function;" (*b*) "by the Municipality, as its agent," and (*c*) "by dedication, prescription or statutory proceedings." In the same volume it is stated at page 1340: "In the absence of Statutes imposing liability it has been held in some jurisdictions that the duties of a Municipal Corporation with regard to its streets are Governmental and that it is not liable to an individual injured by its failure to keep them in repair or safe for travel." The distinction between public or Governmental and corporate or private duties has been pointed out in *Hart* v. *Bridgeport* (18): "Public duties are, in general, those which are exercised by the State as a part of its sovereignty, for the benefit of the whole public, and the discharge of which is delegated or imposed by the State upon the Municipal Corporation. They are not exercised either by the State or the Corporation for its own emolument or benefit, but for the benefit and protection of the entire population. Private or Corporate powers are those which the city is authorised to execute for its own emoluments or from which it derives special advantage or for the increased comforts of its citizens, or for the well-ordering and convenient regulation of particular classes of the business of its inhabitants, but are not exercised in the discharge of those general and recognized duties which are undertaken by the Government for the universal benefit." The citations I have made are applicable to the present case. In the first place, this is not a road maintained by a Local Board or Municipality. Consequently it is strictly within the exercise of Governmental duties that this road is made and maintained. In the second place, if the position of the East India Company is analogous to that of Municipal Corporations in America, even then it is clear that the Company will not be liable for the negligence of its servants in failing to keep the road in good repair.

I must hold, therefore, that this case comes under the exception suggested by Sir Barnes Peacock in *P. and O. S. N. Company* v. *Secretary of State for India* (1). The subject of liability for the negligence of public servants is elaborately discussed by the learned Chief Justice in *Ross* v. *Secretary of State* (2). The question which we have to decide, namely, whether the act complained of in this case was done in the exercise of Sovereign powers, did not arise for decision in that case. The learned Government Pleader, relying on the observations of Sir Lawrence Jenkins in *Shivabhajan* v. *Secretary of State for India* (19) and of the learned Chief Justice in the case already referred, contended that as the Executive Government is vested in the Governor-in-Council by section 56 of 3 and 4 William IV, Chapter 85, the maintenance of the military road is not a liability incurred on behalf of the Governmet of India and conse-

(18 11 Fed. Cas. No. 6, 149.
(19) 38 B. 314; 6 Bom. L. R. 65.

quently, the Secretary of State is not liable. For a proper solution of this question, it will be necessary to investigate between the relative powers of superintendence possessed by the Government of India and the Government of Madras in relation to the Public Works Department. We have not sufficient materials before us for that purpose. It would also necessitate an inquiry into the correctness of the concession made by the Advocate-General in *Vijaya Ragava* v. *Secretary of State for India* (20), that the Secretary of State is liable for all illegal acts of the Governor-in-Council, Fort St. George. I do not propose to go into these questions, as I have come to the conclusion on the records before us that the injury caused in this case wat not due to negligence resulting from the exercise of other than Sovereign or administrative powers by the Government of Madras. I would, therefore, reverse the decrees of the District Judge and dismiss the suits.

Appeals allowed; Suits dismissed.

(20) 7 M. 466.

CALCUTTA HIGH COURT.

APPEALS FROM ORDERS NOS. 288 TO 293 OF 1912.

January 13, 1915.

Present:—Mr. Justice N. Chatterjea and Mr. Justice Greaves.

NARENDRA CHANDRA LAHIRI—DECREE-HOLDER—APPELLANT

versus

AFIFANNESSA BIBI AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 6 as amended by Eastern Bengal and Assam Tenancy Act (I of 1908)—Special limitation—Suit by a co-sharer landlord for his share of rent, whether governed by Art. 6.

The special limitation provided by Article 6 of Schedule III of the Bengal Tenancy Act, as amended by Act I of 1908, Eastern Bengal and Assam Tenancy Act, governs an application for execution of a decree obtained by a co-sharer landlord for his share of the rent in a suit to which the other co-sharers were not parties, the decree being for a sum of money not exceeding Rs. 500

Thakomoni Dassi v. *Mohendra Nath Dey*, 3 Ind. Cas. 389; 10 C. L. J. 463, followed.

K. B. Dutt v. *Gostha Behari Bhuiya*, 17 Ind. Cas. 207; 16 C. L. J. 379; 16 C. W. N. 1006, dissented from.

Article 6 is applicable when the decree has been made in a suit between landlord and tenant *to whom* (and not *to which*) the provisions of the Act are applicable, it being immaterial that all the provisions of the Act are not applicable.

Mrityunjoy v. *Bhola Nath*, 20 Ind. Cas. 833; 18 C. L. J. 81; followed.

Appeal from an order of the District Judge, Rangpore, dated the 15th March 1913, affirming that of the Munsif, Gaibandha, dated the 28th November 1912.

Babu *Nagendra Nath Ghose*, for the Appellant.

JUDGMENT.—The question raised in these appeals is, whether an application for execution of a decree obtained by a co-sharer landlord for his share of the rent, in a suit to which the other co-sharers were not parties, the decree being for a sum of money not exceeding Rs. 500, is governed by the special limitation provided by Article 6 of Schedule III of the Bengal Tenancy Act as amended by Act I of 1908, Eastern Bengal and Assam Tenancy Act.

Under that Article an application for execution of a decree made in a suit between landlord and tenant to whom the provisions of the Act are applicable, and not being a decree for a sum of money exceeding Rs. 500, must be made within three years of the date of the decree. The decree in each of these cases did not exceed Rs. 500 and was made more than three years before the date of application for execution, and the question, therefore, is whether the decrees were made in suits between landlord and tenant, to whom the provisions of the Bengal Tenancy Act are applicable.

Now, a co-sharer landlord is a landlord, though he may be in separate collection of his share of the rent under an arrangement with the tenant. The suits, therefore, were between landlord and tenant. Then, some of the provisions of the Act are applicable to a co-sharer landlord, though not all. So that unless it is necessary that all the provisions of the Act should apply, the cases come within the purview of Article 6 of Schedule III of the Act. It has, however, been held that it is sufficient if some of the provisions apply.

The question has been considered in several cases by this Court. In *Thakomoni Dassi* v. *Mohendra Nath Dey* (1), Mookerjee and

(1) 3 Ind. Cas. 389; 10 C. L. J. 463.

Vincent, JJ., held that an application for execution of such a decree obtained by a co-sharer landlord is governed by Article 6. In a later case, *K. B. Dutt* v. *Gostha Behary Bhuiya* (2), Brett and Sharf-ud-din, JJ., held that the Article does not apply to a decree obtained by co-sharer landlords. The learned Judges, however, observed:—"The suit was not one brought by the present petitioners as co-sharer landlords under the provisions of section 148A or section 153B of the Bengal Tenancy Act, and, in such circumstances, the decree which they obtained was a simple money-decree, and, so far as we can ascertain from the materials before us, there is nothing to indicate, that in that decree, the petitioners invoked the application of the provisions of any section of the Tenancy Act. In our opinion, the present case is distinguishable from the case of *Thakomoni Dassi* v. *Mohendra Nath Dey* (1), on which the lower Courts relied, so that, even if we were prepared to follow the decision in that case, as to which it is not necessary for us in this case to express any opinion, it would not, in our opinion, be applicable to the facts of the present case". The distinction relied upon apparently was that in the earlier case two provisions of the Act were applied for the benefit of the landlord, *viz*, that a decree for damages was made at the full rate mentioned in section 68, and article 2 (*b*) of Schedule III was applied to enable the landlord to obtain a decree for rent for four years, whereas if the provisions of the Act were inapplicable, he could have obtained a decree for rent only for three years, and interest only at the contract rate. In the present cases also, it appears that damages at the full rate mentioned in section 68 were awarded in some of the suits, and some of the suits were decreed for rents for four years. So the distinction relied upon by Brett, J., exists in these cases also.

K. B. Dutt's case (2) has not been followed in subsequent cases. In *Khetra Mohan Chatterjee* v. *Mohim Chandra Das* (3), Carnduff and Beachcroft, JJ., said that they were disposed to follow the views expressed in *Thakomoni Dassi* v. *Mohendra Nath Dey* (1) rather than the later ruling of Brett and Sharfuddin, JJ., in *K. B. Dutt* v. *Gostha Behary Bhuiya* (2). In a still later case, *Mrityunjoy* v. *Bhola Nath* (4), Mookerjee and Beachcroft, JJ., declined to follow *K. B. Dutt's* case (2), and pointed out that that case overlooks the fundamental fact, that Article 6 is applicable where the decree has been made in a suit between landlord and tenant *to whom* (and not 'to which') the provisions of the Act are applicable. They observed: "The vital point to determine is, consequently, whether the provisions of the Act are applicable to the landlord and tenant between whom this suit has been instituted: it is immaterial that all the provisions of the Act are not applicable to the suit", and following *Thakomoni's* case (1) held that the decree was barred by limitation. Again, in Appeal from Order No. 562 of 1912 (decided on the 26th January 1914) *K. B. Dutt's* case (2) was not followed and the view taken in *Thakomoni Dassi* v. *Mohendra Nath Dey* (1) and *Mrityunjoy* v. *Bhola Nath* (4) referred to above was accepted as correct. In *Kedar Nath Banerjee* v. *Ardha Chunder Roy* (5), Banerjee, J., in discussing Article 6 of the Act, as it stood before the amendment, pointed out "that the Article speaks not of decrees for rent, nor of decrees in suits between landlord and tenant, but of decrees made under the Act". In the Article as amended, the words are "decree or order made in a suit between landlord and tenant to whom the provisions of this Act are applicable".

We are of opinion that the Article as amended applies to the decrees in the present cases. The appeals must, accordingly, be dismissed.

Appeals dismissed.

(2) 17 Ind. Cas. 207; 16 C. W. N. 1006; 16 C. L. J. 879.

(3) 18 Ind. Cas. 596; 17 C. W. N. 518.

(4) 20 Ind. Cas. 533; 18 C. L. J. 81.

(5) 20 C. 54, 5 C. W. N. 703.

In the matter of SHAMBHU DIYAL.

ALLAHABAD HIGH COURT.
FULL BENCH.
CIVIL MISCELLANEOUS APPEAL No. 236 OF 1914.
December 18, 1914.

Present.—Justice Sir George Knox, Kt., Mr. Justice Rafique and Mr. Justice Piggott.

In the matter of SHAMBHU DIYAL.

Stamp Act (II of 1899), s 4—Instrument of partition—Full duty paid—Second instrument affirming first with minor alterations—Duty payable—Interpretation of Statute—Fiscal enactment.

Act No. II of 1899 is a fiscal enactment and its provisions should be construed in favour of the subject.

S and *B* executed an instrument setting forth a family arrangement regarding their joint property. The deed was stamped as a deed of partition. Subsequently the two brothers executed another instrument, providing *inter alia* that the original deed of agreement should remain in force after certain alterations entered into later on and that both of them were to remain equally binding.

Held, that the principal deed having been charged with the full duty prescribed in Schedule I for settlement of property, the later instrument was chargeable with a duty of one rupee only.

Stamp reference made by the Hon'ble Board of Revenue of the United Provinces.

Mr. *Ryves*, for the Crown.

JUDGMENT.—This is a reference by the chief controlling Revenue Authority of these Provinces made under section 57 of Act II of 1899. The facts out of which it arises are stated by the Board of Revenue to be that on the 2nd of July 1912, Raja Shambhu Dial and his brother Babu Brij Kishore executed an instrument setting forth a family arrangement regarding their joint property. The instrument was taken to the Collector of Cawnpore in accordance with the provisions of section 31 of the same Act and was held to be an instrument of partition chargeable with a duty of Rs. 925. This duty was paid. On the 23rd of August 1912, the two brothers took another instrument before the same Collector for adjudication as to proper stamp duty to be paid. This instrument provided *inter alia* that the original deed of agreement, namely, of 2nd July 1912, should remain in force after certain alterations entered into later on. Both deeds were to be equally binding. The alterations referred to were (1) some alterations on purely nominal matters which need not be considered; (2) instead of the sum of Rs. 1,600, fixed for travelling expenses in the deed of prior date, the sum of Rs. 1,500 was to be substituted, out of which Rs. 1,000 was to go to Raja Shambhu Dial and Rs. 500 to Babu Brij Kishore; (3) the sum of Rs. 12,000, assessed value of the house, *kothi*, and garden, was raised to Rs. 15,000. This was to be paid by Raja Shambhu Dial to Babu Brij Kishore. The period of payment which had been fixed as one year was extended to one and half year; (4) the *ahata* was to be made over to Babu Brij Kishore without any compensation whatever; (5) Raja Shambhu Dial was to pay in any case the sum of Rs. 3,000, in the marriage ceremony of Babu Brij Kishore's daughter; (6) a garden out of the joint stock was to remain in the sole possession of Raja Shambhu Dial and Rs. 2,300 were to be given to Babu Brij Kishore. The original deed of agreement was to remain in force except so far as the above alterations were concerned. The Board of Revenue considered that the case fell within the principle laid down in the ruling of this Court in Civil Miscellaneous Case No. 79 of 1912 and were of opinion that the later instrument was a fresh instrument of partition to be stamped *ad valorem*. We sent for the ruling cited by the Board of Revenue. We are agreed that it has no bearing whatever upon the case before us. The obvious intention of the contracting parties was that the settlement of certain moneys and properties covered by the deed of 2nd July 1912 should be re-adjusted. No new property was introduced into the second deed. Both deeds were contingent upon the coming to pass of other *events* which were at the time of execution *events* in the future. The intention was that they were to form and to be regarded as one deed. After carefully considering the language used in both deeds and remembering always that Act II of 1899 is a fiscal enactment, that its provisions should be construed in favour of the subject, we hold that the present case falls within the purview of section 4 of the Act. The principal instrument has been charged with the duty prescribed in Schedule I for settlement of property. The later instrument is chargeable with a duty of one rupee only. A copy of this our judgment under a seal of the Court and signature of the Registrar will be sent to the chief controlling Revenue Authority.

Reference answered.

LOWER BURMA CHIEF COURT.
SECOND CIVIL APPEAL No. 168 OF 1913.
February 1, 1915.
Present:—Mr. Justice Twomey.
MAUNG KYAW—PLAINTIFF—APPELLANT
versus
MA GAUK AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11, O. II, r. 2—Res judicata—Cause of action—Suit for redemption dismissed—Second suit on basis of promise to allow redemption, maintainability of—Specific Relief Act (I of 1877), s. 12—Appeal re-heard on application for review—Second appeal—Limitation.

When an application for review of an appeal is admitted and the appeal is re-heard and a fresh decree dismissing the appeal is passed on grounds different from those on which the appeal was originally dismissed, a fresh period of limitation for appeal begins to run from the date of the new decree.

Joykishen Mookerjee v. *Atoor Rohoman*, 6 C. 22; 6 C. L. R. 575; 8 Shome L. R. 197; *Soudamoni Dasi* v. *Maharaj Dheraj Mahatab Chand Bahadur*, B. L. R. Sup. Vol. 585; 6 W. R. Misc. 102, referred to and followed.

The plaintiff-appellant first sued the defendant-respondent for redemption of a piece of land on the basis of a mortgage for Rs. 280, but failed; subsequently he brought the present suit, alleging the same set of facts but basing the suit on the 1st defendant's promise to allow redemption on payment of Rs. 400, for which sum the land had been sub-mortgaged to the 2nd and 3rd defendants. The lower Courts found the promise proved, but dismissed the suit as barred by *res judicata* and Order II, rule 2, Civil Procedure Code:

Held, that the suit is not barred by *res judicata* or by Order II, rule 2, Civil Procedure Code, as the suit is not based on the mortgage but on a subsequent promise to allow redemption, which is an entirely new cause of action.

If a man promises to deliver land for an agreed price and fails to fulfil his promise, there is nothing to prevent the Court from decreeing specific performance of the contract.

Mr. *Halkar*, for the Appellant.

Mr. *May Oung*, for Respondent No. 1.

JUDGMENT.—This second appeal would be barred by limitation if time were to be reckoned from the date of the first decree in the District Court. But the District Judge admitted an application for review, re-heard the appeal and passed a fresh decree dismissing the appeal on grounds different from those on which his predecessor had dismissed it. In these circumstances a fresh period of limitation began to run from the date of the new decree. [See *Joykishen Mookerjee* v. *Atoor Rohoman* (1) and *Soudamoni Dasi* v. *Maharaj Dheraj Mahatab Chand Bahadur* (2).]

(1) 6 C. 22, 5 C. L. R. 575; 8 Shome L. R. 197.
(2) B. L. R. Sup. Vol. 585; 6 W. R. Misc. 102.

The plaintiff-appellant had failed in a former suit to redeem the land in question. In that case it was alleged that the plaintiff's father mortgaged the land to the defendant's father orally for Rs. 280, that the 1st defendant refused to allow redemption for Rs. 280, but agreed to allow redemption for Rs. 400 for which sum the land had been sub-mortgaged to two other men, the 2nd and 3rd defendants. Subsequently, however, the sub-mortgagees, 2nd and 3rd defendants, opposed the redemption for Rs. 400 and the 1st defendant-respondent backed out of his promise to make over the land. It was held by the Township Court and on appeal by the District Court that the mortgage was not proved, and the suit was dismissed on that ground.

Plaintiff-appellant then brought the present suit, alleging the same set of facts and praying for enforcement of the 1st defendant's promise to allow redemption. The Township Court found that the promise was proved, but that this being merely a part of the negotiations for redemption the new suit was barred as *res judicata*. The District Court upheld this decision on appeal. But on review of the judgment the District Court accepted the plaintiff's contention that the new suit was not based on the alleged mortgage but on an entirely separate cause of action, namely, the subsequent promise to allow redemption. The District Judge held, however, that the promise was not one which could be specifically enforced by the Court and that the plaintiff-appellant's proper remedy was a suit for damages. No reasons are given for this view, which appears to be incorrect. If a man promises to deliver land for an agreed price and fails to fulfil his promise, there is nothing to prevent the Court from decreeing specific performance of the contract. The Judge's attention is drawn to the explanation to section 12, Specific Relief Act.

In this case the defendant did not actually contract to sell the land to the plaintiff. What the defendant promised was "to allow redemption for Rs. 400"; in other words, he promised not to oppose the plaintiff's claim as mortgagor provided that the plaintiff paid up enough to redeem the land from the 2nd and 3rd defendants. The 1st defendant in effect said: "I know nothing of the alleged mortgage by your father to mine and the

land is not now in my hands, but in those of the 2nd and 3rd defendants. But as you say the land was mortgaged by your father to mine, I have no objection to redeeming from the 2nd and 3rd defendants and making over the land to you if you provide the requisite amount, Rs. 400, which they advanced on the land. I will not put you to the proof of your alleged mortgage".

The question is, whether this promise gave a fresh cause of action. I think there can be no doubt that it did. There was an express contract by the respondent to redeem the land for Rs. 400, to be provided by the plaintiff, from the 2nd and 3rd defendants and make the land over to the plaintiff. This was irrespective of the mortgage, proof of which the respondent inferentially waived. I think, therefore, that the 2nd suit on the contract was not barred by the rule of *res judicata* merely because the plaintiff had brought a previous suit on his alleged mortgage. Nor can it be held that the second suit was barred by Order II, rule 2. The cause of action on the alleged mortgage and on contract being distinct and seperate the rule has no application.

It is urged for the respondent that the contract was without consideration and is for this reason unenforceable. It was not without consideration. The proposed extinction of the 1st defendant-respondent's mortgage-debt to the 2nd and 3rd defendants-respondents was good consideration for the bargain he made with the plaintiff-appellant.

I set aside the decree of the lower Courts and direct that an account be taken of what is due to each of the 2nd and 3rd defendants by their mortgagor, the 1st defendant, and that on payment by the plaintiff-appellant to the 2nd and 3rd defendants of a sum not exceeding Rs. 400. less a two-third share of the plaintiff's costs in all Courts, the 2nd and 3rd defendants shall convey the lands in suit to the plaintiff-appellant, free from all incumbrances created by the defendants or any persons claiming under them, and shall put the plaintiff-appellant in possession of the property. The remaining one-third share of the plaintiff-appellant's costs shall be recovered by him from the 1st defendant-respondent.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 698 OF 1913.

January 5, 1915.

Present:—Mr. Justice Piggott.

Musammat MUNNI—PLAINTIFF—APPELLANT

versus

MADAN GOPAL—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), s 11—Minor—Conveyance in favour of minor, validity of—Contract and conveyance, distinction between—Transfer of Property Act (IV of 1882), s. 127—Gift in favour of minor, validity of—Rulings, construction of.

A contract of sale negotiated by a minor, who settled the terms, paid consideration and received in return a deed purporting to convey immoveable property by way of sale, is altogether void *ab initio* and no title thereby passes to the minor.

Mohori Bibi v. Dharmodas Ghose, 30 C. 539; 5 Bom. L. R. 421; 7 C. W. N. 441; 30 I. A. 114 (P. C.), followed.

Mir Sarwarjan v. Fakhruddin Mahomed, 13 Ind. Cas. 331, 16 C. W. N. 74, (1912) M. W. N. 22; 15 C. L. J. 69; 14 Bom. L. R. 5, 39 C. 232; 21 M. L. J 156; 39 I. A. 1 (P. C.), 9 A. L. J. 33, *Novakoti Narayana Chetty v. Loyalinga Chetty*, 4 Ind Cas 383; 33 M. 312, 19 M. L. J. 752; 7 M. L. T. 238; *Behari Lal v. Bam Lal*, 3 A. 408; *Ulfat Rai v. Gouri Shankar*, 11 Ind. Cas. 20; 33 A. 657, *Rashik Lal v. Ram Narain*, 13 Ind Cas. 573; 9 A. L. J. 198 at p. 201; 34 A. 273; *Amna Bibi v. Udit Narain Misra*, 1 Ind. Cas. 890; 31 A. 68, 9 C. L. J 512; 11 Bom L. R. 525, 19 M. L. J 295; 6 M. L. T 89 (P. C.); 36 I. A. 44, referred to.

Obiter dicta—(1) Under the provisions of section 127 of the Transfer of Property Act a gift in favour of a minor is not void, though it may be voidable at the option of the minor.

(2) There is a fundamental distinction between a contract and a conveyance. A conveyance is a contract *plus* something more or, in other words, a conveyance by way of sale is either in itself a contract or at any rate involves or implies an antecedent contract.

Second appeal from the decision of the District Judge of Benares, dated the 15th March 1913.

Dr. *S. M. Suleman*, for the Appellant.

Mr. *A. P. Dube*, for the Respondent.

JUDGMENT.—This case has had an unfortunate history. *Musammat* Munni Kunwar, the plaintiff, sued for recovery of possession over a certain house. Her case was that the defendant Madan Gopal, who was her father-in-law, conveyed the house in question to her by a sale-deed dated the 24th of September 1901 and that she subsequently permitted him to reside in the same up to the year 1912. Being then desirous of occupying the house herself to the exclusion of the defendant, she served

the latter with a notice to vacate the house, and the cause of action is stated to have accrued to her on the 24th of February 1912, the date of the defendant's refusal to vacate the house in accordance with the notice. The defendant replied that he had executed the sale-deed in suit in favour of his daughter-in-law without any consideration, as a colourable and fictitious transaction, and had remained in possession of the house ever since as proprietor. He alleged that his son Bishnath Singh, husband of the plaintiff, having subsequently died, the plaintiff had gone to live with her own father and was now bringing this suit in collusion with her father, although both of them were perfectly aware of the fictitious nature of the sale-deed of the 24th of September 1901. The case went to trial upon a plain issue of fact as regards the alleged fictitious nature of the sale-deed and the passing or otherwise of the consideration. At a very late stage of the case, it seems to have occurred to the learned Munsif that there was evidence on the face of the record to show that the plaintiff *Musammat* Munni Kunwar must have been a minor in the month of September 1901. He seems to have thought that this incident might furnish a short cut to the determination of the suit, without necessitating a trial of any of the questions of fact raised by the pleadings of the parties. He framed a fresh issue, and eventually dismissed the suit on the ground that, whatever may or may not have happened at the time of the execution of the sale-deed of 1901, the fact that the plaintiff was then a minor was conclusive against her. This decision was affirmed by the District Judge on appeal. When the matter came before me in June last I found it necessary, for reasons which need not now be discussed, to remand the case in order that the plaintiff might have an opportunity of placing on the record certain evidence which had, in my opinion, been wrongly excluded at the trial in the Court of the Munsif. I asked the lower Appellate Court, after recording this evidence, to re-consider its decision in the light of that evidence, and to state whether the pleas taken in the first two paragraphs of the memorandum of appeal to the lower Appellate Court ought or ought not to prevail in the light of the evidence on the record taken as a whole. I am now inclined to think that, as I was remanding the case, I would have exercised a wiser discretion if I had insisted on a clear finding of fact as to the passing of consideration and as to the alleged fictitious nature of the sale-deed. It appears that, when the plaintiff originally led evidence in the Munsif's Court, the fact that she was a minor in the year 1901 was not present to her mind or to that of her legal advisers. The case put forward by her was that the money which formed the consideration for the sale was a gift to her from her father, and that she had negotiated the sale and paid over to the defendant the money thus received by her as a gift. When the question of minority was raised, the plaintiff appears, as the learned District Judge has remarked, to have very distinctly shifted her ground. She then led evidence to prove that her father had negotiated on her behalf the transaction of sale with the defendant, had paid over the money to the defendant on her behalf and caused a sale-deed of the house to be executed in her name. If this were so in fact, the transaction would really amount to an acquisition by the plaintiff's father from the defendant of a certain house and a gift of that house to the plaintiff by her father. The provisions of section 127 of the Transfer of Property Act (IV of 1882) show that a gift in favour of a minor is not void, though it may be voidable at the option of the minor. I should feel no hesitation in holding that, if the facts were as above stated, the present suit would be maintainable. As the case stands, the learned District Judge has definitely disbelieved and rejected the evidence tendered by the plaintiff subsequenly to my order of remand. He holds that whatever else may have happened in connection with this contract of sale, it is not a fact that the sale was negotiated by the plaintiff's father and the purchase made by him on the plaintiff's behalf. I think it unfortunate that the Courts below should not have proceeded further and considered the effect of the plaintiff's change of attitude and the conflicting nature of the evidence tendered by her, with regard to the plain issues of fact raised by the pleadings as they originally stood. As the case stands I have no finding before me that consideration did or did not pass, or as to whether the execution of this sale-deed of the 24th of September

1901 was not after all, as the defendant has all along pleaded, a purely fictitious transaction. I have to look at the question of law raised in this way: Assuming for the sake of argument that in the month of September 1901, the plaintiff, being at the time a minor, negotiated the sale of the house in suit with the defendant and paid over certain money to the defendant, receiving in return the sale-deed which is the basis of the present suit, is that contract of sale void on the ground of the plaintiff's minority, or can the plaintiff be said to have become by virtue of this transaction the owner of the house in suit? The leading cases on the subject are the recent decisions of their Lordships of the Privy Council in *Mohori Bibi* v. *Dharmodas Ghose* (1) and in *Mir Sarwarjan* v. *Fakhruddin Mahomed* (2). The Madras High Court in *Novakoti Narayana Chetty* v. *Loyalinga Chetty*(3), has interpreted these rulings as laying down in the broadest terms the principle that a sale in favour of a minor is void. The reasoning of the learned Judges in arriving at this decision commends itself to my mind and I do not think it necessary to reproduce it here. It has been suggested that the current of decisions in this Court has always been in another direction from the time of the earliest case on the point, that of *Behari Lal* v. *Beni Lal* (4), in which a mortgage in favour of a minor was affirmed. Their Lordships of the Privy Council in *Mohori Bibi's* case (1) pointed out that there had been some conflict of decisions in the Indian Courts, and considered it necessary to review the whole question of a contract to which a minor was a party with reference to the special provisions of the Indian Contract Act (IX of 1872). Any rulings prior in date require to be reconsidered with reference to the principles laid down by the Privy Council. The nearest case in the plaintiff's favour is that of *Ulfat Rai* v. *Gouri Shankar* (5). It was there pointed out that the Transfer of Property Act in itself contains no provision which makes a minor incapable of being a transferee of immoveable property. That case, however, required to be considered with reference to its own facts. The transfer was one by the minor's certificated guardian in favour of the minor. The transaction as a whole certainly admitted of being regarded as a gift subject to a condition, and such transfer by way of gift would be voidable at the option of the minor under the provisions of the Transfer of Property Act, to which I have already referred. It is quite true, as has been pointed out by this Court in more than one case, [Vide *Rashik Lal* v. *Ram Narain* (6)], that there is a fundamental distinction between a contract and a conveyance; but it seems to me that this point might be stated with equal accuracy by saying that a conveyance is a contract *plus* something more. At any rate, as the learned Judges of the Madras High Court have pointed out in the ruling already referred to, a conveyance by way of a sale either is in itself a contract or at any rate involves or implies an antecedent contract. On the principles laid down by their Lordships of the Privy Council in the cases already referred to, it seems to me impossible to avoid the conclusion that a contract of sale negotiated by a minor, the minor having settled the terms, paid consideration and received in return a deed purporting to convey immoveable property by way of sale, is altogether void *ab initio*, and that no title thereby passed to the minor.

This suit as brought must, therefore, fail. It has been suggested that, in the alternative, the plaintiff should be given a decree for the refund of the purchase-money. I may remark at once that I could not do this without once more remanding the case to the Court below for a definite finding as to whether the alleged sale consideration did or did not pass from the plaintiff to the defendant. It seems to me, however, that from any point of view the claim is not one which can be entertained in the present suit. It was not expressly put forward in the plaint, and it is

(1) 30 C. 539; 3 Bom. L. R. 421; 7 C. W. N. 441, 30 I. A. 114 (P. C.).
(2) 13 Ind. Cas. 331, 9 A. L. J. 33; 16 C. W. N. 74; (1912) M. W. N. 22; 15 C. L. J. 69; 14 Bom. L. R. 5; 39 C. 232, 21 M. L. J. 1156, 39 I. A. 1 (P. C.).
(3) 4 Ind. Cas. 283, 33 M. 312; 19 M. L. J. 752; 7 M. L. T. 233.
(4) 3 A. 408,
(5) 11 Ind. Cas. 20; 33 A. 657.
(6) 13 Ind. Cas. 573; 9 A. L. J. 198 at p. 201; 34 A. 273,

now sought to base it on the general prayer for any other relief, which is contained in the last paragraph of the plaint. If the plaintiff is regarded as claiming this refund of the sale consideration as money payable by the defendant for money received by the defendant for the plaintiff's use (Article 62 of the first Schedule to the Limitation Act IX of 1908), then the claim is time-barred, because it does not appear to have been brought within three years from the plaintiff's attaining majority. For the same reason the claim cannot be sustained, as it perhaps might otherwise have been, as a claim for relief on the ground of fraud. The only other suggestion which has been, or can be, put forward on behalf of the plaintiff is that the claim for refund of purchase-money might be sustained as a claim for money paid upon an existing consideration which afterwards fails. In that case Article 97 of the Schedule already referred to would apply; but it would be for the plaintiff to show when it was that the consideration failed. There is authority in the case of *Amna Bibi* v. *Udit Narain Misra* (7) for giving the plaintiff in a case somewhat analogous to the present a decree for refund of the money paid, and for applying Article 97 of the first Schedule to the Limitation Act to such a suit. In that case, however, as also in a similar case reported as *Venkataramá Aiyar* v. *Venkata Subrahmanian* (8), there had been a previous suit resulting in an adjudication between the parties in consequence of which the plaintiff had failed to obtain the property for the price of which he claimed in the second suit; limitation was held to run against the plaintiff from the date of the final decision in the first litigation holding the plaintiff's claim to the property to be unenforcible. If these principles are in fact applicable to the present case, it may be that the plaintiff will have a cause of action from the date of the dismissal of the present appeal; but that is not a matter as to which it is necessary for me to express a final opinion in order to dispose of this appeal. So far as this claim for refund of purchase-money goes, I hold that the plaintiff, supposing her to be in fact entitled to such refund, has either a cause of action which has become barred by time or a cause of action which has not yet arisen and will arise only on the failure of the present suit. For these reasons I dismiss this appeal with costs including fees on the higher scale.

Appeal dismissed.

(7) 1 Ind. Cas 890; 31 A 68; 9 C. L J. 512; 11 Bom. L. R 525; 19 M. L J. 295; 6 M. L. T. 89 (P. C.); 36 I. A. 44.

(8) 24 M. 27; 10 M. L. J. 217

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 64 OF 1914.

December 3, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

V. BALAKRISHNA MUDALIAR—PLAINTIFF—APPELLANT

versus

V. RAJU MUDALIAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Partition—Status—Intention to divide—Presumption when one co-parcener divides.

If the male members of a joint Hindu family wish to become divided in status they are at liberty to agree to do so, and on their so agreeing, they become divided in status even though the properties are not actually divided between them by metes and bounds. A definite and unambiguous expression even by one member of his intention to separate himself and enjoy his share in severalty may amount to separation. A definite partition of properties by metes and bounds is not essential to constitute a definite division in status between co-parceners. The presumption, when one of several co-parceners becomes divided, is that the others also have become divided in status.

Appeal from the decree of the Hon'ble Mr. Justice Wallis, dated the 14th August 1913, passed in the exercise of the ordinary original jurisdiction of this Court in Civil Suit No. 151 of 1912.

Mr. *K. Ramanath Shevai*, for the Appellant.

Mr. *T. Etheraja Mudaliar*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—The plaintiff, the first defendant and one Muthurama Mudali were the three sons of one T. V. Srinivasa Mudali. They were undivided co-parceners till 1897. One of them, Muthurama Mudali, was then absent at Rangoon. The other two brothers had disputes with each other about partition and on the 8th of May 1897 they asked five persons to divide the ancestral properties between them as *panchayatdars*. If the male members of a joint Hindu family wish to become divided in status, they are at liberty to agree to do so and on their so agreeing, they become divided in status even though the properties are not actually divided

between them by metes and bounds. That has been held in the case of *Segu Chidambaramma* v. *Segu Balayya* (1), decided by Abdur Rahim and Spencer, JJ. As their Lordships of the Privy Council have stated in the case reported in *Suraj Narain* v. *Iqbal Narain* (2), a definite and unambiguous indication even by one member of his intention to separate himself and to enjoy his share in severalty may amount to separation. The cases in *Ram Pershad Singh* v. *Lakhpati Koer* (3) and *Balkishen* v. *Ram Narain Sahu* (4) also establish that definite partition of properties by metes and bounds is not essential to constitute a definite division in status between co-parceners. I, therefore, agree with the learned Judge that the plaintiff and the first defendant became divided in status in 1897, as they then came to a clear mutual understanding to the effect that their interests thereafter shall be separated and they executed the *muchilika*, Exhibit A, to the arbitrators merely to get separate possession of separate properties.

This suit, brought on the footing that no division in status had ever taken place, might be dismissed on the sole ground that the foundation of it, namely, the allegation "that the plaintiff and the first defendant are members of an undivided Hindu family" (see paragraph 3 of the plaint), is non-existent. Taking it, however, that this is a suit by a tenant-in-common for a partition of properties held in common, it has again to be remarked that of the three co-parceners, one (Muthurama) admittedly became divided in status in 1899. It has been held by the Privy Council in several cases, including the two cases already mentioned, that the presumption when one of several co-parceners has become divided is that the others also have become divided in status. The division in status is also made almost conclusive by the fact that the plaintiff and the first defendant in December 1900 executed separate deeds of maintenance, making the executant of each of the two deeds separately liable to pay to the mother Rs. 1-4-0 monthly. Bearing in mind all these facts, I think that the evidence of the first defendant that the properties had also been divided between himself and the plaintiff by the arbitrators and that no property was left to be enjoyed in common between them, is very probable and ought to be accepted; and the burden which lies heavily on the plaintiff to prove that the house and the lands were left undivided by metes and bounds, cannot be held to have been discharged by him. The mother of the plaintiff and of the first defendant (D. W. 2) supports the first defendant by her evidence on the question that the house was divided by lots and that definite shares fell to each of the two brothers. There is no sufficient reason why she should help one of her sons against the other. The question whether the division took place on the very day after the date of Exhibit A (8-5-97) or whether it took place only on some other date before the date of the maintenance-deeds I and II (29-12-1900), is not very important. In the result I would dismiss the appeal with costs.

NAPIER, J.—I concur.

Appeal dismissed.

(1) 12 Ind. Cas 704; (1911) 2 M. W. N. 407.

(2) 18 Ind. Cas. 30; 35 A. 80; 15 Bom. L. R. 456; 16 C. C. 129; 40 I. A. 40 (P. C.), 13 M L. T. 194; 17 C. W. N. 333; 11 A. L. J. 172; 17 C. L. J. 288, 24 M. L. J. 345; (1913) M. W. N. 183.

(3) 30 C. 231; 7 C. W. N. 162; 5 Bom. L. R. 108; 30 I. A. 1.

(4) 30 C. 788; 7 C. W. N. 578; 5 Bom. L. R. 461; 30 I. A. 139.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 19 OF 1914.

December 4, 1914.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerjee, KT.

MANGAL SEN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MUHAMMAD HUSSAIN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s.2 (d) —Consideration—Third party, right of, to sue—Plaintiff not privy to contract—Defendant, liability of, when arises—Equity.

A plaintiff cannot make a defendant liable upon a contract to which the plaintiff was not privy, but in such cases as the defendant would be held liable in "Court of Equity" the Courts in this country should hold him liable.

A *zemindar* who is entitled to *zemindari* dues from his *muafidar* is not entitled to sue a lessee from the *muafidar* for the dues when he was not privy to the contract between his *muafidar* and lessee, although the lessee agreed in his contract to pay the *zemindari* dues, as the *zemindar* has no such equity against

the lessee as a Court of Equity would enforce in his favour.

Letters Patent Appeal against the decision of Mr. Justice Tudball, dated the 12th December 1913, in Second Appeal No. 725 of 1912.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Appellants.

Mr. *B. E. O'Conor*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit in which the plaintiffs claimed *semindari* dues. They made defendants to the suit a certain *muafidar* and also two lessees from the *muafidar*. It is admitted that the *semindars* were entitled to dues (though not the amount claimed) from the *muafidar*. Under the terms of the lease the other defendants, that is to say, the lessees from the *muafidar*, undertook to pay the *semindari* dues. The plaintiffs mainly claimed against the lessees, but stated that for the sake of precaution the *muafidar* was also made a defendant and that if they were not entitled to a decree against the lessees they might have a decree against him. The lessees (the respondents to the present appeal) pleaded, *first*, that they were not liable to the plaintiffs, inasmuch as they had never entered into any contract with them, and *secondly*, that if they were at all liable the dues were not as claimed by the plaintiffs. The Court of first instance granted a decree against the present respondents exempting the *muafidar*. The respondents appealed with the result that the decree of the Court of first instance was confirmed. The plaintiffs preferred no appeal against the dismissal of their claim against the *muafidar*. In second appeal to this Court the decrees of the Courts below were set aside and the plaintiffs' suit dismissed. Against this decree the plaintiffs have preferred the present Letters Patent appeal.

The only point to be decided is, whether or not under the circumstances of the present case the plaintiffs were entitled to sue the defendants, the lessees. It is admitted that there was no privity of contract. It is also admitted that the respondents' liabilty (if any) is under the terms of their contract with their lessor, the *muafidar*. In our opinion the learned Judge of this Court was correct in the view he took. The learned Advocate on behalf of the appellants contends that wherever there is a contract under which a third party may obtain a benefit, he is entitled to sue upon that contract just as fully as he could do if he had been a party to it. We think that such a proposition is altogether too wide. In the present case it is pretty clear that if the plaintiffs thought it was to their advantage, they might even have refused to recognise the respondents as the persons liable to pay their dues. We may also point out that in many cases it would be extremely inconvenient that parties should be sued by persons who were no parties to the contract. On the strict words of the present contract the lessees were liable to pay "the *semindari* dues," and yet we find that there is a difference of opinion between the plaintiffs and the respondents as to the amount of these dues. The plaintiffs never agreed to accept the respondents as the persons to whom they would look for the payment of their dues. They never in any way altered their position in consequence of the contract which the respondents entered into with their lessor. We think there can be no doubt that the general rule is that a party cannot make another person liable upon a contract to which the suing party was not privy. There are no doubt exceptions to this rule. We think that it may fairly be said that in all such cases as the defendant would be liable in a "Court of Equity," the Courts in this country should hold him liable. But we do not think that the present is a case in which a "Court of Equity" could grant the plaintiff relief. The case of *Nawab Khwaja Muhammad Khan* v. *Husaini Begum* (1) has been cited. In that case there was a marriage arrangement between the defendant and the father of the plaintiff, whereby the defendant agreed to pay Rs. 500 a month to the plaintiff and charged certain property with the payment of the money. It was held that the plaintiff, although no party to the contract, was entitled to enforce it. At page 413 of the Report their Lordships of the Privy Council say: "Here the agreement executed by the defendant specifically charges immoveable property for the allowance, which he binds himself to pay to the plaintiff; she is

(1) 7 Ind. Cas. 237; 32 A. 410; 14 C. W. N. 865; 7 A. L. J. 871; 8 M. L. T. 147; 12 Bom. L. R. 638; 12 C. L. J. 205; 20 M. L. J. 814; (1910) M. W. N. 313; 37 I. A. 152 (P. C.).

the only person beneficially entitled under it. In their Lordships' judgment although no party to the document, she is clearly entitled to proceed in equity to enforce her claim."

The case of *Touche* v. *The Metropolitan Railway Warehousing Company* (2) was also quoted. There the plaintiff had done work at the instance of a promoter of a Company. The Articles of the Association provided that in certain events the sum of £2,000 would be paid to one of the promoters for the plaintiff who had done the work. It was held that the plaintiff could get the money from the Company. A copy of the Articles of Association had been sent to the plaintiff, he had done the work and the Company had got the benefit of his labours.

In the case of *Deb Narain Dutt* v. *Ram Sadhan Mandal* (3) it was also held that the plaintiff, though not a party to the arrangement between the defendant and the third party, was entitled to be paid a sum of Rs. 300 and interest. At page 142 the facts of the case are briefly stated by the learned Chief Justice: "On the 22nd July 1899, defendants Nos. 1 to 4 borrowed from the plaintiff a sum of Rs. 300, and, by way of security for this, they gave a personal covenant by a registered bond, and also purported, though ineffectually, to create a charge, by deposit of a *patta* relating to immoveable property. Interest was paid on this bond up to the 13th of April 1903; and, on the 18th of August 1903, defendants Nos. 1 to 4 executed a registered instrument of transfer of all their property, moveable and immoveable, to defendant No. 5 for a sum of Rs. 2,000, becoming thereby, as the plaintiff describes it, 'rightless.' This Rs. 2,000 was not all paid in cash, but there was a provision and declaration in the *kabala* that out of this consideration money of Rs. 2,000, amongst other things, the sum of Rs. 330 due to the plaintiff should be paid by defendant No. 5. On the very same day there was an arrangement between the plaintiff and defendant No. 5 by which the liability of defendant No. 5 under the transfer was acknowledged and accepted, and either then or in connection therewith this *patta* was handed over to defendant No. 5."

It is clear that in all these cases the plaintiff had an "equity" which would always have been enforced by an English Court of Equity. The facts of the present case, as already pointed out, are quite different. We think the view taken by the learned Judge of this Court was correct and we dismiss the appeal with costs.

Appeal dismissed

(2) 6 Ch. App. 671 at p. 677.

(3) 20 Ind. Cas. 630; 41 C. 187; 17 C. W. N. 1148; 18 C. L. J. 603.

CALCUTTA HIGH COURT.

FIRST CIVIL APPEAL No. 55 OF 1912.

August 10, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT. and Mr. Justice Breachcroft.

ACHYUTANANDA DAS—DEFENDANT—APPELLANT

versus

JAGANNATH DAS—PLAINTIFF—RESPONDENT.

Succession Act (X of 1865), s. 187—Hindu Wills Act (XXI of 1870), s. 2—Will not proved in Probate Court, when can be used as evidence—Evidence Act (I of 1872), s. 32 (5)—Relationship, existence of—Adoption—Mutt, kinds of—Succession.

Notwithstanding section 187 of the Succession Act, which is incorporated in the Hindu Wills Act, a Will not proved in the Probate Court may be cited in evidence for a purpose other than the establishment of a right as executor or legatee.

Subunnai Gupta v. *Bharat Mandal*, 26 Ind. Cas. 980; 20 C. L. J. 148, *Surbomungola* v. *Mohendronath*, 4 C. 506; *Janaki* v. *Dhanu Lal*, 14 M. 454; *Coralapatti* v. *Cota*, 3 Ind. Cas. 475, 33 M. 91; *Basanta Kumar* v. *Gopal Chandra Das*, 26 Ind. Cas. 21; 18 C. W. N. 1136, referred to.

The relationship between a *mohunt* and his *chela* is a relationship by adoption within the meaning of clause (5), section 32, of the Indian Evidence Act (I of 1872). A statement in a Will that the testator has one *chela* and has no other *chela* is a statement relating to the existence of a relationship and is admissible in evidence under that clause.

Mohunt Bhagaban v. *Mohunt Ram Praparna*, 22 I. A. 94; 22 C. 843, referred to.

Mutts are of three descriptions, *viz.*, *maurasi*, *panchayati* and *hakimi*. In the first the office of the chief *Mohunt* is hereditary and devolves upon the chief disciple of the existing *Mohunt* who, moreover, usually nominates him as his successor; in the second the office is elective, the presiding *Mohunt* being selected by an assembly of *Mohunts*; in the third the appointment of the presiding *Mohunt* is vested in the Ruling Power or in the party who had endowed the temple.

Mohunt Ramanooj Das v. *Mohunt Deb Raj Das*, 6 Mac. Sel. Rep. 329; 7 Ind. Dec. (o. s.) 918; *Greedharee Doss* v. *Nundokissore Doss*, 11 M. I. A. 405; 8 W. R. 35

ACHYUTANANDA DAS v. JAGANNATH DAS.

(P. C.); 2 Suth P. C. J. 86, 2 Sar P. C. J. 306, 20 Eng. Rep. 54, *Genda Puri* v. *Chatar Puri*, 9 A. 1; 13 I. A. 100; 5 Sar P. C. J. 726, *Ramalingam* v. *Vythilingam*, 16 M. 490, 20 I. A. 150, 6 Sar. P. C. J. 351; 17 Ind. Jur. 578, referred to.

Obiter dictum—A statement as to the time of commencement of a relationship is so indissolubly associated with the existence itself of the relationship that it may be rightly regarded, without undue stretch of language, as a statement which relates to the existence of that relationship under clause (5), section 32, of the Indian Evidence Act

Oriental Government Life Assurance Company Ld., v *Narasimha Chari*, 25 M. 183; 11 M. L. J. 379, *Patabharkaru* v. *Raman*, 24 Ind. Cas. 519, referred to.

Appeal from a decision of the Subordinate Judge of Cuttack, dated the 15th February 1912.

Babus *Provas Chandra Mitter* and *Satis Chandra Bose*, for the Appellant.

Babus *Sarat Chandra Ray Chowdhury* and *Charu Chandra Bhattacharjee*, for the Respondent.

JUDGMENT.—The question in controversy in this appeal relates to the right of succession to the office of *Mohunt* of a Hindu religious institution, known as the Khumbakal *mutt*, situated in the interior of the District of Cuttack at a distance of about 40 miles from the headquarters. In 1906, and for some years before, Raghabananda Das was the *Mohunt*. He died on the 13th November 1906 and left, it is said, a Will executed and registered on the day of his death. His *chela* Sriram Das succeeded to the office of *Mohunt* and continued as such only for a brief period, as he died on the 28th September 1907. He left, it is alleged, a Will executed on the day of his death. Immediately after his death, Jagannath Das laid claim to the office of *Mohunt* on the allegation that he was his *gurubhai* or co-disciple. The claim was resisted on behalf of an infant Achyutananda Das, who, it was said by his supporters, had been taken as *chela* by Sriram Das and was consequently entitled to succeed him as *Mohunt*. This led to proceedings under the Land Registration Act before the Revenue Authorities; one of these was decided against Jagannath Das on the 25th March 1909, while another had terminated in his favour on the 20th February 1909. The result was that on the 11th October 1909, Jagannath Das commenced this action for declaration that as the *gurubhai* of Sriram Das, he had lawfully succeeded to the office of *Mohunt*, and that Achyutananda Das, the pretended *chela*, had no claim thereto and was in fact an impostor set up by persons anxious to seize the properties of the endowment. The Subordinate Judge has found on the evidence, *first*, that the plaintiff Jagannath Das was the senior *chela* of Raghabananda Das, and *secondly*, that Achyutananda Das, the defendant, was not the *chela* of Sriram Das. In this view, the Subordinate Judge has decreed the suit. The defendant has appealed to this Court, and has contended, *first*, that the plaintiff was not the *chela* of Raghabananda Das, and, *secondly*, that he himself had been taken as *chela* by Sriram Das. Before these questions are discussed, it is necessary to determine the rule of succession applicable to this endowment.

It is the common case of the parties that the Khumbakul *mutt* is a *maurusi mutt*. As was explained in the case of *Mohunt Rama Nuj Dass* v. *Mohunt Deb Raj Das* (1) *mutts* are of three descriptions, *viz.*, *maurusi*, *panchayeti* and *hakimi*. In the first, the office of chief *Mohunt* is hereditary and devolves upon the chief disciple of the existing *Mohunt*, who, moreover, usually nominates him as his successor; in the second, the office is elective, the presiding *Mohunt* being selected by an assembly of *Mohunts*, in the third, the appointment of presiding *Mohunt* is vested in the Ruling Power or in the party who has endowed the temple. The Subordinate Judge has found that in a *maurusi mutt*, the *chela* succeeds, and in default of a *chela*, the *gurubhai* succeeds; and, where there are more *chelas* than one, the eldest generally succeeds, but a junior *chela* may succeed, if he be found more capable and if he be selected by the last *Mohunt* as his successor. This is in accord with the decisions of the Judicial Committee in *Greedharee Doss* v. *Nundokissore Doss* (2), *Genda Puri* v. *Chatar Puri* (3), *Ramalingam* v. *Vythilingam* (4). Consequently, as the only law applicable to

(1) (1839) 6 Mac. Sel. Rep. 329; 7 Ind. Dec. (o. s.) 913.

(2) 11 M. I. A. 405; 8 W. R. 25 (P. C), 2 Suth P. C. J. 86, 2 Sar. P. C. J. 306, 20 Eng. Rep. 54.

(3) 13 I. A. 100; 9 A. 1; 5 Sar. P. C. J. 726.

(4) 20 I. A. 150, 16 M. 490; 6 Sar. P. C. J. 351; 17 Ind. Jur. 578.

the *Mohunts*, their offices, functions and duties, is to be found in the custom and practice applicable to the particular institution, the plaintiff must prove that he is the *chela* of Raghabananda Das and that the defendant is not the *chela* of Sriram Das. He must succeed on the strength of his own title and not on the infirmity, if any, in the title of the defendant.

Before we deal with the oral evidence on the record, it is necessary to consider the two Wills alleged to have been executed by Raghabananda Das and Sriram Das respectively. The Subordinate Judge was called upon to examine the question of the genuineness of the two Wills, as Letters of Administration have not yet been taken on the basis of either document. It has been explained that no application was made for Letters of Administration, in view of the decision of this Court in the cases of *Jib Lal Gir* v. *Jaga Mohan Gir* (5), *Sarup Dassin* v. *Hari Charan Dass* (6), *Prosonno Kumari Debi* v. *Ram Chandra* (7) and *Jagadindar Nath* v. *Madhusudan Das* (8) *viz.*, that as the *Mohunt* is not the owner of the property of the *mutt*, a person claiming to be his successor cannot, on his death, apply for Letters of Administration in respect of the *mutt* property. This view has been controverted with reference to the decision in *Ranjit* v. *Jagannath Prosad* (9), but it is unnecessary to determine this point, because notwithstanding section 187 of the Indian Succession Act, which is incorporated in the Hindu Wills Act, a Will not proved in the Probate Court may be cited in evidence for a limited purpose. That section merely provides that no right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction shall have granted a Probate of the Will under which the right is claimed or shall have granted Letters of Administration with the Will or with a copy of an authenticated copy of the Will annexed; this does not debar the use of a Will in evidence for a purpose other than the establishment of a right as executor or legatee: *Sukumari Gupta* v. *Bharat Mandal* (10), *Surbomungola* v. *Mohendronath* (11), *Janaki* v. *Dhanu Lall* (12), *Ouralapatti* v. *Oota* (13) and *Basanta Kumar* v. *Gopal Chandra Das* (14). Consequently, in the case before us, a reference to the terms of the Wills, though neither has been proved in the Probate Court, is permissible, if the genuineness is satisfactorily established and if reference to the terms is not made with a view to establish the right of a person as executor or legatee. Now, as regards the Will of Raghabananda Das, the Subordinate Judge has pronounced in favour of its genuineness. The Will was executed on the day of his death and was registered. On the evidence, there is no question that the document was executed by Raghabananda Das; the only point for consideration is, whether he had testamentary capacity at the time. He died of cholera in a lodging at Cuttack; he was attacked with the disease on the night previous to the date on which he died. The Will was made on the morning of the day on which he died, and the plaintiff suggested in the Court below that he was then unconscious. The Subordinate Judge has refused to adopt this view, and we are disposed to accept his conclusion, although the appearance of the signature of the executant tends to indicate that he must have been at the time very feeble; but there is no reason to distrust the positive testimony that the public asked the Will to be read over and he gave his assent to the terms embodied therein. As regards the Will of Sriram Das, which is said to have been executed by him at the *mutt* on the 28th September 1907, the Subordinate Judge has pronounced against its genuineness. The appellant has failed to convince us that this view is erroneous. The evidence of its execution is by no means satisfactory, and it is inconceivable that the plaintiff should have been allowed, without a protest; to assume the office of *Mohunt* after the death of Sriram Das, if the latter had left a Will in favour of the defendant. On the other hand, the evidence of the medical attendant, Kasi Prusti, shows that the illness of the

(5) 16 Ind. Cas. 453; 16 C. W. N. 798.
(6) 16 Ind. Cas. 588; 17 C. L. J. 65.
(7) 17 Ind. Cas. 155; 17 C. L. J. 66.
(8) 27 Ind. Cas. 24; 20 C. L. J. 307.
(9) 12 C. 375.
(10) 26 Ind. Cas. 980, 20 C. L.J. 148.
(11) 4 C. 508.
(12) 14 M. 464.
(13) 3 Ind. Cas. 475; 33 M. 91.
(14) 26 Ind. Cas. 21; 18 C. W. N. 1136.

deceased was pronounced hopeless two days before his death, and that he was unconscious on the day of his death. On the whole, we are not prepared to disagree with the Subordinate Judge in his view that the alleged testator was, on the day of his death, not in a condition to make a valid testamentary disposition.

The *first* question for consideration is, whether the plaintiff was, as alleged by him, a *chela* of Raghabananda Das and, consequently, the *gurubhai* of Sriram Das. The oral evidence adduced by the plaintiff upon this point has been rightly characterised by the Subordinate Judge as overwhelming and of the most reliable character. The witnesses, who speak to the initiation ceremony of the plaintiff, are men of position and means, and no intelligible reason has been assigned why they should conspire to set up a false case. Reference may be made particularly to the evidence of Dharamdas, the *Mohunt* of Arang, Radhamohan Santra, the *shebait* of an endowment in the neighbourhood, Pran Krishna Das and Kishori Charan Das, two *zemindars*, and Gopal Das, the *Mohunt* of Bara Akhra, to which the Khambakul *mutt* is subordinate. There is, on this oral evidence, no room for doubt that Raghabananda Das had two *chelas*, the senior, Jagannath, and the junior, Sriram. Against this view, the weightiest evidence brought forward by the defendant is the recital in the Will of Raghabanand that he had no one else as his *chela* except Sriram Das. There has been considerable discussion at the Bar upon the question of the admissibility of this statement in evidence. On behalf of the defendant, it has been argued that the statement is admissible under clause 5 of section 32 of the Indian Evidence Act. That section—we quote so much of it as is material for our present purpose—is in these terms: "Statements, written or verbal, of relevant facts made by a person who is dead, are themselves relevant facts in the following cases: (5) when the statement relates to the existence of any relationship by adoption between persons as to whose relationship by adoption the person making the statement had special means of knowledge and when the statement was made, before the question in dispute was raised." On behalf of the plaintiff, it has been argued that the section should be strictly construed and that the statement in question should be excluded, *first*, because it relates not to the existence but to the non-existence of a relationship, and, *secondly*, because the relationship between a *Mohunt* and his *chela* is not a relationship by adoption. On behalf of the defendant, it has been argued that the section should be liberally construed, and that it is only by liberal construction that the view taken in the case of *Ram Chandra Dutt* v. *Jogeswar Narain Deo* (15), affirmed by the Judicial Committee in *Jogeswar Narain Deo* v. *Ram Chandra Dutt* (16) and *Dhanmull* v. *Ram Chaunder* (17), can be defended. In answer, it has been contended by the plaintiff that the view taken in these cases *viz.*, that a statement as to date of birth or marriage of a person is admissible as a statement relating to the existence of relationship, though in accord with illustrations (*l*) and (*m*) of section 32 is opposed to the view taken in *Bepin Bihary* v. *Sreedam* (18), *Satis Chunder* v. *Mohendra Lal* (19) and *Ram Krishna* v. *Monindra Mohan* (20). It is not necessary for our present purpose to determine whether the fluctuation of judicial opinion indicated in the two sets of decisions mentioned is more apparent than real, and whether they may not be reconciled by a recognition of the principle that a statement as to the time of commencement of a relationship is so indissolubly associated with the existence itself of the relationship, that it may be rightly regarded, without undue stretch of language, as a statement which relates to the existence of that relationship: *Oriental Government Security Life Assurance Company Ld.* v. *Narasimha Chari* (21), *Patinharkuru* v. *Raman* (22). But whatever view may be adopted upon that question, it does not directly affect the points raised before us for consideration, *viz.*, *first*, is the relationship between a *Mohunt* and his *chela* a relationship by adoption, and, *secondly*, is a statement that A has one *chela* B and has no other *chela* a statement relating to the existence of a relationship? We are of opinion that both these

(15) 20 C. 758.
(16) 23 C. 670; 23 I. A. 37.
(17) 24 C. 265; 1 C. W. N. 270.
(18) 13 C. 42.
(19) 17 C. 849.
(20) 20 C. L. J. 304.
(21) 25 M. 183; 11 M. L. J. 379.
(22) 24 Ind. Cas. 519.

questions should be answered in the affirmative. In the first place, there is no reason why the term "adoption" should be interpreted in a restricted sense; the expression that A has adopted B as his *chela* is found in judicial decisions of the highest authority.

In the second place, the expression "relates to the existence" is obviously very comprehensive and need not be construed in the narrow sense suggested by the plaintiff. This view is in accord with the decision of the Judicial Committee in *Mohunt Bhagaban v. Mohunt Ram Praparna* (23). In that case, the contest for the office of *Mohunt* lay between one Raghu Nandan, who claimed to be the *gurubhai* of the deceased *Mohunt* Hoygrib (both of them *chelas* of Chatturbhuj), and Bhagaban, who claimed to be the *chela* of Hoygrib. The plaintiff contended that the defendant was not the *chela* of Hoygrib, while the defendant asserted that the plaintiff was not the *chela* of Chatturbhuj, and, consequently, not the *gurubhai* of Hoygrib. A petition by Chatturbhuj, adduced in evidence, contained the statement that he had no other *chela* or heir besides Hoygrib; and this was sought to be used to disprove the allegation of Raghu Nandan that he also was a *chela* of Chatturbhuj. The statement was treated as admissible in evidence, but was held to be not conclusive. We hold accordingly that the statement of Raghabanand in his Will, dated the 13th November 1906, that Sriramdas was his *chela* and that he had no other *chela* has been rightly admitted in evidence. The only question is whether, as Sir Richard Couch said in *Mohunt Bhagaban v. Ram Praparna* (23), having regard to the other evidence in the case, the statements in the Will should be accepted as true. In our opinion, the question must be answered in the negative. It is clear on the oral evidence that the plaintiff Jagganath, though the senior *chela* from the point of view of the date of his initiation, was younger in age than Sriram. As is explained by *Mohunt* Gopal Das, Sriram was not only older than Jagannath but was more intelligent. It is further plain that Jagannath had, on one occasion, attempted to commit suicide, and was sentenced to simple imprisonment for one month. This may have displeased his *guru* Raghabananda, who obviously intended to have him superseded by Sriram; and with a view to strengthen the position of the latter, whom he expressly nominated as his successor, he may have stated in his Will that he has no other *chela*. This could not possibly prejudice the right of Jagannath to succeed as *Mohunt*, should Sriram die without a *chela*. We hold accordingly that, notwithstanding the statement of Raghabananda in his Will, the oral evidence establishes satisfactorily that Jaggannath was the senior *chela* of Raghabanand.

The *second* question for consideration is, whether the defendant Achyutananda was adopted as a *chela* by Sriram. The story for the defendant is that he was taken as *chela* by Sriram on the day of his death. The Subordinate Judge has disbelieved the oral evidence on this point, and we are not prepared to hold that he has taken an erroneous view. In the first place, it is plain from the evidence on the side of the plaintiff that Sriram was, on the day of his death, in a more or less unconscious condition, and was not physically able to perform the elaborate ceremonies essential for the initiation of a *chela*. In the second place, the alleged Will of Sriram puts forward an entirely different story *viz.*, that the defendant was taken as *chela*, six years earlier, when a boy only three years old, during the life-time of Raghabananda himself; whoever may have manufactured the the Will, whether on the day of or immediately after the death of Sriram, did not venture to put forward the story of the initiation of the defendant on the day of the death of Sriram. In the third place, it is indisputable on the evidence that at the *mahotsab* ceremony held on the thirteenth day after the death of Sriram, the plaintiff was installed as the *Mohunt* in the presence of a large assembly of *Mohunts* and respectable men. No claim appears to have been put forward on behalf of the defendant as the *chela* of Sriram. If the defendant had been so recently adopted as *chela*, it is inconceivable that his supporters should have allowed the installation of the plaintiff to go unchallenged. The case for the defendant is cer-

(23) 22 I. A. 94, 22 C. 843.

tainly not improved by the suggestion that the plaintiff was allowed to assume the office of *Mohunt*, because he had been appointed by the Will of Sriram as the guardian of the defendant. On the other hand, it is plain that this was an ingenuous device, adopted by the framers of the Will, to propitiate the plaintiff, if possible, and to secure his acquiescence in the claim subsequently put forward on behalf of the defendant. We feel no hesitation in holding that the defendant is not the *chela* of Sriram Das.

We confirm accordingly the two-fold finding of the Subordinate Judge, *viz.*, that the plaintiff is the *chela* of Raghabanand and consequently the *gurubhai* of Sriram, and that the defendant is not the *chela* of Sriram. In this view, the decree of the Subordinate Judge must be affirmed and this appeal dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL APPEAL No. 124 OF 1911.

September 30, 1914.

Present:—Sir John Edward Power Wallis, KT., Offg. Chief Justice, and Mr. Justice Hannay.

VISVANATHA SANTHASINGARO—DEFENDANT No. 1—APPELLANT

versus

Sri RAMACHANDRA MARDRAJA DEO, MINOR, BY THE GUARDIAN, THE COURT OF WARDS, REPRESENTED BY THE COLLECTOR OF GANJAM—PLAINTIFF AND ANOTHER—DEFENDANT No. 2—RESPONDENTS.

Limitation Act (IX of 1908), s. 19—Suit to recover balance of principal and interest due on registered lease—Part payment by lessee accompanied by letter—Letter, whether acknowledgment.

A registered lease provided that the rent was payable in four instalments on the 15th days of November and December 1901 and January and February 1902. The lessee made a payment of Rs. 20 on the 15th of February 1905, when he wrote to the plaintiff asking that the sum be credited to the account on the lease. The plaintiff sued on the 20th April 1910 to recover the balance of the principal and interest.

Held, that the letter of the 15th of February 1905 contained a clear admission that the rent was then due, from which an implied promise to pay whatever was actually due might be inferred, and was sufficient to save the bar of limitation.

Appeal against the decree of the District Court of Ganjam, in Original Suit No. 24 of 1910.

Mr. *Patanjali Sastri*, for Mr. *P. Narayanamurthy*, for the Appellant.

Dr. *S. Swaminathan*, for the Respondents.

JUDGMENT.—The plaintiff sues to recover the balance of principal and interest due on a registered lease for *Fasli* 1311. The four instalments were due on 15th days of November and December 1901 and January and February 1902. The suit was instituted on 20th April 1910. To save limitation the plaintiff relies on Exhibit A, dated the 15th February 1905, as an acknowledgment under section 19 of the Limitation Act, and also on a payment of Rs. 20 sent with Exhibit A, which was alleged to be a part payment within the meaning of section 20.

The District Judge has upheld both pleas. Exhibit A, which is signed by the defendant, runs as follows: "In respect of the *mustagari* lease of Kodali village in Khalodamuta in Otugada *taluk*, Viswanath Santo sent Rs. 20 through the barber of Sanaloka village. The same should be credited to the *chitta* (or account) and receipt granted."

The District Judge says the payment is expressly made towards the rent due for Kodali village for *Fasli* 1311. In our opinion it contains a clear statement that the Rs. 20 was paid on account of the rent, and was to be credited in the rental account. This appears to contain a clear admission that the rent was then due, from which an implied promise to pay whatever was actually due may be inferred, and is sufficient to save the bar of limitation, *Maniram Seth* v. *Seth Rupchand* (1). The District Judge has also held that the Rs. 20 sent with Exhibit A was a part payment of the principal of a debt, within the meaning of section 20, and that in Exhibit A the fact of the payment appeared in the handwriting of the person writing the same, within the meaning of section 20, although Exhibt A was written and signed before the actual payment. A ruling of Sale, J., in *In the matter of Ambrose Summers, an Insolvent* (2), to the

(1) 33 C. 1047 (P. C.); 33 I. A. 165; 10 C. W. N. 874; 4 C. L. J. 94; 8 Bom. L. R. 501; 8 A. L. J. 525, 1 M. L. T. 199; 16 M. L. J. 300; 2 N. L. R. 130.

(2) 23 C. 592.

same effect has been cited before us, but it is unnecessary to express any final opinion on the point, as the appeal fails on the other ground and must be dismissed with costs.

Appeal dismissed.

COURT OF THE FINANCIAL COMMISSIONER, PUNJAB.

REVENUE REVISION PETITION No. 403 OF 1897-98.

April 27, 1899.

Present:—Mr. Thorburn, F. C.

ARJAN AND OTHERS—PLAINTIFF—PETITIONERS

versus

MANDAS AND ANOTHER—DEFENDANTS—RESPONDENTS.

Punjab Tenancy Act (XVI of 1887), s. 8—Sirsa Tahsil—Wajib-ul-arz—*Occupancy-tenant* — *Butamari, whether confers per se occupancy rights—Principle.*

Section 6 of the *Wajib-ul-arz* of *Mouza* Rampura, Sirsa Tahsil, prepared in 1862 and revised in 1882, cannot be construed to imply that *butamari per se* confers an occupancy right. But as the village was *barani* and the demand for tenants great, up to 1882, at all events, land *personally* broken up in or before 1882, and since cultivated by occupancy-tenants, must be held to rest in them as occupancy-tenants under section 8 of the Punjab Tenancy Act

Petition for revision against the order of the Collector, Hissar, dated the 23rd May 1898, affirming that of the Assistant Collector, Sirsa, Hissar District, dated the 28th March 1898.

Pandit *Sham Das*, for the Petitioners.

Mr. *Brown*, for the Respondent.

ORDER.—(*September 21st*, 1898).—It seems to me that the plaintiffs can only succeed on the precedent of the Diwan Khera case, if the facts are identical, and that Mr. Agnew's careful judgment shows material divergence in the facts. There remains the question of the effect of the *wajib-ul-arz* entry. Broadly it would be an unreasonable precedent to establish to find that tenants who broke up waste, whether *shamlat deh* or *patti*, long after 1862 *i. e.*, probably nearer 1877 than 1862, were *ipso facto* entitled to occupancy rights under section 8, Punjab Tenancy Act, unless the *wajib-ul-arz* entry made any other interpretation out of the question, and further, the question would be influenced by the rent paid. I request the Collector to send me (1) a close translation of the *wajib-ul-arz* entries (2), a statement of the rent rate paid, (3) information as to when the *shamlat deh* became *shamlat* of two or more owners only (Mandas and Biram Das), (4) whether any breakers of *banjar* have since 1882 (the year of the Financial Commissioner's decision in the Diwan Khera case) been, as such, made occupancy tenants.

Returns to be sent as early as possible.

This order covers all four revision applications Nos. 406, 407, 408, 409.

ORDER.—(*April 7th*, 1899).—From the Collector's return, dated 16th February 1899, giving cover to a report by Mr. Humphreys, Assistant Collector, dated 6th February 1899, both of which are to be read as part of this Court's judgment—the Assistant Collector's report from the words "Report re Collector's order dated 5th January 1899"—the answers to the points referred, omitting for the moment No. 1, are as follows:—(2) registered occupancy tenants pay at a rate under 6 annas the cultivated *bigha*, which is apparently the rate plaintiffs have paid out since last settlement, (3) the partition occurred in S. 1919 (A. D. 1862), or 20 years before Mr. Wilson's settlement of 1882, (4) no instances are established. As to (1), the translation of the *wajib-ul-arz* filed shows that in paragraph 6 are "mode of breaking up *Banjar*"; the conditions were that the owners first and after them the occupany-tenants "shall have the right to break up waste land and in the event of their refusing to do so, land will be given to another person." This clause was apparently originally inserted in the 1862 Settlement and repeated in that of 1882. Its broad and obvious intention was to encourage the breaking of waste by owners, occupancy-tenants and outsiders put in by the *lambardar* or owners in the order named. The condition suited owners as it brought them income, and it suited Government and was no doubt inserted at the instance of the Settlement Officer in 1862 in order to benefit Government to some extent by strengthening the village. Mr. Agnew, the Collector, makes a great point in this case that the *wajib-ul-arz* para. related only to *shamlat deh*, not *shamlat patti*. Had this been intended the intention would have

been made clear, but from the omission and remarks just made, I am convinced that the waste referred to was waste generally, whether held by the owners composing a village or only a part of village. In this case the partition took place in *Sambat* 1919 or A. D. 1862, twenty years before the 1862 entry was repeated in the 1882 Settlement. Here a question arises as to what rights the breaking up of waste conferred. Evidently if the return about rent rates is correct, it did not *per se* put occupancy tenants breaking up the waste in as high a category as that in which they stood with reference to their older acquired lands, for which they were recorded as occupancy-tenants. It did not do so because otherwise they would have been entered in the annual papers as occupancy-tenants, and not as tenants-at-will, and would have paid a lower rent rate than 6 annas a *bigha*.

As to the alleged agreement on which the tenants rely, it was, if made, oral, and cannot be proved. At the same time some such agreement was usual, so long as there was plenty of waste and a scarcity of tenants. Indeed it is on the face of it improbable that a man would break up waste without a guarantee of possession at a limited rent rate for at least a term of years: without such a protection it is inconceivable that the occupancy-tenants (plaintiffs in this case) would have extended their cultivation. I understand that in the approaching Settlement there will be a large number of disputes of the present type, that is, the landowners will try to eject occupancy-tenants and others who have under a clause in the *wajib-ul-arz*, such as the No. 6 in this case, broken up cultivated waste, and the *butamars* will appeal to the *wajib-ul-arz* entry as giving them occupancy rights. The reason why the question of status has become a burning one is either increase of population or more probably, as here, the fact that canal irrigation is being or has been extended to the village.

Considering the fact that clause 6 only gave the right to break up waste, but is silent as to what status such *butamari* confers, it cannot be held that *butamari per se* confers an occupancy right. As to whether it does not, must turn on whether or not at the time *butamars* were scarce, in a position, so to say, to make their own terms, and the advantages of getting new land brought under the plough were great to the landowners. A decision on this point will partly depend on the rents taken. Applying the above principle to this case, it is clear that as the village was *barani*—a canal is only now, I understand, being brought to it—and the demand for tenants great, up to 1882 at all events, land personally broken up in or before 1882 and since cultivated by occupancy-tenants must be held to rest in them as occupancy-tenants under section 8, Punjab Tenancy Act. This view I see is very much that taken by Mr. (Sir James) Lyall as Financial Commissioner in the Diwan Khera case, Appeal No. 5 of 1881-82.

It follows then that these four revision petitions must be accepted.

Parties are summoned.

ORDER.

Parties are present and each represented by Counsel, Mr. Brown for Defendants and Pandit Sham Das for Plaintiffs. For the landlords it is urged that the 1882 entry was a mere repetition and that had *butamari* conferred occupancy rights that status would have been recorded as held by the *butamars*, and further that as registered occupancy-tenants pay at about -/3/- a *bigha* and these men pay at -/5/- or about that, the rent rate shows that they have no occupancy rights. For the tenants the entry is appealed to and the fact is pointed out that waste began to be broken up in 1872 and continued to be so broken until long after 1882. On the whole it is pretty certain that no close inquiry preceded the repetition of the old entry of 1862 in the "revised" *wajab-ul-arz* of 1882, and that the *butamars* were not in 1882 given occupancy-rights, because there was no judicial order conferring such rights and the entry itself was vaguely worded. The conclusion to which I come is that each plaintiff is entitled to occupancy-rights under section 8, Punjab Tenancy Act, in respect of all land broken up and since held by him or his predecessor-in-interest in or before 1882, and that in respect of land subsequently broken, the question depends on the finding of fact as to in what year landlords had occasion to stop the further breaking of waste in their own interest, that is,

in what year from any cause the competition changed from one for tenants on any terms almost to one for land amongst tenants at such terms as the landlords cared to dictate. I accept all four applications and reversing the Collector's order, decree plaintiffs' occupancy-rights under section 8, Panjab Tenancy Act, in respect of all land broken up by them or those from whom the present tenants inherit up to 1882, the actual plots in each case having now to be ascertained and decided by the Collector or Assistant Collector; as to other broken up land, the question of fact has to be decided *viz.*, the year in which landlords ceased to find it to their interest to get waste broken up by tenants with occupancy-rights. I refer now all four cases for inquiry and decision, as the question of fact as regards each point has to be decided. I may add here that Counsel for defendants-landlords admits that in their case the fact that land was *shamilat patti* and not *shamilat deh* is immaterial. In any case the landlords were very few.

Each party will pay his own costs throughout.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 666 OF 1913.

October 14, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

JAGANADHA SAHU AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAMA SAHU AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 19—Suit on promissory note—Endorsement of payment—Body in plaintiff's handwriting—Endorsement signed by debtor—Sufficient acknowledgment of liability.

Where an endorsement on the back of a promissory note written by the plaintiff and signed by the debtor ran as follows: "Rs. 164-5-0 was paid in respect of the promissory note:"

Held, that the endorsement was a sufficient acknowledgment of liability under the promissory note within the meaning of section 19 of the Limitation Act.

Visvanatha Santhasingarao v. *Ramchandra Mardraja Deo*, 27 Ind. Cas. 744; 17 M. L. T. 78, followed.

Second appeal against the decree of the District Court of Ganjam at Berhampore, in Appeal Suit No. 317 of 1912, preferred against that of the Court of the principal District Munsif of Berhampore, in Original Suit No. 459 of 1911.

FACTS.—The facts and the questions of law bearing on the case appear fully from the following Judgment of the District Judge:—

"The plaintiff is the appellant. He sued to recover Rs. 883-2-0, balance of principal and interest due on a promissory note, dated 11th March 1903, executed by the 1st and second defendants in his favour. Defendants Nos. 3 to 6 are sued as the sons of the first defendant. It was alleged in the plaint that the suit is not barred, as payments were made and endorsed on the pro-note.

2. The defendants admitted execution of the note but denied the genuineness of the third endorsement but for which the suit would be barred. It was admitted that the first and second endorsements are genuine and the only dispute was about the third endorsement. The District Munsif held that the payment and endorsement in question were not proved to have been made and signed by first defendant. He also held that even if they were proved the suit was barred, as admittedly the body of the endorsement was written by the plaintiff and only the signature was alleged to have been made by 1st defendant, and section 20 of the Limitation Act required the fact of payment should appear in the handwriting of the debtor.

3. Two points arise for determination:—

1. Whether the endorsement in dispute was signed by the first defendant?
2. If so, does it save limitation?

As regards the genuineness of the third endorsement, there is the evidence of the plaintiff on the one side and no evidence on the other. It is admitted that the 1st and 2nd endorsements are genuine and they were also written by the plaintiff and signed by the party who made the payment. I see no reason to hold that the third endorsement is not genuine, especially as the defendants have adduced no evidence on the point and have not even ventured to give evidence. The chief reason that is given by the District

Munsif is that the endorsement is not attested and that it is not usual for endorsements to be written by the creditor unattested. The District Munsif has not noted the fact that the two admitted endorsements are also written by the plaintiff and are not attested. The District Munsif states that the plaintiff is a respectable man, but is of opinion that there might have been a lapse of virtue on his part as the amount at stake is large. I am of opinion that there is no reason to disbelieve the uncontradicted evidence of the plaintiff, especially as the defendants have made no attempt to show by comparison of signatures or otherwise that the endorsement is not genuine.

5. The next question is as to the legal effect of the endorsement. It is admitted that the body of it was written by plaintiff. It runs as follows: "Rs. 167-15-0 was paid in respect of (*notu sambandu*) the promissory note," and is signed by the first defendant. Section 20 of the Limitation Act requires that in the case of part payment of the principal of a debt the fact of the part payment should appear in the handwriting of the person making the same. In *Santishwar Mahanta* v. *Lakhikanta Mahanta* (1), *Dharam Das* v. *Ganga Devi* (2) and *Joshi Bhaishankar* v. *Bai Parvati* (3), it has been held that the whole of the entry relating to part payment should be written by the person making it and that the mere signature of the person is not sufficient.

6. It has been held in *Mallabhushi Seshacharlu* v. *Singara Seshayya* (4) that a signature by a mark would, in cases where a person could not write, be a sufficient compliance with the terms of section 20 of the Limitation Act. *In Ellappa Nayak* v. *Annamalai* (5) it was held that the mark of the payer subscribed to an endorsement not in the handwriting of the payer is sufficient to satisfy the provisions of section 20 of the Limitation Act. Both these cases were those of an illiterate payer and it is clear from the judgment in *Madhabhushi Seshacharlu* v. *Singara Seshayya* (4), which is followed in the case of *Ellappa Nayak* v. *Annamalai* (5) that it proceeded on this fact. Their Lordships' judgment runs as follows: "We consider that signature by a mark would be, under the circumstances, a sufficient compliance with the Act." These decisions were followed in *Jamna* v. *Jaga Bhana* (6), where it was held that a mark put by an illiterate payer under an endorsement of payment would be a sufficient compliance with section 20 of the Limitation Act.

7. In referring to the two Madras cases above cited, their Lordships in *Mukhi Haji Rahmatulla* v. *Coverji Bhuja* (7) observe in their order of reference to the Full Bench as follows:—"It is enough to say that those cases do not apply to the present case. In them the 'person making the payment' could not write; and as far as possible the fact of the payment appeared in his handwriting." The judgment of the Full Bench also proceeds on the ground that the Madras cases are outside the subject of the case they were dealing with. In *Santishwar Mahanta* v. *Lakhikanta Mahanta* (1) their Lordships held that where a debtor can write, it is impossible to hold that an endorsement written by another person signed only by the debtor is sufficient under section 20.

8. The wording of section 20 of the Limitation Act is clear and unambiguous and whatever reasons there might be to put a liberal construction on the section in cases where the person making the payment is illiterate, there is no reason to extend the principle laid down in the two Madras cases to case of persons who are literate and write the endorsement of payment as well as sign it. I am, therefore, of opinion that the endorsement does not extend the period of limitation.

9. It is argued by the appellant's Vakil that even if the endorsement is invalid under section 20 of the Limitation Act, it will still save limitation as an acknowledgment. The endorsement runs as follows:—"In respect of this note payment made is Rs. 164-15-0." There is no acknowledgment that anything further will be due on the note after the endorsement and payment recited therein, and I have not been referred to any case

(1) 4 Ind. Cas. 321; 5 M. L. T 80; 35 C. 813; 13 C. W. N. 177.
(2) 29 A. 773; 4 A. L. J. 628; A. W. N. (1907) 263.
(3) 23 B. 246; 3 Bom. L. R. 834.
(4) 7 M. 55.
(5) 7 M. 76; 7 Ind. Jur. 596
(6) 28 B. 262; 5 Bom. L. R. 1031.
(7) 23 C. 546 at p. 551.

where the mere fact that a certain sum has been paid and endorsed on a bond has, in the absence of any words in the endorsement acknowledging that any more is due, been held to be an acknowledgment under section 19 of the Limitation Act. In *Shearman* v. *Fleming* (8) it has been held that the words 'a remittance of 40 *b* to old account,' do not amount to sufficient acknowledgment or liability. *Lutchumanan Chetty* v. *Mutta Iburaki Marakkayer* (9), where it was held that the entry "Rs. 50 paid" is not sufficient, is also in point.

10. I am of opinion that the endorsement is not an acknowledgment within the meaning of section 19 of the Limitation Act."

Mr. *C. S. Venkatachari*, for the Appellants.

Mr. *N. Srinivasacharri*, for Mr. *K. Narain Rau*, for the Respondents.

JUDGMENT.—Following the decision in Appeal No. 124 of 1911 [*Viswanatha Santhasingarao* v. *Ramchandra Mardraja Deo*(10)], we hold that there was a sufficient acknowledgment of liability under the promissory note by the endorsement, dated 7th February 1909 (signed by the 1st defendant), to entitle the plaintiff to take advantage of section 19 of the Limitation Act.

We, therefore, set aside the decree of the learned District Judge and remand the case for fresh disposal of the Appeal Suit No. 317 for 1912 filed in his Court. Costs of this second appeal will abide.

Decree set aside; Case remanded.

(8) 5 B. L. R. 619
(9) 5 M. H. C. R. 90.
(10) 27 Ind. Cas. 744, 17 M. L. T. 78.

PUNJAB CHIEF COURT.

FIRST CIVIL MISCELLANEOUS APPEAL NO. 637 OF 1913.

February 15, 1915.

Present:—Justice Sir Donald Johnstone, KT.

ANUP SINGH AND OTHERS—OBJECTORS—APPELLANTS

versus

SOHAN SINGH—APPLICANT—RESPONDENT.

Probate and Administration Act (V of 1881), *ss.* 6, 7 —*Will and codicil in favour of minor son—Death of minor—Right of executor to Probate—Guardian of minor, whether can take Probate.*

Where the principal beneficiary under a Will and codicil was the testator's minor son and the codicil made the applicant guardian till majority of the person of the minor and gave all the property to his charge, directing him to pay off all testator's debts and to give maintenance to the testator's wife and where during the pendency of the probate proceedings the minor beneficiary died

Held, (1) that both the Will and the codicil were genuine documents and the fact that they were not registered did not render them suspicious,

(2) that if the codicil did make the applicant executor, then he must have Probate irrespective of the possible effect of the minor's death;

Musammat Bali v. *Musammat Hussain Bibi*, 55 P. R. 1894 and *Indar Narain* v. *Onkar Lal*, 10 Ind. Cas. 30, 20 P. R. 1912, 141 P. L. R. 1911; 283 P. W. R. 1911, followed.

(3) that the direction in the Will making the applicant guardian of the minor beneficiary did not make him an executor and was not sufficient for grant of Probate.

Seshamma v. *Chennappa*, 20 M. 467 and *Gopal Das Agarwala* v. *Budree Das*, 33 C. 657, 10 C. W. N. 662, followed.

Miscellaneous first appeal from the order of the District Judge, Lyallpur, dated the 3rd March 1913, rejecting the application of the objectors.

Rai Bahadur Pandit *Sheo Narain*, for the Appellants.

The Hon'ble Mr. *Muhammad Shafi*, K. B., and Bakhshi *Tek Chand*, for the Respondent.

JUDGMENT.—These two appeals—Nos. 637 and 2407 of 1913—are intimately connected. Sardar Sohan Singh, respondent in both appeals, having applied for Probate of the Will and codicil, dated respectively 11th May 1910 and 21st August 1910, of the late Sardar Natha Singh, various persons lodged *caveats*. The principal beneficiary under the Will and codicil was testator's minor son, who died during the pendency of the case in the Court below, *i.e.*, in April 1912. It was objected thereupon that the application for Probate must abate in consequence of the boy's death, but in an order, which is the subject of the earlier of the two aforesaid appeals, the learned District Judge held that the application did not abate. The application case was then proceeded with, and on 30th August 1913, the same Court granted Probate and ordered Anup Singh, objector, to pay Rs. 500 costs. This order has led to the filing of Appeal No. 2407 of 1913. I have heard the two appeals argued together and will dispose of both in one judgment.

Mr. Sheo Narain, on behalf of Anup Singh and others, objectors, argues the case under four heads, namely :—

ANUP SINGH *v.* SOHAN SINGH.

(*i*) Is the Will with codicil genuine and enforcible, *i.e.*, was it really executed by the late Sardar Natha Singh and was he of sound disposing mind at the time ?

(*ii*) Can Sardar Sohan Singh be properly described as an executor and so be held entitled to ask for probate ?

(*iii*) Does not the death of the minor aforesaid deprive Sardar Sohan Singh of all *locus standi* ?

(*iv*) In any case is not Rs. 500 an excessive sum as costs against Anup Singh ?

As regards (*i*) I have read the evidence. Certain respectable persons, not shown to be interested in Sohan Singh, applicant, or to have any reason for speaking falsely in his favour, have testified that the Will was executed in their presence by the late Sardar Natha Singh when in possession of his senses. Similarly witnesses of the same type testify to the execution of the codicil. On the other hand, evidence has been given that the man was very ill and was not in his senses. Further Mr. Sheo Narain argues that, if these documents had been genuine, they would have been registered. In my opinion there is no good reason for doubting the genuineness of either document, one point very strongly in favour of applicant being that Mr. Sheo Narain admits that, whereas by the Will some property was left to him, by the codicil this was taken away and he was merely made guardian of the minor. This does not look like fraud or undue influence on the part of the applicant. I hold that both documents are genuine. The testator was undoubtedly very ill, and I see no force in the argument that the non-registration of them renders them suspicious. It was probably out of the question for him to travel to the Sub-Registrar's office. At the same time *prima facie* a man dying of gout is not out of his senses some weeks before his death.

As regards (*ii*) I have read the two documents (Exhibits P1 and P2). In the former, applicant is merely a legatee; in the latter he comes, directly and indirectly, into clause (*c*) which gives all the property to the charge of applicant, except one square bequeathed to Sundar Singh, and makes applicant guardian till majority of the person of the minor; (*d*), which directs applicant to pay off all testator's debts out of the property in applicant's charge; (*e*), which directs that maintenance be given to *Musammat* Harnam Kaur, (one of the wives—she is now dead), who is to stay with the minor; (*f*) under which up to Rs. 1,000 is to be spent on the marriages of *Musammat* Bibi Banto and *Musammat* Basant Kaur.

The question is whether this makes him an executor or whether he was merely to be guardian of the person and property of the minor.

I have been referred to several authorities, (see foot-note*) which I have read. Probate can be granted only to an executor appointed by the Will—section 6 of the Act. An executor means "a person to whom the execution of the last Will of a deceased person is, by the testator's appointment, confided"—see section 3. "Execution" is not defined. Appointment may be "express or by necessary implication," section 7. Here there is no express appointment, and I very much doubt whether Sohan Singh was made executor by necessary implication. The *Illustrations* to section 7 are clear cases and do not help here. There is in the Will proper not the smallest indication of executorship in Sohan Singh. The codicil was executed after the son was born. Question (*iii*) above I must decide on the lines laid down in *Musammat Bali* v. *Musammat Hussain Bibi* (1) and *Indar Narain* v. *Onkar Lal* (2). If the codicil, as it stands, makes Sohan Singh executor, then he must have probate irrespective of

(1) 55 P. R. 1894.
(2) 10 Ind. Cas. 130; 20 P. R. 1912; 141 P. L. R. 1911; 238 P. W. R. 1911.

*(1) *Hamabai* v. *Bamanji Nasarvanji*, 7 B. H. C. R. 64; (2) *Muli Bai* v. *Canji Kheraj*, 26 B. 57; 4 Bom. L. R. 9; (3) *Monohur Mukerjee, In the matter of*, 5 C. 756; 6 C. L. R. 228; (4) *Brojo Chunder* v. *Raj Kumar Boy*, 6 C. W. N. 310; (5) *Vittal Dose, Re parte*, 15 M. 360; (6) *Seshamma* v. *Chennappa*, 20 M. 497; (7) *Kuppayammal* v. *Ammani Ammal*, 22 M. 345; (8) *Gopal Das Agarwalla* v. *Budree Das*, 33 C. 667; 10 C. W. N. 662; (9) *Courjon, In the goods of*, 25 C. 65, (10) *Radhika Mohan Sett, In the goods of*, 7 B. L. R. 563; (11) *Kripamoyee Dassi* v. *Mohim Chandra Dutt*, 10 C. W. N. 232; (12) *Musammat Bali* v. *Musammat Hussain Bibi*, 55 P. R. 1894; (13) *Indar Narain* v. *Onkar Lal*, 10 Ind. Cas. 130; 20 P. R. 1912; 141 P. L. R. 1911; 238 P. W. R. 1911.

the possible effect of the minor's death, which is a question outside the scope of this proceeding.

Of the rulings quoted in the foot-note *ante* the second, fourth, ninth and tenth need no discussion, being obviously of little or no use here. The tenth is a case of a universal legatee, held executor on this account *plus* a direction to pay debts, and the rest are such clear cases, each based on its peculiar facts, as to afford no general guidance. Of the remaining seven cases three *viz.*, *Hamabai* v. *Nasarvanji* (3), *Monohur Mookerjee, In the matter of* (4) and *Kripamoyee Dasi* v. *Mohim Chandra Dutt* (5), are in favour of respondent-applicant. In the first, a wife is appointed guardian of testator's minor children in order that of all his property she should carry on the management (until his youngest son should attain 22 years of age) and in the testator's name the management of his firm. In the second, the head-note is defective. It is not a sufficient description of the Will there that *A* was to receive and pay the testator's debts and to get in and distribute his personal estate. *A* was to receive the profits of the entire properties mentioned in the Will for nine years after testator's death, and to pay therefrom all debts and legacies; and testator's other sons were not entitled to claim any of those profits or to call for accounts; and at the end of nine years *A* was to make over the properties aforesaid to certain specified persons. In the third, the testator appointed his wife *shebait* to an idol and to administer the rest of his estate. In all these cases it was held that an executor had been appointed by implication; but I am unable to see that the facts tally with those before me.

Of the cases *per contra* *Vittal Doss, Ex parte* (6) is a case where the Will merely made two sons universal legatees and it was ruled that they were not executors by implication. This ruling seems at variance with *Radhika Mohan Sett, In the goods of* (7), tenth in foot-note, but I do not think I need decide between the two. Even if the Bengal ruling is the more correct,—it is distinguished in the Madras ruling—the facts here are quite different. *Seshamma Chennappa* (8) is a case that seems to me exactly in point, a case of persons appointed to take care of an estate during the minority of a son to be adopted and to provide for the maintenance of persons named. The Will there did not expressly include a direction to pay debts, but it included all that is in clauses (*c*) and (*e*) of the codicil before me, and the direction to pay debts was clearly implied in the words "to take care" of the estate during minority of the beneficiary. *Gopal Das* v. *Budree Dass* (9) lays it down that words in a Will making persons "trustees, *i. e.*, guardians and next friends" are not sufficient for grant of probate. *Kuppayammal* v. *Ammani Ammal* (10) does not help much: in it a direction in a Will that petitioner should out of certain property pay certain debts, did not entitle her to probate. I follow *Seshamma* v. *Chennappa* (8) and *Gopal Dass* v. *Budree Dass* (9), and find against the petitioner, who, in my opinion, is no executor.

The appeals are accepted and the grant of Probate, together with order that the objector do pay Rs. 500 costs, is cancelled with costs throughout. Pleader's fee Rs. 100.

Appeals accepted.

(3) 7 Bom. H. C. R. 64.
(4) 5 C. 756; 6 C. L. R. 228.
(5) 10 C. W. N. 232.
(6) 15 M. 360.
(7) 7 B. L. R. 563.
(8) 20 M. 467.
(9) 33 C. 657; 10 C. W. N. 662.
(10) 22 M. 345.

CALCUTTA HIGH COURT.
CIVIL RULE *Nisi* No. 1009 OF 1914.
December 14, 1914.
Present:—Mr. Justice D. Chatterjee and Mr. Justice Chapman.
BHULU SARDAR AND OTHERS—DEFENDANTS—PETITIONERS
versus
MAYAN JAMADAR—PLAINTIFF—OPPOSITE PARTY.

Provincial Small Causes Courts Act (*IX of* 1887), *s.* 23—*Jurisdiction—Bengal, Assam and N.-W. P. Civil Courts Act* (*XII of* 1887), *s.* 13.

BHULU SARDAR v. MAYAN JAMADAR.

In absence of the second Munsif on leave, the District Judge assigned the Small Cause Court cases of the second Munsif's jurisdiction to the 3rd Munsif In one of those cases the 3rd Munsif made an order under section 23 of the Small Cause Courts Act, that the case involved complicated questions of title and should be tried by the Court in its ordinary jurisdiction and that as he had not the local jurisdiction to try the case, it should go to the Court which had the local jurisdiction. The second Munsif, who had by that time returned, disregarding the said order of the third Munsif tried the suit as a Small Cause Court case and decreed it

Held, that the action of the second Munsif in trying the case as a Small Cause Court suit within his jurisdiction, notwithstanding the order under section 23 by the third Court, was incompetent and illegal.

In the matter of Rule *Nisi* No. 1009 of 1914, issued by this Court under section 25 of the Provincial Small Causes Courts Act and section 115 of the Code of Civil Procedure; and

In the matter of Small Cause Court Suit No. 531 of 1914 of the Munsif, second Court, Diamond Harbour, exercising the powers of a Court of Small Causes.

Babu *Nagendra Nath Ghosh*, for the Petitioner.

Babu *Girija Prosanna Roy Chowdhury*, for the Opposite Party.

JUDGMENT.—The cause of action of the suit giving rise to this Rule arose within the jurisdiction of the second Munsif at Diamond Harbour. The gentleman occupying that position took leave and there was an order by the District Judge assigning the Small Cause Court cases of his jurisdiction to the third Munsif at Diamond Harbour. This case, therefore, went to the third Munsif of Diamond Harbour. On the 29th April 1914, he made an order under section 23 of the Small Cause Courts Act that the case involved complicated questions of title and should be tried by the Court in its ordinary jurisdiction; and that as he had not the local jurisdiction to try the case it should go to the Court which had the local jurisdiction. This case, therefore, went to the second Munsif who had by that time returned. The learned second Munsiff, disregarding the order of the 29th April 1914, made by the third Munsif under section 23 of the Small Cause Courts Act, tried the suit as a Small Cause Court case and decreed it. The present Rule was obtained by the defendants, on the ground that in the face of the order under section 23 made by a Court of competent jurisdiction the trial was incompetent.

It is contended by the learned Vakil who appears to show cause that the order, dated the 29th April 1914, was without jurisdiction and, therefore, the trial was competent. The ground of this argument is that the second Munsif who took leave returned from leave in February 1914, and that with his return the order of the District Judge transferring the local jurisdiction to the third Munsif in respect of Small Cause Court cases was at an end. There is nothing before us from which we can find that the order of the learned District Judge assigning the jurisdiction to the third Court was thus limited. But even if it had been so limited, we think that under section 13 of the Bengal, North-Western Provinces and Assam Civil Courts Act the order passed by the third Munsif upon a case pending before him would not be incompetent notwithstanding that the jurisdiction in respect of it had not been assigned to him at that time by the District Judge. Whether, therefore, the order assigning the jurisdiction to the third Court was limited to the period of the leave of the Second Munsif or not, we think the order passed by the third Court on the 29th April 1914 was a competent order and the second Munsif who came into the case subsequently could not as a Court of concurrent jurisdiction act in defiance of it. We think, therefore, the action of the learned second Munsif in trying this case as a Small Cause Court suit within his jurisdiction, notwithstanding the order under section 23 by the third Court, was incompetent and we set aside the decree and direct that the case be sent back to that Court to be tried in accordance with law. The Rule is made absolute with costs. We assess the hearing fee at one gold *mohur*.

Rule made absolute.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 74 OF 1913.

December 15, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Hannay.

Hajee ABDUR RAHIMAN SAHIB

ACCUSED—APPELLANT

versus

THE OFFICIAL ASSIGNEE—

COMPLAINANT—RESPONDENT.

Presidency Towns Insolvency Act (III of 1909), ss. 49 (4), 103 - Offence under s. 103, essential element of —Inference—Conviction, when sustained.

In order to constitute an offence under section 103 of the Presidency Towns Insolvency Act, the intent to give undue preference or diminish the divisible assets is essential and unless it is shown that that is the natural result of an accused person's action such an intent cannot be inferred.

Where an accused (a member of a firm declared insolvent), under rights given to him under section 49 (4) of the Presidency Towns Insolvency Act, transferred to his wife property in consideration of the private debts owed by him to her and where the existence of the fraudulent intent requisite for a conviction for an offence under section 103 (*b*) is not established, no conviction for an offence under that section can stand.

Appeal from the judgment and order of the Hon'ble Mr. Justice Bakewell, dated the 14th October 1913, made in the Original Insolvency Jurisdiction of the High Court in Insolvency Petition No. 205 of 1910, in the matter of P. M. Enayathulla Sahib and others, Insolvents.

Mr. *M. D. Deva Doss*, for the Appellant.

Mr. *J. C. Adam*, for the Crown.

JUDGMENT.—The appellant has been convicted of an offence under section 103 of the Presidency Towns Insolvency Act in relation to a sale-deed, Exhibit A, executed in favour of his wife, Jaina Bi, on 18th October 1910, in respect of certain immoveable ancestral properties of his, on the 21st November 1910. The firm of P. M. Enayathulla Sahib and Co., of which appellant was a partner was adjudged insolvent and the charge against the appellant is that he executed Exhibit A fraudulently with intent to give an undue preference to his wife over other creditors of himself or his firm, or to diminish the sum to be divided among such creditors.

We may state at once that we have not been referred to any evidence indicating that the appellant had other private creditors: and that the only insolvency proceedings are against the firm above named.

Exhibit A recites that the consideration for the sale was a sum of Rs. 7,000, which the appellant had applied to his own purposes out of amounts recovered by him on his wife's behalf in execution of a partition decree in Original Suit No. 113 of 1908 on the file of the Madras High Court. It is not disputed that the appellant so recovered about Rs. 25,500; and under a power-of-attorney from his wife, deposited the money in the insolvent firm opening an account in her name. This was in 1908. At various times, this account was debited with sums aggregating Rs. 11,334-8-10. According to the appellant, only Rs. 4,307-12-9 of this amount was really spent on his wife's behalf, the balance of Rs. 7,026-12-1 being utilised for his own purposes without her consent or authority. This sum of Rs. 7,026-12-1 is identified with the round figure of Rs. 7,000 mentioned in Exhibit A.

There can, we think, be no doubt that all those withdrawals were made by the appellant as his wife's agent, and that the firm is not liable for the amounts withdrawn. This latter view is also taken by the learned Judge who convicted appellant.

Now, if the items making up this total of Rs. 7,026-12-1 were really applied by the appellant to his own purposes, it seems to us the charge must fail: and it would make no difference whether they were so applied with his wife's consent or without it. For in either case he, in his private capacity, would be accountable to her for this money; and under section 49 (4) of the Act, his private property would be primarily applicable to the satisfaction of such claims, and only the surplus would be dealt with as partnership property. In view of this provision of law, it could not be said that, in executing Exhibit A, appellant had given undue preference to his wife or diminished the amount to be divided among the partnership creditors.

The learned Judge, who convicted the appellant, has dealt with the matter from the point of view of criminal embezzlement which, indeed, seems to have been the line of defence mainly, if not solely, relied on before him; and has rejected this plea on the ground that want of authority for the application of the money to the appellant's private purposes has not been proved. We do not understand him to have determined whether

as a fact the money was applied for the benefit of appellant or of his wife.

In the view which we are disposed to take, the question of authorisation is immaterial.

The Crown Prosecutor argues that, nevertheless, the burden of proving that the money was applied to the appellant's own purposes rests on him (appellant) and that if he fails to discharge it, it must be taken that there was no such application, that the money was applied for the benefit of his wife and that he was not accountable to her for it. This argument would have force if the facts *prima facie* constituting an offence under section 103 (*b*) were proved and the appellant was seeking to show that his action was to restore the consequences of his previous breach of trust, and that his real "governing motive" was not fraudulent. But it cannot prevail in the present case. This is a criminal prosecution and the prosecution must make out the facts primarily necessary to constitute the offence. Apart from the interpretation of the word "fraudulently" in section 103 (*b*), the intent to give undue preference or diminish the divisible assests is essential; and unless it is shown that this was the natural result of the accused person's action, it is difficult to see how such an intent can be inferred.

There is no evidence to contradict the appellant's statement of the application of the Rs. 7,026, and his Vakil is able to refer us to at least one item of Rs. 500 on 7th April 1909 which appears to have been passed straight to his own private account from that of his wife.

We must set aside the conviction and sentence and direct the release of appellant.

Conviction set aside;
Accused set at liberty.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 658 of 1914.

July 17, 1914.

Present:—Mr. Justice Johnstone.

BEGA SINGH AND OTHERS—PETITIONERS

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Original Procedure Code (Act V of 1898), ss. 110, 121, 514—Forfeiture of security bond in a separate proceeding, when not allowed.

If a Criminal Court, knowing that the person charged before it is under security to be of good behaviour, in sentencing that person in the case before it, makes no reference to any confiscation of that security and takes no steps towards its confiscation, it is not competent for that Court or any other Court in a subsequent and separate proceeding to take such steps.

Emperor v. *Mowaz*, 18 Ind. Cas. 403; 13 P. R. 1913 Cr.; 7 P. W. R. 1913 Cr.; 14 Cr. L. J. 67; 39 P. L. R. 1913 (F. B.), followed.

Petition, under section 439 of the Criminal Procedure Code, for revision of the order of the District Magistrate, Amritsar, dated the 17th February 1914, varying that of the Magistrate, first Class, Amritsar, dated the 4th August 1913, and ordering forfeiture of security.

Mr. *Nihal Chand Mehra*, for the Petitioners.

Mr. *Bevan Petman*, for the Respondent.

JUDGMENT.—Bega Singh was, on the 22nd November 1911, found in possession of a *chari*. He had already been bound down to be of good behaviour for one year in the sum of Rs. 500 with two sureties, Santa Singh and Chanda Singh, about eight months previously; and, before the term of his bond had expired, he was convicted for possession of the *chari* aforesaid and sentenced to two years' rigorous imprisonment under the Arms Act, the sentence being, however, reduced to one year by the Chief Court.* In its judgment in the *Chari* case the Magistrate gave a very heavy sentence, because, to use the Magistrate's own words, "The accused is a notorious *badmash* No. 10. He has been twice bound under section 110, Criminal Procedure Code, and it seems that he is the leader of *badmashes*," and so forth. Further, if the statement of Bega Singh himself of the 9th April 1912 in that case is read, it will appear that the Magistrate was not unaware that the man before him was under security. *Emperor* v. *Mowaz* (1) is authority for the proposition that if a Criminal Court, knowing that the person charged before it is under security to be of good behaviour, in sentencing that person in the case before it, makes no reference to any confiscation of security and takes no steps towards its confiscation, it is not competent for that Court or any Court

(1) 18 Ind. Cas. 403; 13 P. R. 1913 Cr.; 7 P. W. R. 1913 Cr.; 14 Cr. L. J. 67; 39 P. L. R. 1913.

*The order of the Chief Court is reported in 24 Ind. Cas. 573.—*Ed.*

in a subsequent and separate proceeding to take such steps. It appears that this ruling exactly covers the present case, for the Magistrate, though he knew that Bega Singh was on security, took no steps, and nothing was done until, some time later, the Police moved the Magistrate to confiscate the bond.

Mr. Bevan Petman, the learned Government Advocate, while not altogether approving of the Full Bench ruling aforesaid, has intimated that he is unable to resist it in the present case. It is unnecessary, therefore, to discuss the remaining grounds for revision, for a finding on the above matter in favour of the petitioners settles the case. I should remark, however, that Mr. Bevan Petman seeks to draw some distinction between the case of Bega Singh himself and that of the sureties. But the Full Bench ruling aforesaid, and the rulings upon which the Judges then relied, do not seem to me to afford any warrant for any such distinction. For these reasons I allow this revision and cancel the order of forfeiture.

Revision allowed.

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 104 OF 1914.

August 3, 1914.

Present:—Mr. Justice Oldfield.

MAHAMMAD KHASIM—PRISONER—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 302—Murder—Circumstantial evidence—No direct evidence—Conviction, whether legal.

In a murder case stress can be fairly laid on the absence of direct proof and the inferential nature of the prosecution case. But where the evidence points to the accused alone and admits of no reasonable doubt, the accused can rightly be convicted.

Appeal against the order of the Court of Session of the Cuddapah Division, in Case No. 5 of the Calendar for 1914.

This appeal coming on for hearing on the 8th June 1914, upon perusing the petition of appeal and the record of the evidence and proceedings before the Court of Session, and upon hearing the arguments of Mr. *C. Madhavan Nair*, Counsel (*amicus curiæ*) for the Prisoner, and of Mr. *J. C. Adam*, for the Public Prosecutor, on behalf of Government, and the case having stood over for consideration till the 14th July 1914, the Court (Ayling and Seshagiri Aiyar, JJ.) delivered the following

JUDGMENT.

AYLING, J.—Appellant has been convicted of the murder of his wife, Sahib Bi, a young woman of 20, living with him in the village of Vontimitta, about 15 miles south-east of Cuddapah.

There can be no doubt that the deceased was brutally throttled by some one on the night of June 23rd 1913 and that her body was found about daybreak in an inner room of her husband's house.

According to the evidence there were no jewels on the corpse, but the jewels usually worn by deceased were produced by appellant's brother (prosecution witness No. 5) from a pot in the house. How they got there or whether she was wearing them before retiring to rest, is uncertain. Prosecution witness No. 5 deposes that he found them in the pot; but his original statement was to the effect that he himself took them from the body and placed them there. However this may be, it seems clear that robbery was not the object of the murder: and I may state here that no motive has been suggested for the commission of the murder by any person except appellant.

The evidence against the appellant is entirely circumstantial, and by its nature requires very careful scrutiny and consideration. As regards the relation of the appellant and deceased, there is evidence (which I see no reason to discredit) to the effect that the couple, who had been married about a year and a half, were, at any rate occasionally, on bad terms. The appellant is said to have been violent to his wife, and there is some evidence to show that he tried to induce her to get money for him from her people who lived at Cuddapah.

It is beyond dispute that on the evening of June 23rd, her uncle prosecution witness

No. 1, arrived from Cuddapah with the intention of taking her to her parents there, and I see no reason whatever to doubt the evidence of this witness and prosecution witness No. 2, the girl's mother, that she (prosecution witness No. 2) sent him because she had heard of fresh ill-treatment of the girl. On his arrival she was found not in her husband's house, but in that of his great-uncle (prosecution witness No. 7). He says she had simply come to his house for dinner in connection with some festival. But there are passages in his evidence, and particularly with reference to his refusal to send her back with her husband at the latter's request, which strongly suggest that she had taken refuge with him to escape appellant's ill-treatment.

Anyhow there is a consensus of evidence that on prosecution witness No. 1's arrival the girl returned to her husband's house with him (prosecution witness No. 1) and her husband, it being understood that all three were to leave for the Cuddapah side by train either that night or early next morning. From prosecution witness No. 1's evidence, it would appear that all three were to go to Cuddapah. But prosecution witness No. 6 says appellant proposed to *leave* his wife there, and go on to Kundapur, some 50 miles further up the line, to buy tobacco for trade. Appellant's brother in the Sessions Court went to the extent of deposing that appellant actually left Vontimitta by the 9-24 P. M. train and did not sleep in the house at all. This, however, is contradicted by his earlier statement, Exhibit H, in which he stated in the most specific fashion that appellant slept in the house that night. The train by which prosecution witness No. 1 came, only arrives at Vontimitta at 8-22 P. M. I have no doubt that this statement of prosecution witness No. 5 in the Sessions Court is a falsehood introduced to help his brother.

Prosecution witness No. 1 says he proposed to start by the mail (at 1-55 A.M.), but was persuaded by appellant to wait till the morning train (6-18 A. M.). He says appellant and deceased, then apparently on friendly terms, retired to the inner room, while he slept on the verandah. He heard nothing in the night. But next morning on trying to arouse them he got no answer, and when he entered the room he found Sahib Bi lying dead and her husband (appellant) gone.

He at once sent a wire to her parents (Exhibit D), while the village Munsif and Police were soon on the spot. An inquest was held the same morning (*vide* Exhibit M).

Appellant was not seen in the village and was not arrested till a week later (July 1st) when he was arrested in a train.

He has declined to make any statement either in the Magistrate's or the Sessions Court: and his appeal petition also contains no suggestion explaining his absence or any of the facts appearing against him. He cited no witnesses. It has been suggested by the learned Counsel who argued the case for him at our request, and to whose assistance we are much indebted, that he really did depart by himself to Kondapuram, if not in the evening, at any rate by the mail, and that his wife was murdered by some one after he left her. I have carefully considered this suggestion. It seems to me most improbable. If appellant had really gone to Kondapuram on business and stayed there knowing nothing of his wife's death, it should be perfectly easy to adduce evidence to that effect of people who had seen and had dealings with him there. Nothing of the kind is forthcoming, and in its absence I think it is not too much to say that appellant absconded before the discovery of the murder.

There is some evidence to show that appellant posted in the train on June 24th a post card, Exhibit E, worded in a very strange and incoherent fashion. The Sessions Judge says that in it he "exults more or less in the death of his wife." I cannot extract anything so definite as this from the document, which simply suggests that the writer was beside himself. But it is not at all the sort of communication likely to be sent by a tobacco merchant going about his business and knowing of no special cause for disturbance. I do not, however, attach much weight to this document. The only other evidence bearing on appellant's movements is that of prosecution witness No. 14, who says he saw him, not at Kondapuram, but at Yerraguntla where he messed and left some

property at the witness's hotel. But he does not fix the date.

Now if we accept the evidence of prosecution witness No. 1 as to the circumstances under which appellant and deceased retired to rest, and couple it with the fact that next morning deceased was found dead and appellant absconding: if these facts are considered in the light of the relations of the parties and appellant's omission to furnish any explanation for his disappearance, I think a Court is justified in concluding that appellant, and no other, was the murderer.

What was the immediate cause of the crime it is impossible to say. It is not essential to believe that appellant went to bed intending anything of the kind. It is more probable that a fresh difference occurred between the pair, possibly because she refused to get him the money he wanted, or possibly he may have changed his mind as to allowing her to go to her people, or tried to extract some promise from her. But the fact that we are reduced to speculation in this respect need not stand in the way of appellant's conviction. There is quite enough on record to show that the relations of the parties were such that a murderous attack by appellant on deceased in a fit of passion entails no great improbability. Much of course depends on the credibility of prosecution witness No. 1; and appellant's Counsel has naturally laboured to show that his evidence cannot be trusted. No personal animus is alleged against him, but it is suggested that he has to throw suspicion on appellant to avoid being suspected himself. I have carefully considered his evidence in the light of this theory, and can find nothing to support it. His evidence seems to me to bear every impress of good faith, and at no single point has he gone out of his way to strengthen the case against appellant. On the contrary, he has made admissions which he would never have made if this theory were true, *e.g.*, he has admitted that he had no personal knowledge of previous quarrels, that appellant did not object to his wife going to Cuddapah and even that the two were "friendly and cheerful" when they went to bed. A man trying to throw suspicion from himself on to the appellant would certainly not have made this last admission.

The other grounds on which evidence is attacked are also unconvincing. It is said that if he had slept where he says he did, he must have been awakened by the girl's cries. I do not think this is so. Nothing need have passed, which would necessarily awake a heavy sleeper, and indeed it is clear (unless we are to reject this witness's evidence as *entirely* false) that he *did* sleep through the murder, whoever it was that committed it. There is no reason why this witness should say he slept on the verandah unless he really did so. I can see nothing improbable in his calling appellant's brother (prosecution witness No. 5) before entering the room. Appellant was evidently a violent-tempered man; and prosecution witness No. 1 may well have been nervous of irritating him. He was not cross-examined on this point in the Sessions Court; but in his first statement (Exhibit B) he said that when he asked prosecution witness No. 5 to call appellant for him, prosecution witness No. 5 declined to do so for fear of being beaten.

Stress is laid on the fact that he now states that he sent a wire to the deceased's mother to the effect that appellant had killed Sahib Bi and absconded, whereas Exhibit D merely says: "Sahib Bi died; come immediately." If it be borne in mind that the witness is a Muhammadan blacksmith, deposing nearly 7 months afterwards to the sending of a telegram in a foreign language at a time of great agitation, I do not think this point has much significance.

Then it is argued that the witness's statement that the appellant and deceased retired to rest together goes beyond his knowledge. Reliance is placed on Exhibit K, an early statement of prosecution witness No. 6 recorded by the Magistrate on June 25th. In it prosecution witness No. 6 says that prosecution witness No 1 told him that when he went to sleep, deceased was also lying on the verandah, and that he does not know when her husband (appellant) came and took her (inside). He adds, however, that both husband and wife did lie down inside—which is what he stated in the Sessions Court. As a means of

attacking prosecution witness No.1's evidence in the Sessions Court, it is useless to simply refer to Exhibit K. This document was filed by the prosecution merely to corroborate the evidence of prosecution witness No. 6 in the Sessions Court and no use was made of it by the defence. No questions were asked about it in cross-examination even of prosecution witness No. 6, nor was any question put to prosecution witness No. 1 as to what he told prosecution witness No. 6. In fact, the discrepancy, such as it is, has only been brought to notice in appeal. It is quite possible that prosecution witness No. 6 in the excitement misunderstood what prosecution witness No. 1 said to him and quite possible that prosecution witness No. 1 could explain if he were given a chance.

Lastly, attention is drawn to a statement of prosecution witness No. 5 that prosecution witness No. 1 was buying a ticket for Cuddapah either before or after despatching his wife at the Railway station. This prosecution witness No. 1 denies. The suggestion is that prosecution witness No. 1 was about to decamp, and that this indicates a guilty conscience in some way. To what extent his evidence would be discredited if it were shown that he had intended to return to Cuddapah that morning, may be a matter of opinion: but there can be no reason for preferring the evidence of prosecution witness No. 5 to that of prosecution witness No. 1. The former has undoubtedly contradicted his earlier statement (Exhibit H) in several important particulars, notably as to his brother's (appellant's) presence in the house that night and when cross-examined has professed inability to remember what he then stated. He is naturally keenly interested in saving his brother. After careful consideration, I must agree with the Sessions Judge in accepting the evidence of prosecution witness No. 1. I think there is no reasonable doubt of appellant's guilt and would dismiss the appeal, confirming the conviction and sentence.

SESHAGIRI AIYAR, J.—I regret I am unable to agree in the conclusion at which my learned colleague has arrived. The case entirely depends on circumstantial evidence. The two questions that have to be considered are, whether the evidence of prosecution witness No. 1 is reliable and whether if it is believed, it necessarily leads to the conviction of the accused. On both the points, my finding is in the negative. Prosecution witness No. 1 admittedly went to Vontimitta at about 9 P. M. on the 23rd June 1913 to take the deceased to Cuddapah at the request of his sister, the mother of the deceased. He says that he slept that night in front of the room in which the accused and the deceased slept. In the first place, I cannot believe that if there was a quarrel between the husband and wife which led to the former strangling the latter, this witness would not have heard it. The witness was sleeping only a few feet from the room. It is conceded that when the deceased and the accused retired to bed, they were "friendly and cheerful." The quarrel, if any, and the murder were subsequent, and it seems incredible that a dispute which led to the committing of murder would not have been heard by the witness.

There is evidence, which the prosecution has let in, to prove that the accused wrote Exhibit E on the 24th between Kamalapuram and Guntakal (*vide* prosecution witness No. 9). Prosecution witness No. 14 proves that on the 24th the accused was at Yerraguntla, a station to the north of Cuddapah. It is thus clear from the evidence of the prosecution witnesses that the accused left Cuddapah on the night of the 23rd. It is suggested that this was after committing the murder. In support of it, Mr. Adam has drawn our attention to the time table of the Southern Mahratta Railway, which shows that the mail train stopped at Vontimitta in June 1913 at about 2 A. M. in the night; but there is no evidence that the accused left by that train. On the other hand, there is the positive evidence of both prosecution witness No. 5 and prosecution witness No. 6 that the accused left Ontimitta at 9 P. M. on the 23rd. This evidence is corroborated by the earlier statement made by prosecution witness No. 6 (Exhibit K). I am not prepared to reject this testimony as false. Exhibit K was a deposition given before the Magistrate on the 25th, and the prosecution has used it to corroborate the evidence of prosecution witness No. 5 and prosecution witness No. 6. If the statements in Exhibit K are believed, the conduct of prosecution witness No. 1 looks very

suspicious. According to Exhibit K, prosecution witness No. 1 was taken back to the scene of the occurrence from the Railway Station, where he had gone on his way to Cuddapah and had purchased a ticket for travelling by the morning train. This is deposed to by prosecution witness No. 5 before the Sessions Court. It is true that the cross-examination of prosecution witness No. 1 was not directed towards testing this statement; but Exhibit K was put in by the prosecution and in examination-in-chief, statements were elicited from prosecution witness No. 6 which fully support Exhibit K. Even if I am not prepared to accept all the statements in it as true, it makes me hesitate to place full reliance on the evidence of prosecution witness No. 1. One other circumstance may be noticed. Prosecution witness No. 1 says that when he called out Sahib Bi at 5 A. M., he got no reply; he then went to the shop where prosecution witness No. 5 was sleeping and asked him to wake up his sister-in-law. No reason is assigned why this assistance was thought necessary. Prosecution witness No. 5 is not likely to feel less delicacy in waking up his sister-in-law than prosecution witness No. 1, the maternal uncle. I am for these reasons not prepared to accept the evidence of prosecution witness No. 1 as being substantially true. The case for the prosecution depends entirely upon this man's evidence and having regard to its unsatisfactory character, I consider it unsafe to rest the accused's conviction upon it.

Nor am I convinced that the acceptance of this evidence is conclusive of the accused's guilt. It only comes to this. At 9 P. M. the accused and deceased retired to bed together, at about 2 A. M. the accused left the place, according to the prosecution theory, and at 5 A. M., the deceased was found dead. I am unable to say that these facts lead to the only inference that the accused killed the deceased.

To strengthen the case for the prosecution, Exhibit E, to which reference has already been made, was put in. I am not satisfied with the proof of this letter being in the handwriting of the accused. Moreover, it is not likely that a person of the accused's status in life would have written this letter. Its language is against that view. Nor am I able to follow the Sessions Judge in his construction of this exhibit. To my mind its language suggests quite the reverse of what the Session Judge understands by it. I do not, therefore, attach any importance to this document.

Then there is the evidence as to quarrels between the deceased and the accused. The dagger incident does not impress me as true. The deceased and the accused were in the habit of going together to the house of prosecution witness No. 2. It is in evidence that prosecution witness No. 1 was asked by prosecution witness No. 2 to bring both of them to Cuddapah. On the evidence before me, I am not able to say that the two had any serious quarrels at any time which would lead one to believe that the accused was murderously inclined towards his wife.

The motive suggested for the murder is of the flimsiest kind. Even granting that the accused wanted his brother-in-law to help him with money and asked the deceased to prevail upon her brother to lend, I cannot accept the theory that the quarrel on the night of the 23rd must have related to the refusal of the deceased to make this request to her brother and that the accused killed the deceased on that account.

One other point has to be noticed. The murder was on the 23rd June. The accused was arrested at Kondapuram on the 1st July. It was argued that his absence from Vontimitta for over a week indicates his guilt. Quite apart from the dramatic setting given to the arrest by prosecution witness No. 12, I find no evidence that the accused had kept out of the way and was evading arrest. It is said that he must have heard of the murder; if so, he must have heard that he was suspected. That might account for his not approaching the village.

It may be that the conduct of the accused is not altogether free from suspicion. There are circumstances appearing in the evidence which the accused has not explained, but looking at the evidence as a whole I am not convinced that the evidence of prosecution witness No. 1 is true in the main, and that its acceptance necessarily leads to the conviction of the accused. I, therefore, resolve to give the benefit of the doubt to him and direct his acquittal.

I entirely agree with Mr. Justice Ayling in his appreciation of the assistance which Mr. Madhavan Nair has rendered to us in this case,

AYLING, J.—As my learned brother differs, the case will be laid before another Judge under section 429 of the Criminal Procedure Code.

This appeal coming on for hearing under section 429 of the Criminal Procedure Code on the 29th July 1914, upon perusing the petition of appeal and the record of evidence and proceedings before the Court of Session and upon hearing the arguments of Mr. *C. Madhavan Nair*, Counsel (*amicus curiæ*) for the Prisoner, and of Mr. *J. C. Adam*, for the Public Prosecutor, on behalf of Government, and the case having stood over for consideration till this day the Court delivered the following

JUDGMENT.—This case has been placed before me in consequence of a difference of opinion between two learned Judges. The appellant has been convicted of murdering his wife, the prosecution contending that its case has been established to the exclusion of reasonable doubt, because (1) adequate motive has been proved, (2) appellant is shown to have been the last person in company with deceased before she was found murdered, (3) his conduct after her death was consistent only with his reponsibility.

Before examining the evidence on each of these points, I make two general observations: *firstly*, the prosecution witnesses, who have deposed directly to the facts of the occurrence, are no doubt persons of no position. But there is on the other hand no reason for supposing that any influence has been exercised over them to induce them to combine against appellant. In fact, except 1st prosecution witness they belong to the village in which he lived and with which (so far as appears) his wife's family had no independent connection; and their bias (if any) might be expected to be in his favour. Some of the witnesses have indeed deposed less favourably to the prosecution than they did in their previous statements. *Secondly*, appellant has at no stage given any sort of explanation of the evidence against him or regarding facts specially within his knowledge and has adduced no evidence. There is, therefore, nothing whatever to rebut the inferences from the evidence for the prosecution.

As regards the first of the heads above referred to, motive, I am not concerned to reach a finding that, after appellant and deceased went home, apparently on good terms, on the night of 23rd June 1913 any quarrel between them originated in any particular way. There is not, it must be conceded, evidence regarding the last hours, which they spent together. But such evidence is not, in my opinion, to be looked for and it will be sufficient, if the general conclusion is that appellant had ill-treated the woman before and that there were differences between them, which might have ended in an actual quarrel and (regard being had to their station) in the use of violence. As to this there is *firstly*, the evidence that appellant had not long before threatened deceased with a dagger in her mother's house at Cuddapah. The witnesses to this incident are of course her relatives, 2nd and 3rd prosecution witnesses. But no other evidence could be expected, and 2nd prosecution witness referred to the matter at the earliest opportunity, when Exhibit C was taken from her on 25th June. There is, *next*, the general evidence of 1st and 2nd prosecution witnesses that deceased had complained of ill-treatment. It derives some support from the statement of 6th prosecution witness, appellant's relative, that he was pressing his wife for some purpose, regarding which the witness did not ask her for details, and from the witness's conduct in insisting on keeping her in his house, his explanation for doing so being unsatisfactory. If his evidence stands alone, that may be due to the failure of other relatives of appellant to adhere to their statements to the Sub-Magistrate before the trial. It may be that, as other evidence indicates, the appellant was pressing deceased to get him money from her family. Whether or no that is the explanation, there is sufficient to show that the relations between the two had been disturbed and to remove any antecedent improbability based on the absence of motive from the prosecution case. And that is all that can be expected, when the circumstances preclude the possibily of proof of the immediate occasion for a quarrel.

Regarding the next part of the case, that relating to the period between the departure

of 1st prosecution witness, appellant and deceased from 6th prosecution witness's house and the discovery of the body of the last-mentioned next morning, Mr. Madhavan Nair, who argued the case very carefully for appellant, contended that the evidence of the only witness, 1st prosecution witness, was unworthy of credit, either as to his own presence outside the house or the presence of appellant and his retiring to sleep inside with deceased.

This argument included first a suggestion, accepted by one of the learned Judges who have heard the appeal, that 1st prosecution witness's evidence was improbable, because he must have been aroused by the struggle, which must have taken place. But, with all respect for the learned Judge, there is no reason for supposing that there was a struggle or that deceased could have given any alarm. For, as the medical evidence, the deposition of 10th prosecution witness and the certificate, Exhibit O, shows, there were no injuries on her body, such as would have been caused in a struggle, the compressed appearance of her arms involving no more than that her assailant may have knelt on them, whilst he compressed her wind-pipe; and if (as may well have happened) she was attacked suddenly or in her sleep, the compression of her wind-pipe would have prevented her crying out.

First prosecution witness's evidence, being in no respect improbable, must then be appraised with reference to his motive and the discrepancies between it and his previous statements and the evidence of other witnesses. But no motive for his deposing falsely can be supposed, except the necessity for inculpating appellant in order to divert suspicion from himself; and that calls for no consideration in the absence of evidence that he had any reason for committing the murder or has ever been suspected of it. It is also argued that he may have slept at the house of accused's aunt, where he had supper. But this possibility rests on mere conjecture and was not referred to in the lower Court. Other minor criticisms are dealt with sufficiently in the judgment of Mr. Justice Ayling; and the attempt to discredit the witness's evidence has been based mainly on the account given by 6th prosecution witness in Exhibit K, his statement at the local enquiry, of what he understood the former to have told him after the body was discovered. I cannot attach importance to the differences between it and the witness's present evidence. *Firstly*, it would not be safe to do so when there was no cross-examination regarding them and when 6th prosecution witness himself was merely asked to identify Exhibit K. and not to give evidence as to this conversation. If the matter had attracted attention at the trial, he might have made additions to his account or 1st prosecution witness might have given explanations, which would have reconciled it with the latter's evidence. Or it may be that 6th prosecution witness simply misunderstood what 1st prosecution witness said. The discrepancies with Exhibit K are not, in my opinion, such as in themselves to justify rejection of 1st prosecution witness's testimony. And if his earlier version is correct, it amounts only to this, that instead of his seeing appellant and deceased enter the house, they were together outside it, when he went to sleep. On this version, the possibility of 1st prosecution witness's responsibility excluded for the reasons already given, appellant is still liable to suspicion as the last person with whom deceased was seen alive; and whether they were seen in the house or in its verandah matters little. I accordingly accept 1st prosecution witness's evidence as true on material points. It is, *next*, important that appellant's status and the fact that deceased's jewels were not taken from her body make it most improbable that she was murdered by a thief. The conclusion must be that appellant is bound to account for his movements and to show that he left the house in circumstances consistent with his innocence.

As already stated, however, he has made no attempt to do so, either in his statements or by calling witnesses; and this part of the case must, therefore, be dealt with on the prosecution evidence. Exhibit E may be excluded from consideration, because, though there is no reason for rejecting the evidence that appellant wrote it, no argument from it would be safe either as

to his attitude towards deceased or as to his having posted it at any particular time and place. It indicates at most that he was travelling on the line on 24th June. As to the train he took from Vontimitta, the scene of the occurrence, there is nothing of value, since the evidence of 5th prosecution witness, his brother, that he left at 9-24 P.M. on 23rd June is contradicted by his earlier statement, Exhibit H, that he slept at his house. It is, moreover, unlikely that he left then, because 1st prosecution witness had only arrived from Cuddapah about an hour before and after his interview with appellant and his meal would hardly have been ready to receive deceased from appellant before the latter's train left. It is, therefore, to be supposed that appellant left, as 1st prosecution witness's evidence indicates, early on the 24th morning. The only evidence as to his purpose is that of 5th and 6th prosecution witnesses, that he was going to Kundapur to buy tobacco. But there is nothing to show that he bought tobacco there or elsewhere. The evidence of 14th and 15th prosecution witnesses is that he was at Yerraguntla, another station nearer than Kundapur to his village, on 24th or 25th June and left without paying for his meals. He was arrested at Kundapur on 1st July, there being no evidence of any communication between him and any one in his village during the interval. It seems to me, with due respect, that the argument from all this has been mistaken by one of the learned Judges. It is not merely that appellant was absenting himself and concealing his movements. That I can understand might eventually have been due to a natural apprehension that he would be arrested. The point is that the ostensible purpose of his journey would not have entailed nearly so lengthy an absence, and that if his reason for protracting it was, as must be supposed, the apprehension referred to, there is nothing to show how he knew during it of his wife's death or that he was suspected. He does not allege that he heard of these facts from any one, and there is no evidence that he did so and no probability that rumour would inform him of the death of a woman of no position and the name of the person suspected in connection with it at a place sixty miles from the scene of the occurrence. The inference must be that he knew of the death from the beginning, because he was responsible for it.

Mr. Madhavan Nair has laid stress very fairly on the absence of direct proof and the inferential nature of the prosecution case. Those considerations would deserve more weight, if the question were between this and an alternative explanation of deceased's death or there were ground for suspicion of any person other than appellant. But the evidence points to him alone and is, in my opinion, sufficient to exclude reasonable doubt. I, therefore, concur in the decision of Mr. Justice Ayling and confirm the conviction. There is no question regarding the sentence. The result is that the appeal is dismissed.

Appeal dismissed.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 1710 OF 1914.

December 5, 1914.

Present:—Mr. Justice Scott-Smith.

ARURA AND OTHERS—CONVICTS—PETITIONERS

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Northern India Canal and Drainage Act (VIII of 1873), s. 70, sub-secs. (1) and (2)—Preventing digging of water-course—Revision—Criminal Procedure Code (Act V of 1898), s. 439—Finding of fact based on inadmissible evidence.

The preventing of the digging of a water-course for taking water from a canal does not come within the purview of section 70 of Act VIII of 1873

A finding of fact based on no evidence or on inadmissible evidence is liable to be set aside on revision under section 439, Criminal Procedure Code, 1898.

Petition, under section 439, Criminal Procedure Code, for revision of the order of the District Magistrate, Lyallpur, dated the 7th September 1914, affirming that of the Magistrate, second Class, Lyallpur, dated the 31st August 1914, convicting the petitioners.

Mr. *Nand Lal*, for the Petitioners.

Mr. *Badr-ud-Din Kureshi*, for the Respondent.

JUDGMENT.—The three petitioners were convicted by a Canal Officer with second Class Magistrate powers of an offence under

section 70 of Act VIII of 1873 and were sentenced to 21 days' simple imprisonment and to a fine of Rs. 30 each. They appealed to the District Magistrate, who maintained the order of the first Court. The District Magistrate in his judgment pointed out that the lower Court had taken into consideration certain reports and letters which were unproved and which were really inadmissible in evidence, but he remarked that the offence had been proved sufficiently by oral evidence.

Turning to the judgment of the Magistrate, I find that the petitioners were convicted of wilfully dismantling the watercourse and cutting off the entire water supply of the complainant.

This no doubt would be an offence under section 70, sub-section (2), of Act VIII of 1873, but there is no legal evidence on the record to substantiate this charge. Leaving out the reports and letters referred to by the District Magistrate and turning to the oral evidence, I find that it is to the effect that the petitioners would not allow complainant, Karim Bakhsh, to dig a certain watercourse. The watercourse had previously been dismantled and the complainant had obtained leave to dig it anew. The preventing of the digging of a watercourse does not appear to me to come within the purview of section 70 of the Act. Mr. Kureshi for the complainant argues that petitioners' act comes within both sub-sections (1) and (2) of section 70, but I am unable to agree with him. Sub-section (1) refers to damage of any canal or drainage work. There is no proof that the petitioners damaged or interfered in any way with an existing canal or watercourse. With regard to sub-section (2), it cannot be said that the petitioners interfered with the supply of water in, or the flow of water from, through, over or under any canal. What they did do was to obstruct the complainant in digging a watercourse. Their act may come within the definition of some other offence or may give rise to an action for damages in a Civil Court, but does not amount to any offence under section 70 of the Act in question. The revision is, therefore, allowed and the conviction and sentences being set aside, petitioners are acquitted and are discharged from their bail, and the fines, if paid, will be refunded.

Revision allowed.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 137 OF 1914.

January 8, 1915.

Present: Mr. Justice Rafique.

HARDEO PRASAD—PETITIONER—APPLICANT

versus

RAM SARUP—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 195—Forgery, charge of—Sanction to prosecute, whether necessary.

It is necessary for a party wishing to prosecute upon a charge of forgery committed in respect of a document produced in Court to obtain sanction of the Court under section 195 of the Criminal Procedure Code.

Application for revision against an order of the District Judge of Moradabad, dated the 26th June 1914.

Mr. *Sital Prasad Ghose*, for the Applicant.

Mr. *Simeon*, for the Opposite Party.

JUDGMENT.—This is an application in revision challenging the order of the learned District Judge of Moradabad setting aside the sanction for prosecution granted by the Munsif. It appears that Ram Sarup, the opposite party, sued the applicant on the basis of a bond. The bond was denied and the claim of Ram Sarup was dismissed. On appeal the decree of the first Court was affirmed, and the Appellate Court said that Ram Sarup had obviously utilised an old stamp in fabricating the bond on behalf of the applicant. The latter then filed an application in the Court of Munsif for the grant of sanction to prosecute Ram Sarup under section 467, Indian Penal Code. The application was granted. On appeal the learned District Judge set aside the sanction, on the ground that the offence under section 467, Indian Penal Code, was not included in section 195 of the Code of Criminal Procedure. The learned Judge, it seems, overlooked the opening sentence of clause (*c*) of section 195, Criminal Procedure Code. The sentence is "of any offence described in section 463." Now an offence punishable under section 467, Indian Penal Code, is defined in section 463, Indian Penal Code. It is, therefore, necessary for a party wishing to prosecute upon a charge of forgery to obtain sanction under section 195, Criminal Procedure Code. The order of the learned Judge is set aside and that of the Munsif is restored. Costs are allowed to the applicant.

Order of first Court restored.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 564 OF 1914.

December 26, 1914.

Present:—Mr. Justice Shah Din.

NUR KHAN AND OTHERS · CONVICTS—APPELLANTS

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Dacoity—First report—Subsequent evidence of identification of dacoits—Corroboration.

Where in the first report only two dacoits are alleged to have been recognised at the time of committing the dacoity, subsequent evidence that they were all identified cannot be relied upon unless there is a strong corroboration to support it.

Appeal from the order of the Additional Sessions Judge, Jhelum, dated the 23rd May 1914, convicting the appellants.

Mr. *Nand Lal*, for the Appellants.

Mr. *Jai Gopal Sethi*, for the Government Advocate.

JUDGMENT.—The appellants, who are nine in number and are residents of three villages situated close to one another in Tahsil Chakwal of the Jhelum District, have been convicted by the Sessions Judge, Jhelum, of the offence of dacoity under section 395, Indian Penal Code, and have been sentenced to various terms of imprisonment. It would be convenient to refer to the appellants according to their numbers on the record of the Sessions Judge. Accused No. 1 on that record is a resident of village Dullah; accused Nos. 2, 3, 4 and 5 are residents of Munda, which is eleven miles from Dullah; accused Nos. 6 and 7 belong to village Wara, which is not far from Munda; and accused Nos. 8 and 9 are residents of Chak Bhon, which is close to Wara.

According to the prosecution, the appellants committed a dacoity in the house of one *Musammat* Sardaran at Dhok Kut, a hamlet attached to village Dullah, on the night between the 20th and 21st February 1914, and carried off clothes and ornaments of some value. The first information report was given by *Musammat* Sardaran, P. W. No. 2, and her brother Nadir, P. W. No. 5, on the 21st of February at 8 A. M. and the head constable, P. W. No. 24, reached the spot two hours later. In the first report *Musammat* Sardaran stated that six dacoits had made a raid on her house where she and her daughter, *Musammat* Amiran, and her sister-in-law, *Musammat* Mukhan, were sleeping; and that of the dacoits she had identified Nur Khan, son of Ghulam, resident of Dullah, and his maternal uncle, Khan Bahadur of Munda. The woman also gave a list of the ornaments and clothes which had been carried off by the dacoits.

The learned Sessions Judge has given in his judgment a connected narrative of the steps taken by the Police to trace the dacoits and of the manner in which their identification by the inmates of the house was carried out. According to the prosecution, *Musammat* Sardaran, P. W. No. 2, *Musammat* Amiran, P. W. No. 3, and *Musammat* Mukhan, P. W. No. 4, were sleeping in the house when the dacoity took place, and *Musammat* Sardaran's brother, Nadir, P. W. No. 5, who was at the time out at his maternal uncle's *dhok*, happened to return to his sister's house when the dacoits were still there. He was seized and beaten by the dacoits and then shut up in the house of Walidad, P. W No. 10, who was away at Bannu, and which was also broken into by the dacoits. The important fact to note at this stage is that whereas in the first report it was stated that only accused No. 1, Nur Khan, and his uncle, Khan Bahadur, had been identified from among the dacoits, in the Court of Session *Musammat* Sardaran, *Musammat* Amiran, *Musammat* Mukhan and Nadir (P. W. Nos. 2 to 5) deposed to having identified between them at the time of the dacoity all the accused persons. In the course of the Police investigation an identification parade was held at village Dullah on the 27th of February in the presence of the Police Inspector and prosecution witnesses, Nur Khan, *lambardar*, P. W. No. 19, and Akbar Khan, *ilaqadar*, P. W. No. 20, and it is stated that on that occasion *Musammat* Sardaran and her relations named above had identified the accused persons in the same way as they identified them subsequently in the Sessions Court. The learned Sessions Judge has, however, given certain reasons for not relying upon this identification, and after careful scrutiny of the evidence of *Musammat* Sardaran, *Musammat* Amiran, *Musammat* Mukhan and Nadir, I have no hesitation in agreeing with the Sessions Judge on this point. In the first report, as has been stated above, only

the names of Nur Khan and Khan Bahadur were mentioned as having been identified, but throughout the Police inquiry and in the Sessions Court *Musammat* Sardaran and Nadir, who had made the first report, admitted that they had named Khan Bahadur merely out of suspicion and that he had not been identified on the spot. As regards Nur Khan, however, the evidence of identification is consistent and convincing, and I agree with the Sessions Judge that he was one of the dacoits who broke into the house of *Musammat* Sardaran. Nur Khan is a *lambardar* of village Dullah, and there existed at the time of the dacoity strong grounds of enmity between him on one side and Walidad, P. W. No. 10, brother of Ali, P. W. No. 9, who is son-in-law of *Musammat* Sardaran, and *Musammat* Sardaran's brother, Mehdi, P. W. No. 13, on the other. The learned Sessions Judge has referred to these causes of enmity in his judgment, and I agree with him that Nur Khan had sufficient motive for committing the dacoity in company with other persons.

As regards the rest of the appellants, there is no direct evidence of identification such as would be sufficient for their convictions, but part of the stolen property, which has been quite satisfactorily identified, has been traced to accused No. 2, Kartar Singh, accused No. 3, Muhammad Khan, and accused No. 7, Ghulam Muhammad, and their convictions must, in my opinion, be maintained. The evidence against accused No. 2 is this. On the evening of the 22nd February when the Police visited village Munda, they were told by one Nawab Khan, P. W. No. 18, that accused No. 2, who was a great friend of his, had that morning offered him a *lungi* saying that it was part of the property which he, in company with other persons, had stolen from Dhok Kut. I may here note that the Sessions Judge is wrong in saying that Nawab Khan identified the *lungi* as Exhibit P.-5; Nawab Khan did nothing of the kind, and the identity of the *lungi* is not established from his evidence. On receiving information from Nawab Khan the Police searched the house of accused No. 2 on the 23rd February, and the result was that two stolen articles, a *pagri* of *tusser* silk, Exhibit P.-3, and a waistcoat, Exhibit P-4, were found there. These have been identified by *Musammat* Sardaran, P. W. No. 2, and her son-in-law Ali, P.-W. No. 9. On the 24th February Bahadur, P. W. No. 22, produced before the Police three articles of clothing, Exhibits P.-5, P.-6 and P.-7, saying that these had been left with him by accused No. 2, Kartar Singh, as he said he was going out to cut grass for his cattle. Exhibit P.-5 has been identified by Ali, P. W. No. 9, and Ghulam Muhammad, P.W. No. 12, and Exhibits P.-6 and P.-7 have been identified by *Musammat* Sardaran. The prosecution evidence regarding the identification of the said articles is, in my opinion, satisfactory, and, therefore, the connection of accused No. 2 with the dacoity is clearly established.

On the 4th March accused No. 3, Muhammad Khan, who like accused No. 2 is also a resident of Munda, produced part of the stolen property, Exhibits P.-13 to P.-20, from a field near his own house which belongs to himself; and these articles have been identified by *Musammat* Sardaran and the other two female witnesses, and some of them by Ali, P. W. No. 9, Walidad, P. W. No 10, and Ghulam Muhammad P. W No. 12. The property was produced by accused No. 4 in the presence of Nur Khan, Akbar Khan and Sultan, P. W. Nos. 19, 20 and 21.

On the 3rd March accused No. 7 produced stolen articles, Exhibits P.-9, P.-10, P.-11 and P.-12, from a field cultivated by himself in the presence of the witnesses just mentioned; and the said articles have been identified by the three women, P. W. Nos. 2, 3 and 4, Exhibit P.-12 being identified also by Ghulam Muhammad, P. W. No. 12.

No stolen property has been traced to the rest of the appellants, and it seems to me that they have been convicted by the Sessions Judge on insufficient grounds. One Sultan, P. W. No. 7, gives evidence to the effect that on the evening before the dacoity in question took place, he and one Khan Beg had seen all the nine appellants together at a *takia* in village Mehra, which is at a distance of about seven miles from Dhok Kut which was the scene of the occurrence. In addition to this there is the

evidence of Jafar, P. W. No. 16, to the effect that he had met accused Nos. 7, 8 and 9 at noon on the boundary between Munda and Chak Bhon the day before the dacoity, and that on inquiry they said they were on their way to the village Munda. On the strength of the evidence of Sultan and Jafar, the Sessions Judge has convicted accused Nos. 3, 5, 6, 8 and 9. It may be noted that, according to the Sessions Judge, as against accused No. 7 there is the additional evidence of his chisel, Exhibit P.-1, being found on the spot. It seems to me that the evidence just referred to is quite consistent with the innocence of the accused persons, for no part of the stolen property has been traced to them at all; and it follows that their convictions were not justified.

The result is that I dismiss the appeal so far as the appellants Nur Khan, Kartar Singh, Muhammad Khan and Ghulam Muhammad are concerned; but I accept it as regards the rest of the appellants, Sahib, Sher Khan, Abbas, Imam Din and Arsala, and setting aside their convictions and sentences, I acquit them.

Accused Nos. 5 to 9 acquitted.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 2020 OF 1914.

January 8, 1915.

Present:—Mr. Justice Shah Din.

TEKU AND ANOTHER—PETITIONERS

versus

BUTA SINGH—COMPLAINANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 145, 439—Non-compliance with provisions of s. 145—Fatal defect—Revision.

Where a Magistrate proceeding under section 145, Criminal Procedure Code, 1898, does not strictly comply with its provisions and fails to find that the dispute between the parties concerning the property in question is likely to occasion a breach of the peace, his order is without jurisdiction and bad in law and is, consequently, liable to be set aside on revision under section 439 of the said Code.

Petition under section 439, Criminal Procedure Code, for revision of the order of the Magistrate, first Class, Bhadana, District Lahore, dated the 23rd August 1914, ordering that the petitioners may bring a civil suit in respect of the house in dispute within two months.

Mr. *Ganpat Rai*, for the Petitioners.

Diwan *Mehr Chand*, for the Respondent.

JUDGMENT.—The procedure adopted by the Magistrate in this case does not comply at all with the provisions of section 145 of the Criminal Procedure Code. Sub-section (1) of section 145 lays down that whenever a Magistrate is satisfied that a dispute likely to cause a breach of the peace exists concerning any land, he shall make an order in writing, stating the grounds of his being so satisfied and requiring the parties concerned in such dispute to attend his Court and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute. Sub-section (4) provides that the Magistrate shall peruse the statements so put in, receive the evidence produced by the parties and, if possible, decide whether any and which of the parties *was at the date of the order before mentioned* in such possession of the said subject. In the present case the Magistrate has wholly ignored these provisions; he made no order in writing stating the grounds of his being satisfied that a dispute likely to cause a breach of the peace existed concerning the *haveli* in question and requiring the parties to put in written statements of their respective claims regarding the fact of actual possession of the *haveli*; and it is clear that in these circumstances he could not decide whether any and which of the parties was at the date of the order, which he should have made but which he did not make, in such possession of the *haveli*. The Magistrate has entirely misconceived the object and scope of section 145, and the order under revision was passed by him without jurisdiction. There is no finding by him that the dispute between the parties concerning the *haveli* in question is likely to occasion a breach of the peace. I accordingly set aside the order of the Magistrate as bad in law. The complainant is at liberty to take fresh proceedings, if so advised, under section 145 of the Code of Criminal Procedure.

Revision allowed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 727 OF 1914.
CRIMINAL REVISION PETITION No. 610 OF 1914.
January 15, 1915.

Present:—Mr. Justice Sponcer.

DORAISWAMY MUDALIAR—COUNTER-PETITIONER—PETITIONER

versus

SUDARSANA CHARIAR—PETITIONER—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 133, 137—Existence of hayricks on premises of petitioner—Conditional order under s. 133—Denial by petitioner that they are nuisance—Inspection of premises by Magistrate—No evidence taken—Order made absolute—Order, whether legal.

In consequence of a representation from the respondent that the hayricks on the petitioner's premises were a nuisance and likely to cause conflagration, the Magistrate issued a conditional order under section 133, Criminal Procedure Code. The petitioner admitted the existence of the hayricks, but denied that they were a nuisance. The Magistrate from his own inspection decided that they were a danger to adjoining houses and made the order absolute without taking any evidence.

Held, that the Magistrate should not have made the order absolute on his own opinion formed by inspection, but should have called on the respondent to adduce evidence that the hayricks constituted a nuisance and the order must, therefore, be set aside.

In the matter of the petition of Mahadaji Sadashiv, 11 B. 375, *Hingu* v. *Emperor*, 3 Ind. Cas. 482; 6 A. L. J. 685, 31 A. 453; 10 Cr. L. J. 297, referred to.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Joint Magistrate of Satur, in Miscellaneous Proceedings No. 10 of 1914.

Messrs. *E. S. Chidambaram Pillai* and *P. N. Marthandam Pillai*, for the Petitioner.

Mr. *K. B. Ranganadha Aiyer* for Mr. *G. S. Ramachandra Aiyar*, for the Respondent.

Mr. *P. R. Grant*, for the Government.

ORDER.—Section 137 of the Criminal Procedure Code requires that the Magistrate shall take evidence, if a person ordered to remove a nuisance appears and shows cause against the order.

In this case no evidence was let in either for or against the order.

The petitioner admitted the existence of hayricks on his premises, but he denied that they were a nuisance.

The Magistrate seems to have decided from his own inspection that they were a danger to adjoining houses. The conditional order under section 133 was issued in consequence of a representation in which it was alleged (1) that the drainage water caused bad odours (2), that the hayrick was likely to cause conflagration. In these circumstances, I think the Magistrate should not have made the order absolute on his own opinion formed by inspection, but should have called on the first party, Sudarsanachariar, to adduce evidence that the hayricks constituted a nuisance.

Vide *In the matter of the petition of Mahadaji Sadashiv* (1) and *Hingu* v. *Emperor* (2). The order does not satisfy the requirements of the section. I set it aside and refer the matter back to the Magistrate to proceed according to law.

Order set aside.

(1) 11 B. 375.
(2) 3 Ind. Cas. 482; 6 A. L. J. 685, 31 A. 453; 10 Cr. L. J. 297.

BOMBAY HIGH COURT.

CRIMINAL REVISION APPLICATION No. 320 OF 1914.
December 7, 1914.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

In re KAREPPA CHANBASAPPA—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 523, 524—No offence proved in respect of property—Possessor unable to prove how he acquired it—Order for disposal of property.

K was suspected of having been concerned in a theft. On search of his house a considerable quantity of jewelry and money was found and was taken possession of by the Police. Inquiry, however, showed that there was no definite evidence of guilt against *K*, nor was any of the property found in the house claimed by any one else although steps were taken under section 523, Criminal Procedure Code, to give others the opportunity to claim it. *K* was unable to show that it was legally acquired by him and consequently the Magistrate ordered that the property should be at the disposal of the Government:

Held, that having regard to the words of sections 523, 524 of the Criminal Procedure Code it could not be said that the Magistrate's proceedings were illegal, but in the circumstances of the case the intention and spirit of those sections had been disregarded, and the order made by the Magistrate should be set aside.

Criminal revision from an order of the Sessions Judge of Dharwar, confirming that of the First Class Magistrate of Dharwar.

In re KAREPPA CHANBASAPPA.

Mr. *P. D. Bhide*, for the Accused.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

HEATON, J.—In this case a certain Kareppa was suspected as possibly having been concerned in a theft from the house of a certain Mokashi, who gave information to the Police as a consequence of which a considerable quantity of jewelry and money was found in Kareppa's house and was taken possession of by the Police. Inquiry showed that there was no definite evidence on which a charge that Kareppa had been concerned in the theft could be based, nor was any of the property found in Kareppa's house claimed by Mokashi to be his. It became necessary, then, to make an order for the disposal of the property. Acting under section 523 of the Criminal Procedure Code, the Magistrate came to the conclusion that the person entitled to the property was unknown. He issued a proclamation and when the six months required by the section had elapsed, no person had come forward to claim any of the properties. The Magistrate then determined that the property ought not to be returned to Kareppa unless he was able to show that it was legally acquired by him. In the Magistrate's opinion he was not able to show this and consequently he ordered that the property should be at the disposal of the Government. This order was upheld in appeal and the proceedings have come before us by way of revision.

I am not prepared to say that the Magistrate's proceedings can be said to be illegal having regard to the words used in sections 523 and 524. Nevertheless, I think in the circumstances of this case that the intention and spirit of these sections has been disregarded and that the order made by the Magistrate was in the circumstances an improper order. I will say briefly why I hold this opinion, and I must be understood as speaking purely with reference to the circumstances of this case and in no way generalising. The property was found with Kareppa. It was not claimed by any one else, although steps were taken to give others the opportunity of claiming it. There was no evidence which really connected Kareppa with either the theft from Mokashi's house or any other theft, and the only reasons which eventually transpired for supposing that Kareppa had come by this property improperly were these: he did not appear to be anything but a poor man or to be pursuing a business which seemed likely to yield considerable profits and yet quite suddenly his wife and mistress were found to be wearing gold ornaments of considerable value and when his house came to be searched, he was found to be in the possession of somewhere above a thousand rupees (Rs. 1,000) in money. If there had been anything specific against Kareppa, I think the further proceedings might have been justified, but there was nothing specific against him. There was only this general surmise, which was based after all on the opinion of people who might, as people often are in their opinion of others, be mistaken. The principal ground on which the Magistrate based his order was that Kareppa himself gave an account of how he acquired his wealth, which seemed to the Magistrate to be manifestly untrue. But I think the circumstances of the case did not in themselves require or justify an inquisitorial inquiry into the private affairs of this man Kareppa. I think the spirit of our Criminal Law and its provisions both indicate quite clearly that inquisitorial inquiries into the private affairs and concerns of any person are not to be made, except possibly in rare instances, unless there is something specific against that peron. On the circumstances disclosed in this case, I think that the proper course would have been to refrain from making that inquisitorial inquiry into Kareppa's private affairs which the Magistrate did make. That being so, I do not think that the circumcumstance that Kareppa gave an account of how he had acquired his property which did not satisfy the Magistrate, is a good reason for maintaining the order which he has made.

Therefore, I would set aside the order and direct that the property which has been ordered to be at the disposal of Government should be returned to Kareppa.

SHAH, J.—I concur.

Order set aside.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 766 OF 1911.

February 11, 1915.

Present:—Mr. Justice Shah Din and Mr. Justice Rossignol.

DYAL SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

GIAN SINGH—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), ss. 17 (c), 49—Document extinguishing rights, whether compulsorily registrable.

A document which purports to extinguish the executant's right in immoveable property of the value of more than Rs. 100, in respect of the mortgage rights held by his grandfather in the land in suit, is compulsorily registrable, and if not registered, cannot be received in evidence of any transaction affecting that property.

Appeal from the decree of the Divisional Judge, Gujranwala Division, at Lahore, dated the 1st March 1911, affirming that of the Munsif, first Class, Gujranwala, dated the 31st October 1910, decreeing the claim.

Mr. *Gokal Chand Narang*, for the Appellants.

Messrs. *Ganpat Rai* and *Nanak Chand*, for the Respondents.

JUDGMENT.—One Surjan Singh, a *tarkhan* of *Mauza* Gondlanwala, distant about five miles from the Gujranwala city, held mortgage rights in 129 *kanals* 10 *marlas* of land (the area of the land is incorrectly entered in the judgments of the lower Courts as 109 *kanals* 10 *marlas*), situate at Gondlanwala. He died in December 1909, leaving some moveables in addition to the mortgage rights in the land just mentioned. The plaintiff Gian Singh, who is a daughter's son of Surjan Singh, has sued the defendants, who are Surjan Singh's collaterals, for possession of the land which was under mortgage with Surjan Singh, and both the Courts below have given a decree in his favour. The pleas of the defendants were, *inter alia*, that Surjan Singh was governed by agricultural custom and not by Hindu Law; that the plaintiff, as a daughter's son of the deceased, was, therefore, excluded from the succession to his land; and that, even if the plaintiff had a right to succeed to the land, he had waived that right after the death of Surjan Singh, as evidenced by an agreement dated the 20th of January 1910.

Both the Courts below have held that the defendants on whom the onus lay have failed to prove that Surjan Singh deceased was governed by agricultural custom and not by Hindu Law; that under Hindu Law the plaintiff, as daughter's son of the deceased, was entitled to succeed to his property to the exclusion of his collaterals, the defendants; that the agreement, dated the 20th January 1910, was compulsorily registrable under section 17 of the Indian Registration Act, and not being registered was inadmissible in evidence; and that, therefore, the alleged waiver of his rights of succession by the plaintiff was not established. Upon these grounds the plaintiff's claim has been decreed.

The defendants have appealed to this Court, and we have heard their learned Counsel at some length in support of the contentions raised by him, *viz.*, (1) that the deceased, who was an agricultural *tarkhan* residing in a village, was governed by the ordinary agricultural custom by which his collaterals were entitled to succeed to his landed property to the exclusion of his daughter's son; and (2) that the agreement, dated the 20th of January 1910, did not require registration and was admissible in evidence, inasmuch as it was simply a record of a settlement already arrived at between the parties, under which the plaintiff had given up all his rights in the immoveable property left by Surjan Singh deceased.

It would be more convenient to deal with the second contention first. We have carefully read the agreement in question; and after giving every weight to the argument of the Counsel for the defendants, we agree with the Courts below that this document purports to extinguish the plaintiff's right in immoveable property of the value of more than Rs. 100, *i. e.*, in respect of the mortgage rights held by his grandfather, Surjan Singh, in the land in suit, that it was, therefore, compulsorily registrable under section 17 of the Registration Act, and not being registered, it cannot, under section 49 of the Act, be received in evidence of any transaction affecting the said immoveable property. The document is

not written in very happy language, but we are clearly of opinion, upon a careful consideration of its terms, that it did not contain a mere recital of past facts and was not, therefore, excepted from the operation of section 17 of the Indian Registration Act.

As regards the first contention raised by the defendants' Counsel, it is unnecessary to decide whether Surjan Singh deceased was governed by agricultural custom or by Hindu Law. The property in dispute comprises, as has been noted above, mortgage rights in 129 *kanals* 10 *marlas* of land; and it is admitted before us that it was Surjan Singh deceased himself who had advanced the mortgage-money to the owners of the land and taken it in mortgage, the mortgage being one with possession. Such being the case, the mortgage rights in the land in suit were the self-acquired property of Surjan Singh, and whether he was governed by Customary Law or by Hindu Law his daughter, and through her the plaintiff, would be entitled to succeed to the said mortgage rights which he possessed in the land in question.

For these reasons we maintain the decree of the lower Appellate Court and dismiss this appeal. As the plaintiff has taken advantage of the non-registration of the agreement, dated the 20th of January 1910, which he had undoubtedly executed in favour of the defendants, and his conduct has been disingenuous, we think that the parties should bear their own costs in this Court and we direct accordingly. The cross-objections are dismissed.

Appeal and Cross-objections dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER NO. 34 OF 1914.

December 3, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Tyabji.

ARASALWAR PERIA TIRUVADI AIYENGAR—PLAINTIFF—APPELLANT

versus

MUTHAMMAL JANAKI—DEFENDANT—RESPONDENT.

Mortgage-deed, suit on—Covenant to pay—Personal decree, right of—Application for personal decree—Limitation.

Where in a document there is a covenant to pay a debt on a particular date, although followed by a direction that in default of payment the sum may be recovered from the hypothecated property, the mortgagee is nevertheless entitled to a personal decree.

Abbakka Heggadthi v. Kinhiamma Shetty, 29 M. 491, followed.

An application for a personal decree can be made even after six years from the date of bond, provided the suit is filed within six years from the date of the bond.

Appeal against the decree of the District Court of Tinnevelly, in Appeal Suits Nos. 271 and 273 of 1913, preferred against those of the Additional District Munsif of Tinnevelly, in Civil Miscellaneous Petitions Nos. 73 and 142 of 1913 in Original Suit No. 70 of 1911.

FACTS.—This is an appeal against an order refusing to pass a personal decree under Order XXXIV, rule 6, of the Code of Civil Procedure in a mortgage suit. The appellant is the decree-holder. A decree was passed directing the realization of the mortgage amount from a sale of the hypothecated properties. He brought the *hypotheca* to sale and realized therefrom a sum of Rs. 910. A sum of Rs. 109 still remained due under the decree, and he sought to recover it by attachment and sale of the other properties of mortgagor, and applied, therefore, for a personal decree under Order XXXIV, rule 6. The judgment-debtor at first paid the amount into Court. She afterwards contested the application stating that she, being a woman, was misled into paying the balance of the decree amount into Court and that the decree-holder is not entitled to a personal decree *as the mortgage document* merely provides *for the realisation of the amount out of the hypotheca*. The District Munsif applied the amount paid by her into Court towards the decree, and directed satisfaction of the decree to be entered up. She then appealed to the District Judge, who passed the following order:

"It will be observed that there is a covenant to pay on a particular date accompanied by a mortgage of certain property as security. It is, however, immediately followed by a direction that in default of payment the sum shall be recovered from the mortgaged property.

"It seems to me, therefore, that the covenant to pay was not absolute but qualified, and that the debt could not be recovered otherwise than from the mortgaged property."

He accordingly allowed the appeal and dismissed the application for a personal decree. The present appeal is against that order.

Mr. *M. D. Devadoss*, for the Appellant.

Mr. *K. R. Rangaswami Aiyangar*, for the Respondent.

JUDGMENT.—We follow *Abbakka Heggadthi* v. *Kinhiamma Shetty* (1), the terms of the document in that case resembling those of the document before us, and dissent from the District Judge's conclusion that the plaintiff was not entitled to a personal decree.

It is then argued by the defendant that the application for a personal decree is made out of time, being more than six years from the date of the suit mortgage. It is not shown that this objection was taken in the lower Appellate Court, and in any case it is sufficient that the plaintiff's suit was in time, the date of its institution, not that of the application for personal decree, being material.

The appeals against Appellate orders are allowed and the lower Appellate Court's decisions are set aside.

The civil miscellaneous second appeals are remanded to the District Munsif for re-admission and disposal according to law after passing a personal decree in plaintiff's favour. Defendant will pay plaintiff's costs throughout.

Appeal allowed, Petition remanded.

(1) 29 M. 491.

ALLAHABAD HIGH COURT.

EXECUTION FIRST APPEAL No. 129 OF 1914.

January 25, 1915.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

MUHAMMAD MASIH ULLAH KHAN AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Musammat JARAO BAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 10—Proceedings after preliminary decree for sale or redemption, whether proceedings in suit—Purchaser of property, whether entitled to be made party—Rule 10, whether applicable to execution proceedings.

Under the Civil Procedure Code, 1908, proceedings after a preliminary decree for sale or redemption are proceedings in the suit and, therefore, a suit for redemption does not come to an end after the passing of a preliminary decree and must be considered pending, within the meaning of Order XXII, rule 10, and the private purchaser of the property after such a decree acquires an interest which entitles him to be made a party to the suit.

Quære Whether Order XXII, rule 10, applies to execution proceedings?

Bhugwan Das Khettry v. *Nilkanta Ganguli*, 9 C. W. N. 171, referred to.

Execution first appeal from the decision of the Second Additional Subordinate Judge of Aligarh, dated the 30th August 1913.

Mr. *B. E. O'Conor* (with him Dr. *Suleman*), for the Appellants.

Mr. *Durga Charan Banerji* (with him Mr. *Mohan Lal Sandal*), for the Respondents.

JUDGMENT.—*Musammat* Maimuna Khatun, on December 22nd, 1908, obtained a preliminary decree for redemption. On appeal to this Court the decision was upheld by a decree, dated May 19th, 1910, which allowed the plaintiff six months from that date to redeem the property. On October 12th, 1912, *Musammat* Maimuna Khatun sold the mortgaged property to the present appellants, leaving in their hands a sum of money sufficient to enable them to redeem the property in accordance with the decree. On April 5th, 1914, the appellants applied to the Court below to be made plaintiffs in the suit in the place of Maimuna Khatun and on the same day they applied to the Court to extend the time for redemption and to allow them to pay the mortgage-money into Court. Both applications were dismissed. This is an appeal against the order dismissing the appellants' application to be made plaintiffs in the suit.

The Subordinate Judge seems to have dismissed the application on two grounds, *namely*, (1) that no execution proceedings were pending at the time when the application was made, therefore, Order XXII, rule 10, did not apply to the case; and (2) that the decree had not been transferred to the appellants, therefore, Order XXI, rule 16, did not apply. In appeal it is contended that the suit is still pending, and reliance is placed on a decision of the Calcutta High Court in *Bhugwan Das Khettry* v. *Nilkanta Ganguli* (1) to the effect that a suit of this kind may be "pending" even after the decree absolute. A question is raised as to whether these proceedings are governed by the new

(1) 9 C. W. N. 171.

Code of Civil Procedure. It seems to us that the proceedings must be held to be governed by the new Code. It is true that the preliminary decree was passed by the Subordinate Judge in December 1908 just before the new Code came into force, but the case, as already stated, was brought up to this Court and a decree was passed by this Court in May 1910, after the passing of the new Code. Before the passing of the new Code there was considerable conflict of judicial opinion on the question whether proceedings after a preliminary decree for sale or redemption should be regarded as proceedings in a suit or as proceedings in execution of a decree. Under the present Code there can be no doubt that such proceedings must be held to be proceedings in a suit. We have no difficulty in holding that the suit with which we are now concerned was still pending within the meaning of Order XXII, rule 10, when the appellants' application to be made plaintiffs was filed. In the definition of "decree" contained in the present Code of Civil Procedure, it is explained that a decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. This makes it quite clear that a suit of this kind does not come to an end after the passing of a preliminary decree. In this view it is unnecessary to consider whether Order XXII, rule 10, applies to execution proceedings. It was held by this Court that section 372 of the old Code of Civil Procedure did not apply to execution proceedings. It is unnecessary to decide whether Order XXII, rule 10, which has taken the place of that section, does or does not apply to execution proceedings. It is sufficient for the present case to say that the suit was still pending when the appellants' application to be made plaintiffs was made. The only other question is whether there has been a devolution of interest which entitles the present appellants to be made plaintiffs in the suit. The sale-deed executed by *Musammat* Maimuna Khatun transfers the whole of the mortgaged property to the appellants and recites that part of the price has been left in their hands in order that they may proceed to redeem the property. The sale-deed in fact comes very near being a transfer of the preliminary decree. It is quite clear from the terms of the deed that the parties considered that the purchasers of the property would be entitled to redeem the property in the suit in which the preliminary decree had been passed, without holding that there had been a definite transfer of the decree. We have no doubt whatever that there has been a devolution of interest which entitles the appellants to be made plaintiffs in the suit. In our opinion the appellants' application should have been allowed. We, therefore, allow this appeal, set aside the order of the Court below and direct that the name of the appellants be entered as plaintiffs in the place of *Musammat* Maimuna Khatun. The respondents must pay the appellants' costs.

Appeal allowed.

MADRAS HIGH COURT.

FIRST CIVIL APPEALS NOS. 191 AND 240 OF 1910.

September 1, 1914.

Present:—Sir John Edward Power Wallis, KT., Offg. Chief Justice, and Mr. Justice Seshagiri Aiyar.

IN A. S. No. 191 OF 1910

KUTHIARVATHATH PRABBAKARAN THAMPAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

SESHAN PATTAR AND OTHERS—PLAINTIFFS—RESPONDENTS

IN A. S. No. 240 OF 1910

SESHAN PATTAR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

K. UKKALI *alias* PAPPI THAMPATTI AND OTHERS—DEFENDANTS—RESPONDENTS.

Possessory right over channel—Right exercised for 40 years—Obstruction in enjoyment of right—Damages, right of.

Where nothing more than a mere possessory right over a *chal* exercised for a period of forty years is proved, that of itself, is sufficient to entitle a person to claim damages for obstruction in the enjoyment of that right.

Appeals against the decrees of the Court of the Subordinate Judge of Palghat, in Original Suit No. 7 of 1909.

Mr. *C. Madhavan Nair*, for the Appellants in Appeal Suit No. 191 of 1910 and for the Respondents in Appeal Suit No. 240 of 1910.

Mr. *C. V. Ananthakrishna Aiyar*, for the Respondents in Appeal Suit 191 of 1910 and for the Appellants in Appeal Suit 240 of 1910.

TIKA SHAHU *v.* CHIRKAT SHAHU.

JUDGMENT.—This is a suit by the plaintiffs to recover from the defendants possession of an anicut and a *chal*. The plaintiffs' predecessors-in-title constructed an anicut in the bed of the river and took water through a channel to lands that they occupied under defendants' predecessors. They also continued the channel, apparently by permission of the riparian proprietors, higher up and sold them the surplus water. In 1904 the anicut was washed away by the flood and in 1908 the defendants, who were the owners of the land for the irrigation of which the water was originally taken and had re-entered into possession, erected by permission of Government a new anicut, partly on the same site as the old anicut, and have since been using the upper reaches of the *chal* where there are not riparian owners to supply water for payment to the other owners. As regards those upper reaches, the evidence is that the plaintiffs and their predecessors have enjoyed for at least forty years a possessory right over the upper reach of the *chal* above the plaintiffs' lands. The defendants have not shown any right on their part to interfere with the plaintiffs' proprietary right and the Subordinate Judge was right in restraining the defendants from interfering with the plaintiffs' enjoyment of the *chal*. The plaintiffs have not in fact been damnified by the interference of the defendants, but on the contrary have gained by the reconstruction of the anicut by the defendants. In these circumstances we think a sum of Rs. 100 will be sufficient damages. As regards the anicut, we agree so far with the lower Court as to be of opinion that the plaintiffs have failed to prove any present right to possession of the anicut. They were allowed to erect the anicut which has been swept away for the purpose of irrigating the lands which they then held and which they hold no longer. They are, therefore, no longer entitled to this easement. As regards the defendants' claim for compensation for clearing the channel, they have not shown any principle entitling them to compensation and their claim must be disallowed.

In the result we must modify the decree in favour of the plaintiffs by awarding Rs. 100 for damages. In other respects both appeals are dismissed with costs.

Appeal No. 240 *allowed in part*; *Decree modified.*

CALCUTTA HIGH COURT.

CIVIL RULE No. 868 OF 1914.

December 16, 1914.

Present:—Mr. Justice N. Chatterjea and Mr. Justice Greaves.

TIKA SHAHU AND OTHERS—DEFENDANTS—PETITIONERS

versus

CHIRKAT SHAHU AND OTHERS—PLAINTIFFS—OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 28, *interpretation and scope of—Suit by heir of deceased to recover moveables of deceased detained by defendant, whether cognizable by Small Cause Court—Defendant's denial of plaintiff's title, effect of.*

The suits contemplated by the words in Article 28 of Schedule II of Act IX of 1887, are suits for the recovery of the property of an intestate, between rival claimants to the estate or against persons administering the estate.

Therefore a Small Cause Court has jurisdiction to entertain a suit by the heir of a deceased to recover from the defendant certain moveable property of the deceased detained by him. The fact that the defendant denies the title of the plaintiff does not oust the jurisdiction of the Court.

Kopalee Bewah v. *Keshram Kooch*, 11 W. R. 93; *Mohesher Mondul* v. *Koilash Nath Mundul*, 7 C. L. R. 71; *Okheda* v. *Gulabo*, 27 A. 622; A. W. N. (1905) 134; 2 A. L. J. 388, referred to.

Rule against an order of the Small Cause Court Judge of Saran, dated the 13th May 1914.

Babu *Rajendra Prosad*, for the Petitioner.

Babu *Probodh Chandra Mukerjee*, for the Opposite Party.

JUDGMENT.—The opposite party instituted a suit in the Small Cause Court for recovery of certain ornaments and cash which belonged to one Phuleshwari. They were alleged to have been made over to the defendant No. 1 after her death, and were withheld by him from the plaintiffs. Plaintiffs alleged that Phuleshwari was the wife of the plaintiff No. 1 and mother of the plaintiff No. 2. Defendant No. 1 denied that there was such relationship between the plaintiffs and the deceased or that he had ever received the ornaments and cash. The Judge of the Small Cause Court held that the plaintiffs were the heirs as alleged by them and that, on Phuleshwari's death, the ornaments and cash were made over by the *chaukidar* and *daffadar* to the defendant No. 1; and he accordingly gave a decree in favour of the

plaintiffs. Defendants thereupon moved this Court, and obtained this Rule calling upon the opposite party to show cause why the decree of the Small Cause Court Judge should not be set aside on the ground that he had no jurisdiction to decide the case.

It is contended on behalf of the petitioners that the suit is exempted from the cognizance of the Provincial Small Cause Court by Article 28 of Schedule II of Act IX of 1887, which exempts a suit "for a legacy or for the whole or a share of a residue bequeathed by a testator, or for the whole or a share of the property of an intestate". The question, therefore, is whether this is a suit for the "whole or a share of the property of an intestate" within the meaning of the said Article. We are of opinion that the suits contemplated by the said words in Article 28 are suits for the recovery of the property of an intestate between rival claimants to the estate, or against persons administering the estate: and this was the view taken in the case of *Kapalee Bewah* v. *Keshram Kooch* (1). In that case the learned Judges had to consider the second exception to section 6 of Act XI of 1865, which exempted suits for "a share or part of a share in an intestacy" from the jurisdiction of the Small Cause Court; and Mr. Justice Norman, in delivering the judgment of the Court, said as follows: "We think that those words are intended to apply to suits by persons claiming as heirs against other persons similarly entitled in order to determine their respective rights and interests, and to suits against persons administering the estate of a person who has died intestate, where the share or proportion to which the claimant is entitled is in question", and do not apply to suits by the heirs against a wrong-doer. A similar view was taken in the case of *Moheshur Mondul* v. *Koilash Nath Mundul* (2) where, in considering the said section, Mitter and Maclean, JJ, held that "suits between parties claiming respectively, property left by a deceased person as heirs-at-law of such person, are contemplated by this exception". The Allahabad High Court, in considering Article 28 of Schedule II of the present Provincial Small Cause Courts Act, agreed with the view taken in the above two cases (See the case of *Chhedi* v. *Gulabo* (3).

Reliance has been placed on behalf of the petitioners upon two cases reported in 17 W. R. [*Grish Chunder Singh* v. *Auna Dossee* (4) and *Nabin Chunder Goosamee* v. *Dribo Moyee Debee* (5)], in which Couch, C.J., held that a suit to recover money as personal property in respect of a share under an intestacy is not cognizable by the Small Cause Court. But the facts of the first of the two cases (at page 46 of the said Volume) do not appear from the report, and we do not know whether the suit was against a rival claimant. The second case reported at page 520 was clearly a suit against a person who also claimed to be an heir; and the suit would fall within the class of suits contemplated by the exception to section 6 of Act XI of 1865 as laid down by Mr. Justice Norman. It is true that the Small Cause Court Judge also asked the High Court to set aside a previous decree passed by him in a suit, which had been brought apparently against a wrong-doer. The learned Judges did not interfere, although on the ground that the decree had been passed long ago and that the parties had made no application to the High Court.

We agree with the view taken in the first three cases noticed above. It is contended that in these three cases the defendant did not deny the title of the plaintiff. But in the case of *Kapalee Bewah* v. *Keshram Kooch* (1), we think that the plaintiff's title must have been denied, as the reference to the Munsif's finding that the plaintiff was not the wife of the deceased would go to show. In the Allahabad case, the heirship of the plaintiff had been determined in a previous suit between the parties, but then that fact is not relied upon and, in fact, has not even been referred to in the judgment of the Court. The judgment in all those three cases proceeded upon the ground that the suit contemplated by the section was one between rival claimants to the estate under an intestacy. The fact, therefore, that the defendants in the present case have denied the title of the plaintiffs is immaterial.

(1) 1 W. R. 93.
(2) 7 C. L. R. 71.
(3) 27 A. 622; A. W. N. (1905) 134; 2 A. L. J. 388.
(4) 17 W. R. 46.
(5) 17 W. R. 520

It was argued that the title of the plaintiffs having been disputed in the present case, the suit was taken out of the cognizance of the Small Cause Court. But the suit is based upon the ground that certain moveable property left by the deceased was detained by the defendants. There is nothing in the Small Cause Courts Act to show that the jurisdiction of the Court is ousted merely because the plaintiff's right is denied. We are of opinion that the Small Cause Court had jurisdiction to entertain the suit,

The Rule must accordingly be discharged with costs. We asses the hearing fee at one gold *mohur*.

Rule discharged.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 182 OF 1912.

November 12, 1914.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Spencer.

KAKERLA CHUKKAMMA—PLAINTIFF—APPELLANT

versus

KAKERLA PUNNAMMA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Adoption—Mitakshara *system—Adoption by junior widow with consent of majority of* sapindas—*Consent of senior widow not obtained—Validity of adoption.*

Under the *Mitakshara* system of Hindu law an adoption made by a junior widow of a deceased Hindu without the consent of the senior widow is invalid even though the adoption was made with the consent of the majority of *sapindas*, as the senior widow has a preferential right to make an adoption.

Narayanasami Naick v. *Mangammal*, 28 M. 315; 15 M. L. J 143 and *Rakhmabai* v. *Radhabai*, 5 B. H. C. R. A. C. J. 181, referred to.

Padajirav v *Ramrav*, 13 B. 160 and *Ranjit Lal Karmakar* v. *Bejoy Krishna Karmakar*, 14 Ind. Cas. 17; 16 C. W. N. 440; 39 C. 582, followed.

Appeal against the decree of the Court of the Temporary Subordinate Judge, Masulipatam, in Original Suit No. 82 of 1909.

FACTS.—One Kakerla Lakshmipathi died without male issue, leaving two widows him surviving. The junior widow, after obtaining the consent of the majority of the *sapindas*, adopted a son to her deceased husband, without the consent of the senior widow and without even consulting her about the matter. The senior widow then sued for a declaration that the adoption was not true and valid. The Temporary Subordinate Judge of Masulipatam held that though the plaintiff was not consulted and was not even present at the adoption, it was valid as it was made with the consent of the majority of the *sapindas*. The plaintiff appealed to the High Court.

Mr. *V. Ramadoss*, for the Appellant:—The adoption is clearly illegal as the senior widow did not consent to the same. *Padajirav* v. *Ramrav* (1) and *Ranjit Lal Karmakar* v. *Bejoy Krishna Karmakar* (2). West and Buhler also say the same thing.

Mr. *T. Ramachandra Row*, for the Respondents:—At the worst the omission to obtain the senior widow's consent is only improper and the doctrine of *factum valet* will apply to validate the same. [*Narayanasami Naick* v. *Mangammal* (3).] The text of West and Buhler does not apply to Madras, as the law here is different and as a widow in Bombay can adopt even without the consent of the *sapindas*.

JUDGMENT.—The plaintiff, the senior widow of Kakerla Lakshmipathi deceased, sued for a declaration that the alleged adoption of the 2nd defendant made by the 1st defendant, the junior widow, is neither true nor valid, as it was made without her consent. The defence is that it is true and valid. The Subordinate Judge has found that the plaintiff was not consulted by the 1st defendant about the adoption and that she was not present at it, but that as it was made with the consent of the majority of the *sapindas* it is valid.

In appeal it is argued that an adoption made without the consent of the senior widow (the plaintiff) and without even consulting her is not valid in law. There is no Madras decision directly in point. In *Narayanasami Naick* v. *Mangammal* (3) the learned Judges held that the omission by the senior widow to consult her co-widow, though no doubt improper, would not be a sufficient reason for holding the adoption made by her to be invalid, because a junior widow is bound, as a matter of duty, to give her

(1) 13 B. 160.
(2) 14 Ind. Cas 17; 39 C. 582; 16 C. W. N. 440.
(3) 8 M. 15; 15 M. L. J 1

consent. In Bombay it has been held that where there are several widows the elder has a right to adopt even without the consent of the junior widow [see *Rakhmabai* v. *Radhabai*(4)], but that the junior widow cannot adopt without the consent of the elder [See *Padajirav* v. *Ramrav* (1)], except in certain circumstances to which it is now unnecessary to refer. This view has been accepted by the Calcutta High Court [See *Ranjit Lal Karmakar* v. *Bejoy Krishna Karmakar* (2)]. West and Buhler are the only text-writers cited before us who deal with this question. They say that in the case of a difference of opinion between the widows "the elder has the superior right; and the younger cannot, it would seem, adopt without her senior's authority, except in case of irregularity on the senior's part causing interference by the caste." Then the opinions of the *Sastris* to the same effect are quoted. But it has been urged before us that the law is different in Madras, because in Bombay an adoption may be made by a widow without the consent of the *sapindas* of her husband.

Now when several widows inherit jointly, the senior widow, in the case of an ordinary co-parcenership, has a preferential right to the management of the joint property on behalf of all the widows, unless by consent or decree the joint estate is converted into an estate in severalty. If the property is impartible, she is entitled to hold it subject to the rights of the others for maintenance. An adoption by the junior widow will thus have the effect of depriving her of the impartible property or the possession of the co-parcenary property. In Madras the law relating to the senior widow's right of management was laid down in the *Tanjore* case reported as *Jijoyiamba Bayi Saiba* v. *Kamakshi Saiba* (5). The learned Judges refer to the following statement of the law in Strange's Hindu Law, page 127, at page 435:— "When a man has left more widows than one, and no son by any, she who first married, being the one who is considered to have been married from a sense of duty, succeeds,..... the others, inheriting in their turn as they survive, being entitled in the meantime, to be maintained by the first."

Has she got the same preferential right in the performance of religious duties? In Colebrook's Digest of Hindu Law, Book IV, Chapter I, Sloka 51, it is said that "the first is the wife married from a sense of duty, and it is she whom acts of duty concern," which, the commentator states, means "who officiates in acts of religion and so forth." A *sloka* of Yagnavalkya is quoted as showing that if there are several wives of the same class, acts of religion are lawfully performed "by no other than the eldest" (Slokas 48 and 49): and the commentator Vignaneswara is cited as saying that in such a case the husband shall not employ another in business relating to religious duties and that the first married one must be preferred in all matters relating to acts of religion even though, according to Vishnu, there may be younger wives who are dearer to him. Certain exceptions are referred to in Sloka 50. It will be observed that it is the very ground on which her preferential right to manage the property left by the deceased husband is recognised by Strange in the passage cited above and extracted in the judgment in *Jijoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba* (5). *A fortiori* her preferential right to perform acts of religion should be recognised: and it is not denied that adoption is an act of religion. The decisions of the Bombay and Calcutta High Courts are based on sound principle and we are of opinion, therefore, that the plaintiff has got a preferential right to make the adoption and that so long as that preferential right exists in the plaintiff, the 1st defendant has no right to adopt. The consent of the *sapindas* will not, in the circumstances, give her a right to adopt and the adoption is, therefore, invalid.

We accordingly reverse the decree of the lower Court and declare that the adoption of the 2nd defendant by the 1st defendant is not valid, and that the 2nd defendant is not, therefore, the adopted son of the deceased Kakerla Lakshimpathi. The plaintiff is entitled to her costs from the defendants in both Courts.

Appeal allowed;
Decree set aside.

(4) 5 B. H. C. R., A. J. C. 181
(5) 3 M. H. C. R. 424.

MG. PO NYEIN *v.* MAUNG MY.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 216 OF 1913.

February 5, 1915.

Present:—Mr. Justice Twomey.

MG. PO NYEIN AND OTHERS—PLAINTIFFS —APPELLANTS

versus

MAUNG MY AND OTHERS—DEFENDANTS —RESPONDENTS.

Evidence Act (*I of* 1872), *s.* 32 (2)—*Pyatbaings —No documents of title—Revenue Surveyor's report not signed by transferors, probative value of—Transfer of Property Act* (*IV of* 1882), *s.* 41 - *Purchase from ostensible owner—Inquiry by purchaser.*

A Revenue Surveyor's reports though admissible under section 32 (2) of the Evidence Act have very little probative value when they are not signed by the transferors and are not supported by the evidence of persons who purport to sign them as witnesses.

To claim the protection afforded by section 41 of the Transfer of Property Act, the purchaser must prove that he inquired as to who was in actual possession of the land for 12 years before purchase, and should not assume that his vendor is the true owner merely on the strength of the *pyatbaings*, which are not signed by the transferors The *pyatbaings* after the Transfer of Property Act came into force are no documents of title at all.

Ramen Chetty v. *Po Son*, 4 Ind. Cas. 309; 5 L. B. R. 125, referred to and followed.

Mr. *Gyi*, for the Appellants.

Mr. *Palit*, for the Respondents.

JUDGMENT.—The plaintiffs-appellants proved their mortgage to the satisfaction of both the lower Courts. There was oral evidence in support of it apart from the admission of the 1st defendant, Maung Pe. Maung Pe alleged that the mortgaged land was subsequently transferred to him outright as the plaintiff could not pay the mortgage debt. But this subsequent transfer was not proved. It rests on the statement of the 1st defendant, Maung Pe, and the *pyatbaings* of 1907, Exhibits 1 and 2. These *pyatbaings* were rejected by the Township Court. The Revenue Surveyor who wrote the two reports died before the suit was filed and the reports would probably be admissible under section 32 (2) of the Evidence Act. But they are not signed by the alleged transferors and are not supported by the evidence of persons who purported to sign them as witnesses. In the circumstances their probative value is very slight and would not justify the Court in finding that Po Nyein and his wife reported an outright transfer of the land to their mortgagee, Maung Pe.

The only question that remains is whether the District Court was right in deciding that Maung Mya and Ma Kyet U (who bought the land from San Nyun and Ma Hla Bon, who had in turn got it from the mortgagee, Maung Pe) are *bona fide* purchasers without notice and as such entitled to the protection afforded by section 41 of the Transfer of Property Act, as held by the District Court. The learned District Judge says that Maung Mya could hardly have been expected to carry his enquiries back further than to Maung Pe. Maung Pe obtained the land only some five years before the sale to Maung Mya. Was Maung Mya justified in assuming that Maung Pe was the true owner merely on the strength of the *pyatbaings*, Exhibits 1 and 2, which were not signed by the transferors? I think it is clear that he was not justified in doing so and that he must be held to have had notice of the plaintiffs-appellants' mortgage, seeing that but for his wilful abstention from enquiry he would have known it. As pointed out in *Ramen Chetty* v. *Po Son* (1), an inquiry into title which does not extend to inquiry as to actual possession for at least 12 years cannot be said to be such an inquiry as a reasonable and prudent man would or should make. It was Maung Mya's duty before purchasing the land to inquire from Po Nyein and Ma Ngwe Kin, who to his knowledge were in possession some five years before. I see no reason at all for holding that Po Nyein and Ma Ngwe Kin are estopped from asserting their rights as mortgagors, even if Maung Pe was on the footing of an ostensible owner in 1907. It would be still incumbent on Maung Mya to inquire into Maung Pe's title. The *pyatbaings* of 1907 are not documents of title at all.

Maung Pe being merely a mortgagee had no power to sell the land.

The decree of the District Court is set aside and that of the Township Court is restored. The respondents will pay the costs of the appellants in all Courts.

Appeal allowed.

(1) 4 Ind. Cas. 309; 5 L. B. R. 125.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2183 OF 1914.

February 22, 1915.

Present:—Justice Sir Donald Johnstone, KT.

JHANDA MAL—PLAINTIFF—APPELLANT

versus

Musammat SARDAR BEGAM AND ANOTHER—DEFENDANTS—RESPONDENTS.

Pre-emption—Custom—Instances in adjoining mohallas—Degree of proof required—Lahore City, Taksali Gate Bazar.

In order to prove the custom of pre-emption instances of the enforcement of the right of pre-emption in the adjoining streets or *mohallas* are relevant.

The circumstance that a particular bazar is essentially a street of shops and prostitutes' lodgings cannot override the fact that pre-emption has been enforced as a matter of right in certain cases.

The mere fact that the property in suit has changed hands three or four times without any claim of pre emption being made does not go to disprove the existence of the custom.

Where in a pre-emption suit it was contended on behalf of the vendee-defendant that four instances were not enough to prove custom and that compromises out of Court should not be relied on:

Held, (1) that extra-judicial compromises were valid instances of the existence of custom;

(2) that each case must be decided on its own facts and that in this case the custom of pre-emption was proved to exist

Musammat Durga Devi v. *Ramsan*, 10 Ind Cas. 330; 91 P. R. 1911; 127 P. L. R. 1911, distinguished

Second appeal from the decree of the Divisional Judge, Lahore Division, dated the 15th June 1914, reversing that of the Subordinate Judge, Lahore, dated the 30th March 1912, decreeing claim.

Messrs. *Beechey* and *Jai Gopal Sethi*, for the Appellant.

The Hon'able Mr. *Muhammad Shafi*, K. B., for the Respondents.

JUDGMENT.—This case has been very hotly contested. Here in second appeal the questions for decision are:—

(*a*) Does the custom of pre-emption exist in the sub-division of Lahore City in which the property sought to be pre-empted is situate?

(*b*) Is the property a house or a shop?

(*c*) The proper price.

As regards (*a*) we have to consider in what sub-division the property lies. Plaintiff says Guzar Talwara, vendee says Taksali Gate Bazar. The latter is a comparatively small and defined area, while no one is able to give the boundaries of the former. It seems that in ancient times the whole city consisted of two "*Guzars*" called Talwara and Barra respectively; but, in my opinion, these cannot now be called sub-divisions for the purposes of pre-emption, the city having altered enormously. The property is, therefore, in the Taksali Gate sub-division. As to whether the custom of pre-emption exists in this sub-division or not, I have heard an enormous amount of argument, supported on both sides by a great mass of authority in the shape of published rulings. I do not think any good purpose will be served by a detailed notice here of all these rulings, all of which I have seen and weighed. It will suffice if I note the lines of argument put forward and deal in turn with each point taken.

Mr. Beechey for plaintiff-appellant points to four instances of the enforcement of right of pre-emption in the immediate vicinity, two being decided contested cases: *Musammat Piro* v. *Miran Bakhsh*, decided 10th November 1897 by the Additional District Judge, Lahore, and *Ishar Das* v. *Imam Din*, decided by the Munsif on 18th March 1895, and the other two extra-judicial compromises in 1906 and 1908. These cases are fully proved and Mr. Beechey points to a number of rulings, *Muhammad Nawaz Khan* v. *Bobo Sahib* (1) (Ferozepore), *Maula Bakhsh* v. *Devi Ditta* (2) (Amritsar), *Fateh Muhammad* v. *Karimun* (3) (Jullundur), *Manohar Lal* v. *Pars Ram* (4) (Jagadhri), as showing that instances in adjoining streets or *muhallas* are relevant.

Mr. Shafi meets all this by the argument that the above rulings all relate to towns in which the custom is universal, while in many parts of Lahore the custom has been found not to exist [*Raman Mal* v. *Bhagat Ram* (5) and *Hakim Rai* v. *Muhammad Din* (6), etc., etc.]. I am not pressed by this argument, as there is no real reason to suppose that Lahore is very different from the

(1) 44 P. R. 1903; 75 P. L. R. 1903.
(2) 6 P. R. 1907; 54 P. W. R. 1907; 122 P. L. R. 1907.
(3) 7 P. R. 1907; 42 P. W. R. 1907; 104 P. L. R. 1907.
(4) 67 P. R. 1907; 51 P. L. R. 1907 88 P. W. R. 1907.
(5) 17 P. R. 1895.
(6) 83 P. R. 1901.

other towns named above in the matter of the prevalence of the custom.

Then Mr. Shafi argues that the Taksali Gate Bazar is essentially a street of shops and prostitutes' lodgings, and thus the necessity for custom of pre-emption is not apparent, see P. W. No. 7, who has a shop separated by 14 shops from the property in suit. Such a circumstance cannot override the fact that pre-emption has been enforced as a matter of fact in recent times in four cases.

Then it is argued that this property has changed hands three or four times without any claim being made, and that similarly other sales have taken place without contest. This seems to me immaterial: it is not *always* the case that a neighbour has the desire or the means to acquire adjoining property which is in the market.

Next, it is contended that compromises out of Court prove nothing. Remarks of this sort are to be found in *Raman Mal* v. *Bhagat Ram* (5) and elsewhere, but they are contradicted in other rulings. The fact is that "circumstances alter cases"; it seems to me that where a would-be-purchaser of property, on being challenged by a *soi-disant* pre-emptor, surrenders, there is a fairly strong inference that it is because he knows the claimant will be able to oust him by suit if he resists.

Then it is contended that *Ishar Das's* case was decided by a Munsif on a wrong imposition of onus. I cannot see that this matters. It is also pointed out that the property in *Musammat Piro's* case was in Tibbi Bazar, but reference to the map shows that that Bazar is so near the Taksali Gate Bazar that the two may well be deemed to be in the same sub-division.

Again, Mr. Shafi points to *Imam Din* v. *Ghulam Muhammad* (7) and contends that instances in adjoining sub-divisions should not be taken into account; but the sentence in point beginning "we think, however," does not support him here, as the dictum is strictly limited to cases in which there are *no* instances in the sub-division in which the property is situated.

Further *Gokal Chand* v. *Mohan Lal* (8), a Lahore case, is relied upon by Mr. Shafi. There in a certain sub-division two cases were proved of pre-emption and yet the Court held the custom not established. Here we have four instances. Each case must be decided on its own facts. *Musammat Durga Devi* v. *Ramsan* (9) is also put forward as showing how much proof of the custom is required. There, too, only two instances were established, one very old and the other a case in which there was a reason to believe the compromise out of Court was amicably arranged, the vendee being amply compensated. I decline to apply that case here.

My finding, then, is that the custom of pre-emption of house property does exist in the Taksali Gate Bazar sub-division of Lahore City, and I overrule the lower Appellate Court here. As regards the nature of the property, vendee, by re-building in the teeth of repeated prohibitions and warnings from the first Court, has made inspection impossible, and, therefore, the past history of the spot must be considered. I have seen the evidence of Wasdeo himself, P. W. No. 5, who occupied it for seven years up to 1903 using no part as a shop; of P. W. No. 1, P. W. No. 3, P. W. No. 4, P. W. No. 7, P. W. No. 8, P. W. No. 9, P. W. No. 10, P. W. No. 11, P. W. No. 14 (drawer of a plan on the record), P. W. No. 16 (writer of deeds concerning property in these parts); and *per contra* of D. W. No. 2 and D. W. No. 3. The first Court found the property was predominantly residential on the oral and documentary evidence, and I must say I think with much reason. The lower Appellate Court after a few rather summary observations on the subject finds the premises were not residential or subject to pre-emption. What has to be decided is not whether they were residential, but whether they come under the exceptions set forth in section 5 of the Act, *i. e.*, if not a shop, or a *katra*, or a *serai* or *dharmsala*, mosque or "other similar building," these premises are certainly subject to pre-emption—*cf.* section 7 of the Act. I hold the property was not at time of sale a shop and so was subject to pre-emption.

(7) 86 P. R. 1901.
(8) 6 P. R. 1905; 10 P. L. R. 1905.
(9) 10 Ind. Cas. 330; 91 P. R. 1911; 127 P. L. R. 1911.

The Courts below are agreed as to the matter of price, and I see no reason to differ from them.

I, therefore, accept the appeal with costs.

Appeal accepted.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 467 OF 1910.

July 20, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

DHAKESWAR PROSAD SINGH—DEFENDANT No. 2—APPELLANT

versus

HARIHAR PROSAD NARAIN SINGH—PLAINTIFF—RESPONDENT.

Mortgage—Co-mortgagors—Purchaser of portion of mortgaged property, position of—One co-mortgagor redeeming whole mortgage, right of—Contribution—Charge.

When one of several mortgagors redeems the whole mortgage, he acquries a charge on the share of each of his co-mortgagors for his proportion of the expenses properly incurred in the redemption of the property.

The purchaser of a portion of a mortgaged property is in the same position as one of the co-mortgagors and if he redeems the property, he is entitled to a charge for such sum as the owner of the rest may be called upon to contribute.

A decree obtained on a mortgage does not extinguish the security, though the security may be merged in the decree, and the judgment recovered in any form of action is still but a security for the original cause of action until it be made productive in satisfaction to the judgment-creditor.

Bibi Jan v. *Sachi Bewa*, 31 C. 863; 8 C. W. N. 684 (F. B.); *Puranamal* v. *Venkata*, 20 M. 486; 9 M. L. J. 198; *Surjiram* v. *Barhamdeo*, 2 C. L. J. 202 at p. 214; *Drake* v. *Mitchell*, 3 East 251; 7 R. R. 449; 102 E. R. 594; *Lowry* v. *Williams*, (1895) 1 I. R. 274; 1 Irish Law Reports 741 and *Economic Life Assurance Society* v. *Usborne*, (1902) App. Cas. 147; 71 L. J. P. C. 34; 85 L. T. 587, referred to.

The right to claim contribution is the same, whether the mortgage is redeemed in the usual way or whether the debt is realized by a forced sale of the property of one of several owners of the equity of redemption.

Rajah of Vizianagaram v. *Rajah of Setrucherla*, 26 M. 666 and *Ibn Hasan* v. *Brij Bhukhan*, 26 A. 407; A. W. N. (1904) 74; 1 A. L. J. 148 (F. B.), referred to.

Appeal from the decree of the Sub-Judge of Gaya, dated 13th August 1910.

Babus *Mahendra Nath Roy*, *Haribhusan Mookerjee*, *Gones Dut Singh* and *Baidya Nath Narayan Singh*, for the Appellant.

Babu *Ram Chandra Mozumdar* and Maulvi *Muhammad Mustafa Khan*, for the Respondent.

JUDGMENT.—This is an appeal by the second defendant in a suit for contribution under the first paragraph of section 82 of the Transfer of Property Act. The facts essential for the determination of the questions raised before us are not in controversy and may be briefly recited. On the 25th March 1897, Khaja Obedullah executed a mortgage of a third share in each of two properties, Attapur and Paharpur, to Mahomed Sidiq to secure a loan of Rs. 25,000, which carried interest at 18 per cent. per annum. The mortgagee sued to enforce his security, obtained a decee on the 20th November 1905 and in execution thereof had the mortgaged properties advertised for sale. Meanwhile, the interest of the mortgagor in Attapur, which for the sake of brevity we shall call *A*, had been sold in execution of a decree on a puisne mortgage dated 9th June 1897 and had passed on the 21st September 1904 into the hands of one Jobraj Lal, now represented by the plaintiff. The interest of the mortgagor in Paharpur, which we may call *B*, had also passed out of his hands, and had, by successive transfers dated 18th May 1898, 29th September 1902 and 7th November 1902, vested in the second defendant. Consequently, when the mortgagee-decree-holder took steps for the sale of the mortgaged properties, the purchaser of *A* satisfied the decree on the 23rd October 1906 by payment of Rs. 7,456. He then instituted this suit on the 30th September 1909 for recovery of a proportionate amount from the first defendant, namely, Rs. 5,964, together with interest thereon at 18 per cent per annum; he also prayed that this sum might be declared a charge upon *B*. The suit was originally brought against the first defendant, on the assumption that she had purchased *B*; but, when it subsequently transpired that *B* belonged not to the first defendant, but to her son, the second defendant, the latter was joined as a party on the 17th December 1909, that is, more than three years after the satisfaction of the mortgage-decree. Three questions, consequently, arose for consideration in the Court below, namely,

first, was the suit barred by limitation, *secondly*, was the plaintiff entitled to a charge upon *B*, and, *thirdly*, what was the amount recoverable by the plaintiff? The Subordinate Judge has held that the suit is not barred by limitation, as the plaintiff is entitled to a charge on *B*, enforceable within 12 years from the date when the money sued for became due (Article 132 of the second Schedule of the Indian Limitation Act). The Subordinate Judge has also found that the plaintiff was entitled to receive Rs. 5,026, with interest thereon at 12 per cent. per annum from date of deposit to date of suit, to be realised by sale of *B*. The second defendant has appealed to this Court, and has contended, *first*, that the suit is barred by limitation, as the plaintiff has no charge for the realisation of the sum due to him, and, *secondly*, that the sum decreed has been ascertained on erroneous principles.

In support of the *first* ground, reliance has been placed upon the decision in *Nawab Jahan Ara Begum* v. *Mirza Shuja-ud-din*(1). In that case, a mortgagee had obtained a decree on his mortgage, which was satisfied by one of several representatives of the deceased mortgagor. It was held that sections 82 and 95 of the Transfer of Property Act were inapplicable, that the representative who paid up the decretal amount did not thereby acquire a charge on the morgaged property, and that, consequently, to a suit for contribution brought by him, the three years' rule of limitation contained in Article 61 or Article 99 of the second Schedule to the Indian Limitation Act was applicable. It need not be disputed that the principle, which underlies the decision in *Nawab Jahan Ara Begum* v. *Mirza Shuja-ud-din* (1), assists the contention of the appellant; but it is worthy of note that a contrary rule was adopted in *Raushan Ali* v. *Kali Mohan* (2), where Ghose, J., held, with the concurrence of Casperez, J., who was a party to the decision in *Nawab Jahan Ara Begum* v. *Mirza Shuja-ud-din* (1), that where one of two co-mortgagors pays off the entire mortgage-debt, he occupies the position of the mortgagee when he seeks contribution from his co-mortgagor. This view is in accord with the decisions in *Unnunnissa* v. *Muhammad Yar Khan* (3); *Pancham Singh* v. *Ali Ahmad* (4); *Ashfaq Ahmad* v. *Wasir Ali* (5); *Nura Bibi* v. *Jagat. Narain* (6); *Bhagwan Das* v. *Har Dei* (7); *Ibn Hasan* v. *Brij Bhukhan* (8); *Bhagwan Das* v. *Karam Husain* (9); *Har Prasad* v. *Raghunandan Prasad* (10); *Danappa* v. *Yamnappa* (11); *Asansab* v. *Vamana* (12); *Moidin* v. *Oothumangamni* (13); *Ghulam Maula Khan* v. *Banno Khanam* (14). We may further observe that the view taken in *Nawab Jahan Ara Begum* v. *Mirza Shuja-ud-din* (1) is contrary to the rule adopted in *Magniram* v. *Mehdi Hossein Khan*(15), to which the attention of the Court was apparently not invited. An examination of the cases shows that *Nawab Jahan Ara Begum* v. *Mirza Shuja-ud-din* (1) stands alone, and it is really inconsistent with the decision of the Judicial Committee in *Ahmad Wali Khan* v. *Shamsh-ul-Jahan Begum*(16). In this case, the Judicial Committee construed section 95 of the Transfer of Property Act, which is in these terms: "Where one of several mortgagors redeems the mortgaged property and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming and obtaining possession." It was ruled that the section should not be limited in its operation to mortgages under which possession passes, and that it was more reasonable to construe the section distributively, to make the condition of obtaining possession apply only to the cases in which its fulfilment is, from the nature of the mortgage, possible, and in other cases to make the charge follow upon redemption. It is plain that if this principle be applied to the case before us, the objection

(1) 9 C. W. N. 865
(2) 4 C. L. J. 79.
(3) 3 A. 24.
(4) 4 A. 58; A. W. N. (1881) 113.
(5) 14 I. A. 1; 11 A. 423; A. W. N. (1889) 211.
(6) 8 A. 295 at p. 299, A. W. N. (1886) 98.
(7) 26 A. 227; A. W. N. (1904) 3.
(8) 26 A. 407; A. W. N. (1904) 74, 1 A. L. J. 148 (F. B.).
(9) 11 Ind. Cas. 145; 33 A. 708; 8 A. L. J. 854.
(10) 1 Ind. Cas. 825; 31 A. 166; 6 A. L. J. 67.
(11) 26 B. 379; 4 Bom. L. R. 61.
(12) 2 M. 223 at p. 225.
(13) 11 M. 416.
(14) 4 C. C. 273.
(15) 31 C. 95 at p. 103; 8 C. W. N. 30.
(16) 33 I. A. 81; 28 A. 482; 10 C. W. N. 626; 3 A. L. J. 366; 3 C. L. J. 481; 1 M. L. T. 143; 8 Bom. L. R. 397; 16 M. L. J. 269.

of the appellant must be held entirely groundless. It cannot also be disputed that this conclusion, as is clear from the case of *Digambar Das* v. *Harendra Narain* (17), is in harmony with what is widely recognised as the rule of justice, equity and good conscience.

The principle which underlies the rule is thus formulated by Pomeroy in his work on Equity Jurisprudence, Volume III, Articles 1221, 1222: "Where a party interested in the premises, who is not personally and primarily liable as the principal debtor for the whole mortgage debt, pays the mortgage to the holder thereof, he is entitled to regard the transaction as an equitable assignment of the mortgage to himself, and to keep it alive as security of his own rights against others, who are owners of or interested in the land. Any such person who redeems, no matter how small a portion of the premises he may own, or how partial may be his interest, must redeem the entire mortgage by paying the whole mortgage debt. The doctrine of contribution among all those who are interested in having the mortgage redeemed, in order to refund the redemptor the excess of his payment over and above his own proportionate share, and the doctrine of equitable assignment, in order to secure such contribution, are the efficient means by which Equity completely and most beautifully works out perfect justice and equality of burden." To the same effect is the exposition by Sheldon in his work on Subrogation (Article 169): "One of several joint debtors will, as against his co-debtors, ordinarily be subrogated to the securities and means of payment of the common creditor whom he has satisfied, so as to enable him to recover from his co-debtors, by means thereof, their proportional share of the indebtedness which he has discharged; and this, as in other cases of subrogation, arises rather from natural justice than from contract. Each joint debtor is regarded as the principal debtor for that part of the debt which he ought to pay, and as a surety for his co-debtors as to that part of the debt which ought to be discharged by them." A similar reason for the rule is assigned by Harris in his work on Subrogation (section 424): "The payment (by one of two joint debtors) would not surely so absolutely extinguish the debt as to deprive the paying debtor of his right to contribution, to obtain which he must be subrogated, or he must take the position of a simple creditor and sue his co-debtor in assumpsit. The former course would serve to prevent a multiplicity of suits. The rule to be applied between them should be the same as between principal and surety. This rule applies as well to joint mortgagors, they being joint debtors or even if they be joint co-sureties." Jones on his treatise on Mortgages (Volume I, Article 877) defends the rule on a similar ground: "When a mortgage is paid by one entitled to redeem, who is under no obligation to pay it, although he does not take a formal assignment of it, he is subrogated to the rights of the mortgagee in the mortgaged property, and holds the title so acquired as against subsequent encumbrances, although he had also acquired the equity of redemption. In such case, no proof of intention on his part to keep the mortgage alive is necessary to give him the benefit of it; his payment of the mortgage and his relation to the estate are in aid of his title to strengthen and uphold it." The injustice which might result if this rule were not adopted, is forcibly described by Shepley, C. J., in *Watkins* v. *Eaton* (18): "If one, who may be obliged to redeem the share of a co-tenant to relieve his own share from incumbrance, could have no right to retain the share of such co-tenant as security and to obtain a reimbursement of the amount equitably chargeable to it, he might utterly fail to obtain compensation; and yet his co-tenant, without making any payment might be entitled to the full possession and benefit of his share of the land, discharged from the incumbrance. The law cannot be justly chargeable with such results, as produced by conformity to its provisions. The principle is well established and is of frequent application in the redemption of mortgages, that one having a legal interest in an estate under incumbrance, may redeem the whole estate, when necessary, to enable him

(17) 5 Ind. Cas. 165; 11 C. L. J. 228; 14 C. W. N. 617.

(18) (1849) 30 Maine 529; 50 Am. Dec. 637.

to redeem his own shar or to relieve his own title from incumbrance, even against the pleasure of a co-tenant or other owner, and may be regarded as the assignee of the incumbrance upon the other shares or interests, and may retain possession of them to secure a reimbursement of the amount equitably chargeable to them." It is consequently plain that the decision in *Nawb Jahan Ara Begum* v. *Mirza Shuja-ud-din* (1) not only stands by itself, but is also not well-founded on principle. On the other hand, the view adopted in *Raushan Ali* v. *Kali Mohan* (2) is consistent with the rules of justice, equity and good conscience: but we may observe parantheticaly that we must not be taken to approve of another proposition enunciated in the same case, namely, that an assignee of a lease hold interest created by one of the co-mortgagors, though entitled to claim contribution, cannot claim a charge against the shares of the co-mortgagors of the lessor. We hold accordingly that when one of several mortgagors redeems the whole mortgage, he acquires a charge on the share of each of his co-mortgagors for his proportion of the expenses properly incurred in the redemption of the property.

This principle is obviously applicable to the case before us, although the mortgage debt was satisfied by a purchaser of a portion of the mortgage property after a decree had been obtained on the mortgage. The purchaser who redeemed the mortgage was, for the purposes of the rule, in the same position as if he were one of two joint mortgagors : *Mohan* v. *Kashinath* (19). The fact that a decree had been obtained on the mortgage was also immaterial, because a decree obtained on a mortgage does not extinguish the security, though the security may be merged in the decree, and the judgment recovered in any form of action is still but a security for the original cause of action, until it be made productive in satisfaction to the judgment-creditor : *Bibi Jan* v. *Sadi Bewah* (20); *Purnamal* v. *Venkata* (21); *Surjiram* v. *Barhamdeo* (22); *Drake* v. *Mitchell* (23); *Lowry* v. *Williams* (24);

(19) 3 N. L. R. 92.

(20) 31 C. 863. 8 C. W. N 644 (F. B.)

(21) 20 M. 486; 9 M. L. J. 198.

(22) 2 C. L. J. 202 at p. 214.

(23) 1808) 3 East. 251, 7 R. R. 449; 102 Eng. Rep. 594.

(24) (1895) 1 I. R. 274; 1 Irish Law Reports 741.

Economic Life Assurance Society v. *Usborne*(25) Indeed, it has been held that the right to claim contribution is the same, whether the mortgage is redeemed in the usual way or whether the debt is realised by a forced sale of the property of one of several owners of the equity of redemption : *Rajah of Vizianagaram* v. *Rajah of Setrucherla*(26), *Ibn Hasan* v. *Brij Bhukhan* (8). We hold accordingly that the plaintiff is entitled to a charge for such sum as the defendant may be called upon to contribute, and in this view no question of limitation arises. The first ground urged by the appellant consequently fails.

In support of the *second* ground, it has been argued that the values of *A* and *B* at the date of the mortgage of the 25th March 1897 have not been correctly determined. This contention is well-founded only in respect of *A*. As regards *B*, the plaintiff stated in the plaint that the value was Rs. 20,000 ; this was not specifically or by necessary implication denied in the written statement ; consequently under rule 5 of Order VIII of the Civil Procedure Code, the allegation of the plaintiff must be taken to have been admitted by the defendant. As regards *A*, the plaintiff stated, in his plaint, that its value was Rs. 10,000, but that it was subject to a prior charge for Rs. 5,000 under a usufructuary mortgage, dated the 14th December 1885. The defendant, in his written statement, disputed this valuation of *A*, The Subordinate Judge has found that the prior charge was real, but that the value of *A*, when unencumbered, was two-thirds of Rs. 22,000, as shown by a conveyance dated the 28th September 1899. This conclusion is erroneous, because *A* is not proved to be identical with the property mentioned in the conveyance. We have, however, other materials on the record from which the value of *A* may be determined. On the 21st September, 1904, *A* was sold in execution of a decree on a puisne mortgage for Rs. 10,540. This sum represents the value of *A* when not encumbered, reduced by the value of the prior encumbrance, Rs. 5,000, and amount chargeable on *A* in 1904 on the foot of the mortgage of the 25th March 1897. From these data, the value of *A*, when not subject

(25) (1902) App. Cas 147; 71 L. J. P. C. 34; 85 L. T 587.

(26) 26 M. 683.

to encumbrances, turns out to be Rs. 17,450. The value of *A*, when the mortgage of the 25th March 1897 was granted, was thus Rs. 12,450. Consequently, on the principle explained in *Bhagwan Singh* v. *Muhammad Mashar Ali Khan* (27), the defendant who held property *B* worth Rs. 20,000, is bound to contribute Rs. 4,596 out of the aggregate sum of Rs. 7,456 paid by the plaintiff to satisfy the whole mortgaged debt, although he held property *A* worth only Rs. 12,450. The finding of the Subordinate Judge on the question of the sum payable by the defendant must accordingly be varied by the substitution of Rs. 4,596 in place of Rs. 5,026, in his judgment. On this basis, the decree must be varied by the substitution of Rs. 6,530-4 in place of Rs. 7,037-14. The second ground must accordingly prevail to this extent.

The result is that this appeal is allowed in part and the decree of the Subordinate Judge varied by the substitution of Rs. 6,530-4 in place of Rs. 7,037-14. Subject to this variation, the decree will stand confirmed. The defendant-appelant must pay the plaintiff-respondent his costs in this Court.

Appeal partly allowed.

(27) 23 Ind. Cas. 339; 36 A. 272; 12 A. L. J. 394.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 182 OF 1913.

January 26, 1915.

Present:—Mr. Justice Parlett.

MA ME THIN—APPELLANT

versus

MAUNG SAN LUN—RESPONDENT.

Limitation Act (IX of 1908), s. 5—Civil Procedure Code (Act V of 1908), O. XX, r. 1—Appeal filed beyond time, admissibility of—Court's negligence to observe procedure—Sufficient cause.

A party is not bound to make inquiries as to when a judgment will be delivered, but is entitled to rely on the Court obeying the express provisions of law and giving notice to his Pleader of the date fixed for delivery of judgment, and if an appeal is barred entirely through the negligence of the Judge in following the procedure, the appellant cannot be held responsible for it and the appeal should be admitted.

Mr. *Shaw*, for the Appellant.

Mr. *Ba Dun*, for the Respondent.

JUDGMENT.—(*December 14th*, 1914).—Appellant was plaintiff in a suit in which the hearing was completed on 2nd April 1913 and judgment was reserved. No date was fixed for delivery of judgment, the case was never entered again in the cause list, and on the 9th April judgment dismissing the suit was delivered, without any notice to the parties and so far as the record shows in the absence of both of them and of their Pleaders. The Judge thus entirely flouted the provisions of the law laid down in Order XX, rule 1, of the Code of Civil Procedure as well as the orders of this Court regarding the fixing of dates and the maintenance of cause lists. On having come to know that judgment had been delivered, the appellant applied for a copy on the 20th May and on 21st presented an appeal which was dismissed as time-barred. She filed affidavits, which stand uncontradicted, that she sent messengers several times to inquire when judgment was to be delivered, but they returned without any information and it was not till 16th May that she heard of its delivery. The District Court held that sufficient cause was not shown for admitting the appeal after time and that she had not used due diligence. I am unable to agree with him. The fact that Civil Courts were closed for over a fortnight at some period between 9th April and 16th May fully accounts for appellant's messenger failing to obtain any information. The 16th May was a Friday. Appellant lives some 20 miles from Moulmein, where the Township Court sits and her legal adviser lives. It cannot be said that if she travelled in and consulted him on Monday 19th and applied for the copy next day, that she failed to use due diligence. Moreover, it is not incumbent upon her to make inquiries about the judgment at all. She was entitled to rely upon the Court obeying the express provisions of law and giving notice to her Pleader of the date fixed for its delivery. That the appeal became barred was entirely due to the negligence of the Judge, and she cannot be held responsible for it. The appeal is allowed and the order of the District Court is set aside. The appeal will be admitted by that Court and disposed of according to law. Respondent will pay costs of this appeal, Advocate's fees two gold *mohurs*

FURTHER ORDER.—A certificate under section 13 of the Court Fees Act, 1870, will be granted.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2547 OF 1913.

November 24, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Hannay.

HATTIKUDUR NARAIN RAO AND OTHERS —PLAINTIFFS—APPELLANTS

versus

ANDAR SAYAD ABBAS SAHIB—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 43—Landlord and tenant—Land belonging to Government transferred by lease—Government declaring its right and granting it to lessor—Determination of tenancy—Estoppel between lessor and lessee—Erroneous representation to create estoppel must be believed in good faith and after due inquiry—Privies, rights and liabilities of—Classes of privies.

Where land belonging to Government is included in a lease and the Government, subsequently having declared the land at its disposal, grants it to the lessor, the tenancy is determined by the declaration and the lessee cannot take the benefit of section 43 of the Transfer of Property Act.

In the absence of any allegation or proof to the effect that in taking the lease the lessee believed in good faith and after due inquiry the erroneous representation regarding the title to the land made by the lessor, the lessee is not entitled to rely upon the principle embodied in section 43 of the Transfer of Property Act.

Section 43 of the Transfer of Property Act applies also to the privies of the original transferor and the original transferee.

Unless a Statute expressly or by necessary implication precludes the application of provisions awarding rights to or imposing civil liabilities on the privies of the person to whom the rights are given or on whom the liabilities are imposed, the privies are entitled or are bound, as the case may be, to the extent to which the original parties are so entitled or are so bound. The extent of privy's liability, however, is not always co-equal with the extent of the liability of the person through whom he claims.

Privies are of three classes: (1) in blood (as heirs), (2) by estate (as lessees, assignees, etc.), (3) in law (as the lord by escheat, the tenant by courtesy, executors and administrators).

Second appeal from the decree of the Court of the Subordinate Judge of South Canara in Appeal Suit No. 487 of 1912, preferred against that of the Court of the District Munsif of Karkal, in Original Suit No. 361 of 1911.

Messrs. *H. Balakrishna Rao* and *B. Ananda Rao*, for the Appellants.

Mr. *B. Sitarama Rao*, for the Respondents.

JUDGMENT.

SADSIVA AIYAR, J.—The plaintiffs represent the interests of the *mulgeni* tenants, who obtained a *mulgeni* lease in 1862 from the predecessor-in-title of the defendant, who is the purchaser from the purchaser of the *mul* right from the original landlord. The lands leased to the plaintiff's father consisted of several items. The small extent now in dispute is alleged by the plaintiffs to be a part of the lands leased on *mulgeni* right, while the defendant denies it. The defendant obtained this small extent of land now in dispute on *darkhast* grant from the Government in 1911 and is in possession of it. The first plaintiff's contention is that he and his father had been in possession of it along with the other *mulgeni* lands till September 1911 and that the defendant on the strength of the *darkhast* grant dispossessed the plaintiff in 1911. The defendant's case is that the plaint lands were not included in the *mulgeni* grant and that in any view, the lands having belonged to the Government, the defendant is entitled to possession of them as against his lessee after he (the defendant) obtained it from the real owner, the Government.

The District Munsif held that the plaint lands were included in the old *mulgeni* lease of 1862 and he further held that by virtue of section 43 of the Transfer of Property Act the *mulgeni* right will attach to the plaint plot also in favour of the first plaintiff, notwithstanding that the plaint land did always belong to Government and was granted to the defendant in August 1911. The District Munsif, therefore, decreed the plaintiff's suit.

On appeal, the learned Subordinate Judge, without deciding the question whether the plaint land was included in the old *mulgeni* lease, held that section 43 of the Transfer of Property Act did not apply so as to give the first plaintiff a right to hold the plaint land on *mulgeni* lease and that the first plaintiff cannot claim such right on the strength of any other rule of law. He, therefore, dismissed the plaintiff's suit with costs. The contention in second appeal is that both under section 43 of the Transfer of Property Act and on general principles of estoppel, the first plaintiff is entitled to a *mulgeni* right over the plaint land. (Of course, if the 1st plaintiff succeeds in this legal contention, the case would have to go back to the Subordinate Judge, as the learned Subordinate Judge has not decided

the question whether the plaint land was included in the old *mulgeni* lease).

Section 43 of the Transfer of Property Act is as follows: "Where a person erroneously represents that he is authorised to transfer certain immoveable property, and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.

"Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option."

The illustration to section 115 of the Evidence Act is as follows. "*A*, intentionally and falsely, leads *B* to believe that certain land belongs to *A*, and thereby induces *B* to buy and pay for it. The land afterwards becomes the property of *A*, and *A* seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title." The difference in language between section 43 of the Transfer of Property Act and the language of the illustration to section 115 of the Evidence Act seems to be that under section 43 of the Transfer of Property Act, mere erroneous representation will apparently suffice and the representation need not be intentionally false, whereas the illustration to section 115 (Evidence Act) uses the words "intentionally and falsely." Again under section 43, there is nothing said about the belief of the transferee in the truth of the erroneous representation, whereas the illustration to section 115 implies that the transferee must have believed the intentional and false representation and acted on the faith of such representation. However, even as regards section 115 of the Evidence Act, it has been held that the representation of the transferor need not be fraudulent or dishonest in order to estop the transferor. [See *Helan Dasi* v. *Durga Das Mundal* (1)].

As stated already, in dealing with this legal question we have to assume without deciding that the plaint land was included in the old *mulgeni* lease of 1862 to the first plaintiff's father and that the defendant's predecessor-in-interest erroneously represented to the first plaintiff's father when granting the lease of 1862, that the plaint land belonged to him and that he had the power to grant a permanent lease of it though, as a matter of fact, the land belonged to the Government.

I am unable to accept the respondent's learned Vakil's contention that section 43 of the Transfer of Property Act does not apply to transfers by way of lease, nor can I accept his contention that section 43 applies only as between the original transferor and the original transferee and does not bind the privies of the original transferor and cannot be taken advantage of by the privies of the original transferee. Unless a Statute expressly or by necessary implication precludes the application of provisions awarding rights to or imposing civil liabilities on the privies of the person to whom the rights are given or on whom the liabilities are imposed, the privies are entitled or are bound as the case may be, to the extent to which the original parties are so entitled or are so bound, under the general principles of jurisprudence.

Privies are usually described as of three classes:—Privies in blood (as heirs); privies by estate (as feoffees, lessees, assignees, etc.); and privies in law (as the lord by escheat, the tenant by courtesy, executors and administrators). It is of course rather loosely said that the privy stands in no better position than the party through whom he derives his title But it is well established that the extent of priviy's liability is not always co-equal with the extent of the liability of the person through whom he claims. Privies by blood are liable only to the extent of assets inherited by them. As regards privies by estate the extent of their liability is not so well settled. In Halsbury's Laws of England, Vol. XIII, page 403, it is broadly stated that "the lessor is estopped from repudiating the lease under which possession has been given or a tenancy which he has acknowledged, and that the assignee of the lessor's interest is estopped from denying anything which the lessor is estopped from denying. The foot-note at the same page begins by saying that "This is an example of the dictum that estoppels must be mutual and reciprocal." In *Kurn Chowbey*

(1) 4 C. L. J. 323.

v. *Jankee Pershad* (2) it was held that when a Raja granted a perpetual lease of certain lands in which the Raja had only an interest for a term, the plaintiff who purchased in auction-sale the proprietary rights of the Raja, who had after the lease to the defendant acquired such proprietary rights, was estopped from denying that the defendant had acquired perpetual occupancy rights. In *Kazee Abdool Mannah* v. *Buroda Kant Banerjee* (3) it was held that "parties holding an estate under a Permanent Ssettlement from Government cannot question the validity of a *mokuraree pottah* previously granted by themselves, when they sold the property under a temporary Settlement." The principle of section 43 of the Transfer of Property Act is also embodied in section 18A of the Specific Relief Act.

If the matter were *res integra*, therefore, and if I were at liberty to construe section 43 of Act IV of 1882 according to its strict literal interpretation, I would hold that the defendant (assuming that he is a privy in estate to the original lessor as regards the disputed lands) cannot deny the right of the first plaintiff and the first plaintiff's option to treat the *mulyeni* right as attaching to the plaint lands which the defendant has recently obtained from the Government. But I am pressed by two decisions of this Court, the one in *Subbaraya* v. *Krishnappa* (4) and the other in *Padmanabaya* v. *Ranga* (5). In *Subbaraya* v. *Krishnappa* (4), where the first defendant got into possession of the disputed land as assignee of the second defendant, who was the plaintiff's lessee in respect of a barren sandhill which really belonged to Government as unassessed waste (though the plaintiff was entitled to Umki privilege in it) and who afterwards obtained a land on *darkhast* from the Government, it was held that the tenant (1st defendant) was not estopped from setting up a title adverse to the plaintiff as regards the land granted to him by the Government and that the plaintiff was not entitled to eject the 1st defendant simply because the 1st defendant entered into possession as plaintiff's tenant's assignee.

(2) 1 Agra H. C. R. 164.
(3) 15 W. R. 394.
(4) 12 M. 422.
(5) 6 Ind. Cas. 447; 34 M. 161; 20 M. L. J. 930; 8 M. L. T. 110; (1910) M. W. N. 462.

The learned Judges (Collins, C.J., and Parker, J.) stated quite broadly that when the plot was declared by the Revenue Authorities to be at the disposal of the Goverment and when they granted it to the defendant No. 1 (the assignee of the defendant No. 2), the tenancy of defendant No. 2 became determined. If this ruling is correct, it follows, that when the Government granted the plaint land to the defendant the plaintiff's tenancy was determined, the defendant was no longer the landlord of the 1st plaintiff as regards the plaint lands and the 1st plaintiff cannot take advantage of section 43 (Act IV of 1882) or of the priciple of estoppel embodied therein. Then in *Pandiri Bangaram* v. *Karumoory Subba Raju* (6) Benson and Krishnaswami Iyer, JJ., while conceding that section 43 of the Transfer of Property Act does not state that the transferee should have in good faith and after due inquiry believed in the erroneous representation made by the transferor and should have acted on that representation if he wanted to rely upon the rights given to him by section 43 to fasten upon the transferors after acquired title, the learned Judges nevertheless held that such words should be understood as embodied in that section, and they rely in support of their opinion on the decision in *Gangabai* v. *Basvant* (7). Now in paragraph 3 of the plaint in this case; it is not stated that the plaintiff's father, when he got the *mulgeni* right to the plaint lands in 1862, believed in good faith after taking reasonable care and making reasonable inquiry that the defendant's predecessor-in-title had power to grant the perpetual lease and he, therefore, obtained the said lease. In the absence of any allegation or proof to that effect, he is clearly not entitled (if *Pandiri Bangaram* v. *Karumoory Subbaraju* (6) was rightly decided) to rely upon the principle of estoppel embodied in section 43. While I reserve my opinion on the question whether the decision in *Subbaraya* v. *Krishnappa* (4), has not been decided on too broad grounds (even the tenant's obligation to surrender possession before setting up the non-existence of the landlord's title not being referred to in the judgment in that case), and while I am free to confess that I feel some doubts as to

(6) 8 Ind. Cas. 388; 34 M. 159; 8 M. L. T. 285.
(7) 5 Ind. Cas. 866, 34 B. 175 at p. 182, 12 Bom. L. R. 143.

whether the unqualified words of section 43 of the Transfer of Property Act can be qualified by importing expressions found in section 41 of the Transfer of Property Act, as seems to have been done in the case in *Pandiri Bangaram* v. *Karumoory Subbaraju* (6), I do not feel myself strong enough to overrule the evidently considered judgment of the very learned Judges who decided the latter case. In the result, I would dismiss the second appeal with costs.

In conclusion, I might be permitted to express my appreciation of the very able manner in which this case has been argued for the appellants by Mr. H. Balakrishna Rao.

HANNAY, J.—I agree with my learned brother that, on the authority of the cases cited by him *viz.*, *Subbaraya* v. *Krishnappa* (4) and *Pandiri Bangaram* v. *Karumoory Subba Raju* (6), this second appeal must fail and be dismissed with costs. Following the former decision I concur in holding that when the suit land was declared to be at the disposal of Government, the plaintiff's lease ceased to subsist and that, therefore, section 43 of the Transfer of Property Act is inapplicable and the plaintiffs cannot take the benefit of the section. The latter case is also authority that the plaintiffs cannot take the benefit of the section on another ground as well, namely, because they have failed to allege and prove that in taking the lease their predecessor believed in good faith and after due enquiry the erroneous representation made by the transferor. In this view it is unnecessary for me to express an opinion upon the question whether apart from these decisions the defendant, assuming he is a privy in estate to the original lessor in respect of the disputed land, would have been bound to concede to the plaintiffs the option allowed by section 43 of the Transfer of Property Act in the circumstances of the case.

Appeal dismissed

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 169 OF 1913.

January 5, 1915.

Present:—Mr. Justice Ormond.

MA SHWE ME AND ANOTHER—DEFENDANTS—APPELLANTS

versus

P. A. R. M. CHETTY AND ANOTHER PLAINTIFFS—RESPONDENTS.

Buddhist Law—Mortgage by husband, when binding on wife—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 1—Transfer of Property Act (IV of 1882), ss. 85, 50—Mesne profits.

Where it is found that a Burmese Buddhist husband had authority from his wife to enter into a mortgage of the property, to sign the mortgage document and to register the same, and to be sued on the mortgage so as to bind her interest, the mortgagee is entitled to a declaration that he is the owner and to possession.

A decree for mesne profits may be passed against a defendant who has no right to be in possession as against the plaintiff, though he is the other defendant's tenant.

Mr. *R. N. Burjorjee*, for the Appellants.

Mr. *Johannes*, for the Respondents.

JUDGMENT.—In 1906 U Meik, the husband of the 1st defendant, together with a son, San Bein, mortgaged the land in suit to the plaintiff. The plaintiff obtained a mortgage-decree against his mortgagors and bought the property with leave under that decree. The 1st defendant, who is the wife of U Meik, and her son, the 2nd defendant (San Chein), were in possession at the time when this suit was instituted. The wife claims that her half share in the property was not affected by the mortgage of U Meik or by the decree obtained against him in a suit in which she was not a party, or by the sale in pursuance of that decree. The land has stood in U Meik's name for several years. In 1900 he mortgaged this land; in 1904 he again mortgaged it and both the lower Courts have found that the wife knew of this present mortgage and acquiesced in it. I see no reason to interfere with that finding. The mortgage, therefore, by U Meik binds the wife's interest. It is urged that, under Order XXXIV, rule 1, which says all persons interested in the mortgage security or in the right of redemption shall be joined as parties, a decree obtained against U Meik is not binding on his wife. Order XXXIV, rule 1, supersedes section 85 of the Transfer of Property Act which had the following proviso: "Provided that the plaintiff has notice of such interest." The unreported case of *Ma*

Tin May v. *Maung Maung* and *Wightman and Company, Ltd.* (1) of this Court shows, where a Burmese wife authorizes her husband to deal with her interest in landed property in his own name, the mortgage-decree obtained against the husband only binds the wife's interest in the land. In the present case the plaintiff, a Chetty money-lender, had known U Meik and his family for eight, nine or ten years, but there is nothing to show that he should be affected with notice that at the time of his mortgage the wife had a share in this property or that U Meik was not the sole owner. It is further contended that section 59 of the Transfer of Property Act requires the mortgagor, *i. e.*, the wife, to sign the mortgage and that the mortgage of her interest must be by a registered document, her share in the mortgage being over Rs. 100 in value. The husband alone signed the document and he purports to mortgage the whole interest in the land. He must, therefore, be taken to have signed for himself and for his wife. Section 32 of the Registration Act says the person executing the mortgage is the proper person to register it. Therefore, it was not necessary for the wife to register the mortgage. The husband had authority from his wife to enter into the mortgage, to sign the mortgage document and to register the same, and to be sued on the mortgage so as to bind her interest. The plaintiff is, therefore, entitled to a declaration that he is the owner and to possession. He obtained a decree also for mesne profits against both defendants. It is contended that no decree for mesne profits should be made against the 2nd defendant because he was the tenant of the 1st defendant. But neither the 1st defendant nor the 2nd defendant had a right as against the plaintiff to be in possession. Both are, therefore, liable for mesne profits.

The appeal is dismissed with costs.

Appeal dismissed.

(1) Civil 1st Appeal No. 14 of 1913.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 22 OF 1913.

December 2, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

T. R. M. A. R. R. M. ARUNACHELAM CHETTY AND ANOTHER—DEFENDANTS—APPELLANTS

versus

K. N. KOTHANDAPANI PILLAY—PLAINTIFF—RESPONDENT.

Practice—Madras High Court Original Side Rules, r. 48—Written statement, failure to file, in time—Delay, excuse of, if discretionary—Ex parte decree, setting aside of—Proof of promissory note—Witness examined—Notes of evidence not on record—Decree, if valid.

Under rule 48 of the Original Side Rules a defendant is not entitled, until the leave of the Court is obtained, to put in a written statement after the date fixed in the summons served on him and the Judge has a discretion to grant or refuse such leave.

Collins v. *Vestry of Paddington*, 5 Q. B. D. 368, 49 L. J. Q. B. 264; 42 L. T. 573; 28 W. R. 588, distinguished.

If, however, a written statement is filed after the due date without getting the leave of the Court, but an extension of time is afterwards applied for and obtained, the pleading already put in is not a nullity but can be looked into and accepted.

Graces v. *Terry*, 9 Q. B. D. 170; 51 L. J. Q. B. 484; 30 W. R. 748, explained.

Gill v. *Woodfin*, 25 Ch. D. 707; 53 L. J. Ch. 617; 50 L. T. 490; 32 W. R. 393 and *Gibbings* v. *Strong*, 28 Ch. D. 66; 50 L. T. 578; 32 W. R. 757, not followed.

An *ex parte* decree will not be set aside merely for the reason that it does not appear from the record, *viz.*, (the Judge's notes) that the promissory note in suit had been properly proved, especially when the point had not been taken in the memorandum of appeal and where as a matter of fact it appeared from the statement of the Vakil for the respondent-plaintiff that an attestor of the note had been examined before the trial Judge.

Appeal from the decree of the Hon'ble Mr. Justice Bakewell, dated the 7th Jaunary 1913, in the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 203 of 1911.

FACTS.—The suit was upon a promissory note. After successfully evading several summonses taken out for his appearance, the defendant was eventually served personally. He then put forward an untenable allegation that he was a lunatic and several months after the service of summons on him, he applied under rule 48 of the Original Side Rules for leave to file his written statement. In support of his application he filed an affidavit wherein he stated that he asked a third party to look after the litigation and that he had played him false. Bakewell, J., who heard the application

refused the leave sought and decreed the suit. The defendant then preferred this appeal.

Mr. *G. Krishnaswamy Iyer*, for the 2nd Appellants:—The learned Judge ought to have granted the extension of time applied for. *Collins* v. *Vestry of Paddington* (1), *Gill* v. *Woodfin* (2), *Graves* v. *Terry* (3) and *Gibbings* v. *Strong* (4). The suit promissory-note has not been properly proved. No witness has been examined. The decree is, therefore, illegal.

Mr. *V. Visvanatha Sastry*, for the Respondent:—The defendant successfully evaded service and delayed filing his defence. Further he put forward untenable allegations. Under the circumstances he was not entitled to any indulgence at the hands of the Court. The learned Judge had certainly a discretion in the matter and was justified in exercising it against the defendant. The point as to proof of the promissory note was not taken in the memorandum of appeal. As a matter of fact, however, one Singaravelu Pillay, an attestor, was examined in Court. The decree is, therefore, legal and proper.

JUDGMENT.—Rule 48 of the Original Side Rules clearly implies that until the leave of the Court is obtained, a defendant is not entitled to put in a statement of defence after the date fixed in the summons served on him to file such statement. It further implies that the Judge has a discretion to grant such leave and is not bound always to grant such leave. The case in *Collins* v. *Vestry of Paddington* (1), quoted by the appellant's learned Vakil, merely decides that when applications for extension of time are made before judgment, "reasonable relaxation" should be freely granted "whenever an unintentional mistake has been committed," and not that the Judge has no discretion in the matter of granting an extension of time. The decision in *Gill* v. *Woodfin* (2) professes to follow the decision in *Graves* v. *Terry* (3). The latter case only decided that the contention that a pleading paper not filed within the time allowed by the rules was a *nullity*, is not sustainable simply because an extension of time has not been obtained from the Court.

We take it that this means that if an extension is applied for and obtained, afterwards the pleading already put in might be looked into and accepted and need not be treated as a nullity and a fresh statement called for.

It must be admitted, however, that there are observations in *Gill* v. *Woodfin* (2) and *Gibbings* v. *Strong* (4), which seem to go as far as is contended for by the appellant, but with great respect we differ from those observations.

In the present case, the learned Judge clearly held that the defendant deliberately delayed putting in the statement of his defence till serveral months after the due date, and after evading the several summonses taken out for his appearance and after putting forward an untenable allegation that he was a lunatic. We are also not satisfied that the allegations in his affidavit that he asked somebody else to look after this litigation and that that man played him false, are at all reliable. We are, therefore, not prepared to interfere with the order of the learned Judge, who exercised the discretion vested in him by refusing to allow to the defendant leave to put in his statement of defence long after the due date.

It is next contended that the learned Judge in passing the *ex parte* decree in the plaintiff's favour failed to consider that the promissory note sued on had not been proved by any evidence found on the record. But this is not one of the grounds taken in the memorandum of appeal and as we are not bound to listen to it, we are not inclined to allow it to be argued *in the circumstances of this case*, especially as we are told by Mr. Visvanatha Sastry, the Vakil for the respondent, that one Singaravelu Pillay (an attestor of the promissory note) *was* examined by him before the learned Judge and did give evidence in proof of the promissory note, though his evidence does not appear among the Judge's notes.

We dismiss the appeal with costs.

Appeal dismissed.

(1) 5 Q. B. D. 368; 49 L. J. Q. B. 264; 42 L. T. 573; 28 W. R. 588.
(2) 25 Ch. D. 707; 53 L. J. Ch. 617; 50 L. T. 490; 2 W. R. 393.
(3) 9 Q. B. D. 170; 51 L. J. Q. B. 464; 30 W. R. 748.
(4) 26 Ch. D. 60; 50 L. T. 578; 32 W. R. 757.

NAWAB ALI *v.* LAL SINGH.

COURT OF THE FINANCIAL COMMISSIONER, PUNJAB.

REVENUE REVISION No. 145 OF 1913-14.

August 12, 1914.

Present:—Mr. Maynard, F. C.

NAWAB ALI AND ANOTHER—DEFENDANTS—PETITIONERS

versus

LAL SINGH—PLAINTIFF—RESPONDENT.

Punjab Tenancy Act (XVI of 1887), s. 8—Occupancy rights, butamari per se does not confer—Criterion.

In the Sirsa Tahsil Settlement papers of 1863 and 1882, the clause giving the right to break up waste cannot be construed to import that *butamari per se* confers an occupancy right. As to whether it does or not, must turn on the question whether at the time when the land was first broken up and occupied, the competition for land was such that the tenant could dictate his own terms, or such that the landlord could do so

Revision from the order of the Commissioner, Ambala Division, dated the 24th January 1914.

JUDGMENT.—I have heard the parties in this case. The applicants are tenants in *Mauza* Ganga of Tahsil Sirsa, and the land in dispute was broken up by them partly before and partly after 1882, while a portion of it was not broken up by them at all but received by them in an already cultivated state. The landlord having sued for possession by ejectment, the tenants sued for occupancy rights, which all the lower Courts have found that they have failed to establish.

As in many villages of the Sirsa Tahsil, the administration papers of the Settlements both of 1862 and 1882 contain a clause which sets forth the right, in the first place, of the owners and, in the second place, of the occupancy tenants, to break up waste and adds that, if these be unwilling, the right will be given to some one else. In the fifth ground of the application for revision, the applicants refer to this clause and claim it as establishing their rights of occupancy.

A clause of the same character in the administration paper of the village of Diwan Kheora in the Dabwali Tahsil of the old Sirsa District came under the consideration of the Financial Commissioner, Sir J. Lyall, in Case No. 5 of 1881-82. He observed that there was nothing in the rule expressly declaring that an occupancy tenant, obtaining and cultivating waste land under the clause, would acquire a right of occupancy in it. But in the circumstances of the particular case (which was one of first founding in 1853 and a subsequent re-founding in 1861 after abandonment in consequence of drought), Sir J. Lyall held that tenants of the village, classed as occupancy tenants at the Settlement of 1862, who had been allowed to break up waste land under this clause within the term of the expiring Settlement (1862-1882) were entitled to a right of occupancy in the lands broken up.

In *Arjan* v. *Mandas* (1) a similar case connected with occupancy rights in the same tract came before Mr. Thorburn, then Financial Commissioner. In the course of his judgment Mr. Thorburn observed: —

"Considering the fact that clause 6 only gave the right to break up waste, but is silent as to what status such *butamari* confers, it cannot be held that *butamari per se* confers an occupancy right. As to whether it does or not, must turn on whether or no at the time *butamari* were scarce, in a position, so to say, to make their own terms, and the advantages of getting new land brought under the plough were great to the landowners. A decision on this point will partly depend on the rents taken."

In the particular case then under his consideration, Mr. Thorburn decided that each plaintiff was "entitled to occupancy rights under section 8, Punjab Tenancy Act, in respect of all land broken up and since held by him or his predecessor-in-interest in or before 1882, and that, in respect of lands subsequently broken, the question depends on the finding of fact as to in what year...from any cause the competition changed from one for tenants on any terms almost, to one for land amongst tenants on such terms as the landlords chose to dictate."

In the case now before me, the second ground of revision amounts to a claim that this judgment has established as a general principle of tenancy law for unirrigated villages of the old Sirsa District, that a tenant who has broken up land prior to 1882 is entitled to occupancy rights in that land. This claim is not limited to tenants who enjoyed occupancy rights in other land in the village prior to 1882, and in this case t is shown that the father of the

(1) 27 Ind. Cas. 745.

applicants had no such rights in this village prior to the Settlement of 1882.

The Assistant Collector who originally decided against the applicants held that, in the present instance, there was not the slightest reason to suppose that there was any scarcity of tenants when their father broke up the land now in dispute and added that the rent rate (which, as pointed out by Mr. Thorburn, is an important consideration in determining whether the evidence points to a scarcity of tenants) is high. The rent rate is four annas and four pies per *pakka bigha*, equivalent to seven annas and two pies per acre, a rate which is certainly not particularly low for *barani* lands in the Sirsa District and was double the land revenue rate in this village. In rejecting the application for revision, the Commissioner observed that the real point was "whether at the time that this land was first broken up and occupied by appellant or his ancestors, the competition for land was such that the tenant could make his own terms, or such that the landlord could do so, *i.e.*, was land scarce or were tenants scarce," and he held that the facts established that the tenant was, at the time, in the less favourable position, a conclusion from which there is no reason to differ.

Mr. Thorburn's decision in *Arjan* v. *Mandas* (1) did not establish a new principle of law conferring occupancy rights under section 8 on all tenants in the old Sirsa District who had broken up waste prior to 1882. It merely provided a new criterion by which each claim put forward by such persons to the establishment of such rights might equitably be decided. The application of the criterion depends upon the particular facts of each case, and the question at issue in every such case is one of fact, whether the circumstances, and in particular the rate of rent paid, point to the conclusion that at the time, when the waste was broken up, tenants were so scarce as to be in a position to dictate their own terms. In cases where the breaking up of the waste took place prior to 1882, the probability that tenants were so scarce as to be in a position to dictate their own terms is greater than in cases where it took place later. But the probability is not to be taken as a certainty in any case, and all the circumstances must be examined.

In the present case, there are no grounds of revision at all in respect to that portion of the land which was received by the applicants' father in an already cultivated state. In respect to the remaining land, the contention of the applicants fails for the reasons explained, and they have not proved the facts which are requisite in order to establish the occupancy status on the principle laid down in *Arjan* v. *Mandas* (1).

The application is rejected.

Revision rejected.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 925 OF 1913.

November 18, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Hannay.

KHANDE SUBBAYYA—DEFENDANT No. 1—APPELLANT

versus

NARA SUBBA REDDY AND OTHERS—PLAINTIFF No. 2 AND DEFENDANTS NOS. 2 AND 3—RESPONDENTS.

Execution—Attachment—Dismissal of application, effect of—Civil Procedure Code (Act V of 1908), O. XXI, r. 57, whether has retrospective effect—Lease created during continuance of attachment—Auction-sale—Right of lessee as against auction-purchaser.

While after the passing of the new Civil Procedure Code, Order XXI, rule 57, has the effect of releasing an attachment when the execution application, under which the attachment was made, has been dismissed it cannot have a retrospective effect upon an order of dismissal made before the operation of the Code.

The dismissal of an application puts an end only to an attachment made on that application.

Where a lease was executed by the judgment-debtor while an attachment under the old Code was still subsisting

Held, that it was invalid as against the right of the auction-purchaser under his purchase in Court-auction held in pursuance of the attachment.

Second appeal against the decree of the District Court of Kurnool, in Appeal Suit No. 59 of 1912, preferred against that of the Court of the District Munsif of Nandyal in Original Suit No. 546 of 1911.

FACTS.—The suit land originally belonged to the father of the 2nd defendant, who gave a *muniguttu* lease thereof to one Rama Rao, who transferred the same to the plaintiff. This lease had still five years to run at the date of suit. Subsequent to the grant of the above lease, the 2nd defendant conveyed the said land by means of a colourable sale-deed to his brother-in-law, the 3rd defendant, who had no means of his own and was living with the 2nd defendant. It

also appeared that after this alienation the 2nd defendant had mortgaged this very property as his own. After his purchase the 3rd defendant granted a reversionary *muniqutta* lease of the suit land to plaintiff for a further period of 12 years, to commence after the expiry of Rama Rao's lease. In the meantime the 1st defendant had the suit property attached in August 1906 in execution of a decree he had obtained against the 2nd defendant, brought it to sale, purchased it in February 1910 and obtained delivery thereof through Court. The plaintiff thereupon instituted the present suit for a declaration that the delivery obtained by the 1st defendant was only symbolical and did not affect his rights for a period of 17 years, made up of the unexpired five years of Rama Rao's lease and the 12 years of the 3rd defendant's lease. The 1st defendant, who alone contested the suit, admitted plaintiff's right to continue in possession for the unexpired portion of Rama Rao's lease, but disputed the validity of the 3rd defendant's lease. The Court of first instance decreed the suit so far as the admitted five years of Rama Rao's lease were concerned, but dismissed the suit as regards the period covered by the 3rd defendant's lease, holding that the sale by the 2nd defendant to the 3rd defendant was not true and was void as against the 1st defendant, that the plaintiff was not a *bona fide* alienee from the 3rd defendant and that in consequence the plaintiff's claims could not prevail over those of the 1st defendant. On appeal by the plaintiff the District Judge of Kurnool held that there was no attachment subsisting on the property on the date of 3rd defendant's lease, and that the plaintiff obtained the same, without notice of 3rd defendant's infirmity of title, if any, *bona fide* and for valuable consideration from the 3rd defendant, the ostensible owner. He, therefore, decreed the plaintiff's suit. The 1st defendant thereupon appealed to the High Court.

Mr. *V. C. Seshachariar*, for the Appellant:—The order of remand is illegal. The lower Appellate Court clearly erred in modifying the decree of the District Munsif. The latter found that the sale to 3rd defendant was not true and was void as against the 1st defendant. The learned District Judge has not dissented from that finding. He ought, therefore, to have dismissed the appeal. Further, the District Munsif has found that prior to the grant of the lease the plaintiff was aware of the attachment by the 1st defendant, having been informed of it by the 3rd defendant. There is also evidence to show that some inquiries were made before the lease was taken. Under the circumstances the plaintiff cannot be said to be a *bona fide* alienee. Mere payment of consideration is not enough. There must also exist *bona fides*. The District Judge erred in holding that no attachment was subsisting. The petition had only been struck off and it had repeatedly been held that striking off did not have the effect of raising the attachment. [*Srinivasa Sastrial* v. *Sami Rao* (1)].

The attachment having been effected before the new Civil Procedure Code came into force, it cannot be affected by a dismissal of the petition. The provisions of Order XXI, rule 57, have no retrospective effect.

Mr. *S. Duraiswami Iyer*, for the Respondents:—The decree of the learned District Judge is quite correct. Whatever may be the effect of the dismissal of an execution petition on an attachment effected thereunder under the old Code, in the present case, Exhibit VII shows that in April 1909 an application was made under the new Code for sale of attached properties and that the same had been dismissed. The attachment, therefore, ceased to exist by virtue of Order XXI, rule 57, and the plaintiff is entitled to succeed. The validity of the 3rd defendant's purchase had been upheld by the order passed on a claim petition preferred at the instance of a lessee of the 3rd defendant in 1906. It cannot be re-opened now. No objections have been filed against the finding of the District Munsif. In the face of the findings of fact the 1st defendant is not entitled to succeed.

JUDGMENT.—The 1st defendant is the appellant He purchased in Court-auction the 2nd defendant's rights in the plaint lands, the Court auction-sale having taken place in February 1910. The attachment had taken place in August 1906 before the new Civil Procedure Code came into force. The execution petition, in pursuance of which the attachment was made, was struck off on the 1st of October 1906, but the subsequent proceedings show that, as usual

(1) 17 M. 180.

under the old practice, the attachment was considered by all parties and by the Court as still subsisting, so that when fresh applications for execution are made, they need not pray for fresh attachment but need only pray for sale of the attached property already remaining under attachment, the fresh execution applications being treated as a revival and continuation of the execution application which was struck off (for non-payment of *batta* or some similar cause).

The 2nd defendant had, before the attachment of August 1906, executed a nominal and colourable sale-deed to the 3rd defendant in 1901. The 2nd defendant's father had, in September 1887, executed a registered *munigutta* lease, Exhibit A, for 28 years to the plaintiff's assignor. The 3rd defendant in December 1909 executed Exhibit B in plaintiff's favour giving the plaintiff a further lease for a term of 12 years. to commence after the expiry of the 28 years' lease then subsisting. The 1st defendant's contention is that this 12 years' lease, having been made during the continuance of the attachment and having been taken from his judgment-debtor's *benamidar* (the 3rd defendant), is not binding upon him, while the plaintiff's case is that the 3rd defendant was not the 2nd defendant's *benamidar* but a *bona fide* purchaser from the 2nd defendant and that the plaintiff was not aware of the 1st defendant's attachment.

The plaintiff brought the suit for a declaration that the 1st defendant's purchase in Court auction would not affect the plaintiff's right to enjoy the lands during the unexpired five years' portion of the first lease of 28 years' duration, nor the plaintiff's right to enjoy during the next 12 years granted by the second *munigutta* lease-deed obtained from the 3rd defendant. The 1st defendant contested the suit only as regards the plaintiff's alleged right to enjoy during the second 12 years' period.

The District Judge has decreed the plaintiff's suit even as regards the second period of 12 years on the following grounds :—

(1) There was no attachment subsisting on the property in December 1909, when the plaintiff obtained the 12 years' extension.

(2) The plaintiff was not aware of the said attachment and he took the second lease in good faith and for valuable consideration from the ostensible owner of the property (the 3rd defendant).

It will be seen from the above that the District Judge does not interfere with the District Munsif's finding that the 3rd defendant was only an "ostensible owner," in other words, that the 2nd defendant's sale to the 3rd defendant in 1901 was a colourable transaction.

As regards the non-existence of attachment in December 1909, both the lower Courts rely on the provision first introduced by the new Civil Procedure Code, Order XXI, rule 57. But Order XXI, rule 57, while it of course has the effect of releasing an attachment when the execution application under which the attachment had been made was dismissed after the passing of the Code, cannot have a retrospective effect upon an order of dismissal made before the Act came into force. If, then, the attachment subsisted notwithstanding the order of dismissal in 1906 of the execution application in which that attachment had been made, that attachment would not cease to exist merely by the passing of the new Code so as to make the provisions of the new Code apply to the old order of 1906.

It is also significant that the plaintiff in this case nowhere alleges that on the date when he got his fresh 12 years' lease, the attachment had ceased to exist. On the other hand, in paragraph 9 of the plaint he admits that the 1st defendant attached and put up the schedule mentioned land to sale and in paragraph 10 he merely says that he was not aware of attachment when he got the second lease. Further, the District Munsif says in paragraph 6 of his judgment that the plaintiff's own witness admitted that he told the plaintiff of the existence of the attachment in December 1909, that is, at the time of Exhibit B. Again, if the execution petition for sale filed in September 1909 by the 1st defendant is treated as a continuation and revival of the old execution application of 1906, the attachment has clearly continued to subsist. In short, the District Munsif (after the remand) and the District Judge seem to have taken up a point in plaintiff's

favour, namely, the alleged non-existence of the attachment, which was not put forward by the plaintiff himself in his plaint. It is argued by the respondents' learned Vakil that Exhibit VII shows that there was another execution petition in April 1909, which was dismissed on some technical ground. But there is nothing to show that any attachment was made on such petition or even what the nature of that petition was. Order XXI, rule 57, clearly means that the dismissal of an application puts an end only to an attachment made *on that application*.

In the result, we hold that the 12 years' lease granted to the plaintiff under Exhibit B was invalid as against the rights of the 1st defendant under his purchase in Court auction held in pursuance of the attachment which was subsisting on the date of Exhibit B, and setting aside the lower Appellate Court's decree, we restore the decree of District Munsif with costs payable to the 1st defendant by the plaintiff in the District Court and in this Court.

Appeal allowed.

ALLAHABAD HIGH COURT.

FULL BENCH.

SECOND CIVIL APPEAL No. 1530 OF 1913.

January 11, 1915.

Present:—Sir Henry Richards, KT., Chief Justice, Justice Sir P. C. Banerji, KT., and Mr. Justice Tudball.

LAL BAHADUR SINGH—DEFENDANT—APPELLANT

versus

ABHARAN SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 99—Civil Procedure Code (Act V of 1908), O XXXIV, r. 14—Sale held in contravention of section 99, Transfer of Property Act, whether void or voidable—Objection, if not taken before confirmation of sale, effect of—Hindu Law—Joint family—Managing member, representation by, whether on behalf of family.

Section 99 of the Transfer of Property Act does not render a sale in violation of the section absolutely null and void, it is only voidable.

If no objection is taken to such a sale before confirmation, such objection cannot be taken later.

Per *Banerji, J.*—In the case of a joint Hindu family the manager of the family represents the whole family.

Tara Chand v. *Imdad Husain*, 18 A. 325; A. W. N. (1896) 94; *Muhammad Abdul Rashid Khan* v. *Dilsukh Rai*, 27 A. 517; 2 A. L. J. 210; A. W. N. (1905) 80; *Madan Mukund Lal* v. *Jamna Kaulapuri*, 2 A. L. J. 123; A. W. N. (1908) 48 and *Mangli Prasad* v. *Pati Ram*, 1 A. L. J. 360, approved of.

Jhabba Lal v. *Chajju Mal*, 4 A. L. J. 787; A. W. N. (1908) 1, 3 M. L. T. 132, *Sirdar Singh* v. *Ratan Lal*, 24 Ind. Cas. 612, 12 A. L. J. 855; 36 A. 516; *Ashutosh Sikdar* v. *Behari Lal Kirtania*, 35 C. 61; 11 C. W. N. 1011; 6 C. L. J. 320, referred to.

Second appeal from the decision of the District Judge of Benares, dated the 30th May 1913.

Dr. *S. C. Banerji*, (with him the Hon'ble Mr. *Gokul Prasad*), for the Appellant.

Mr. *Haribans Sahai*, for the Respondents.

JUDGMENT.

RICHARDS, C. J.—The material facts connected with this appeal are as follows:—On the 11th of June 1881, Amir Singh and *Musammat* Dulra Kunwar executed a usufructuary mortgage of certain *zemindari* property in favour of Rani Dharam Raj Kunwar. The real mortgagor was the said Amir Singh. Possession of the *sir* land was not given in accordance with the provisions of the mortgage-deed and the Rani brought a suit against the mortgagors for possession and mesne profits. She obtained a decree, and in execution for mesne profits and costs the mortgaged property was attached, put up to sale and purchased by the Rani. The sale was subsequently confirmed and the usual certificate issued. Lal Bahadur Singh now represents the estate of Rani Dharam Raj Kunwar. The plaintiffs are the grandsons and great-grandsons of Amir Singh, and they have brought the present suit for a declaration that the auction-sale mentioned above is null and void and that they are still entitled to redeem the mortgage. There is a further claim for a declaration that the plaintiffs, or some of them, are in any event ex-proprietary tenants of the *sir* land.

It seems to me that the only question we have to decide is, what is the effect of section 99 of the Transfer of Property Act, which was in force at the date of the purchase by Rani Dharam Raj Kunwar? It has not been contended that if the Rani had never occupied the position of mortgagee, and if she had obtained a simple money decree, and in execution of such decree purchased the property, the plaintiffs, who are the grandsons and great-grandsons

of Amir Singh, could now set aside the sale and get possession of the property. The contention is that the sale was in contravention of the provisions of section 99 of the Transfer of Property Act and, therefore, null and void. In my opinion this case must be disposed of on the assumption that the plaintiffs have exactly the same rights as Amir Singh would have had if he had brought the suit instead of them. Section 99 is as follows :—

"Where a mortgagee in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches the mortgaged property, he shall not be entitled to bring such property to sale otherwise than by instituting a suit under section 67."

It seems to me that the decision depends on whether a sale at the instance of a mortgagee in contravention of the section was a wholly illegal act. If it was thus, the equity of redemption never vested in the Rani and the mortgage is still capable of being redeemed. Section 99 has been repealed and new provisions have been substituted in the Code of Civil Procedure. Order XXXIV, rule 14, of the first Schedule is as follows:—

"Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgage property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage."

Two things will here be noticed, *first*, that the provisions of law restraining a mortgagee from bringing mortgaged property to sale is not so wide as previously, and *second*, that the provision finds its place in an Act dealing with matters of procedure and not of substantive law. If the effect of section 99 is that all sales in contravention of its provisions are absolutely null and void, great hardship might occur in many cases: for example, a purchase might be made by a perfectly innocent third party who would have to give up the property. In considering the construction of the section I can see no distinction between a purchase by the mortgagee and a purchase by a third party. Undoubtedly the mortgagor, or any one interested in the property in cases governed by section 99, could object to the sale of the mortgaged property by the mortgagee on foot of a simple money decree, and in all probability the sale could be set aside on this sole ground at any time before confirmation. But can the sale be set aside after the confirmation? This question depends on whether we regard the provisions of the section as enacting that no sale can legally be had, or as merely giving the mortgagor and persons interested in the property a right to object to the sale being had, provided the objection is taken at the proper time, that is to say, sometime before the sale was confirmed.

In the case of *Tara Chand* v. *Imdad Husain* (1) the plaintiff sued for partition. His title to his alleged share was a purchase by him at an auction-sale at the instance of the mortgagee who had obtained a simple money decree. A Bench of this Court held that he was entitled to partition notwithstanding the provisions of section 99. It is true that in that case the Revenue Court had already overruled the objection that the property could not be sold and had confirmed the sale. Nevertheless it is quite clear that if the sale was a nullity, the plaintiff would have acquired no title to the share upon which he based his right to partition. It is true also that the plaintiff in this case was not the mortgagee, but section 99 restrains the mortgagee from "bringing the property to sale." If any act is rendered illegal, it is the "bringing of the property to sale."

In the case of *Muhammad Abdul Rashid Khan* v. *Dilsukh Rai* (2) the mortgagees had brought the equity of redemption to sale in exercise of a simple money decree for mesne profits and costs and purchased it themselves. The plaintiffs brought their suit to redeem the property, treating the sale to and purchase by the mortgagees as a nullity. A Bench of this Court was of opinion that the sale was not a nullity. The sale in this case was apparently before the passing of the Transfer of Property Act. But it seems a clear authority for the proposition that if the mortgagor allows the equity of redemption to be sold and the sale confirmed without

(1) 18 A. 325, A. W. N. (1896) 94.
(2) 27 A. 517; 2 A. L. J. 210; A. W. N. (1905) 80.

objection, he cannot later on take exception to it.

In the case of *Mangli Prasad* v. *Pati Ram* (3) the question arose as to whether or not the plaintiff had a right to redeem a subsequent mortgage. His claim was based on purchase at an auction-sale of the equity of redemption in execution of a simple money decree obtained by a mortgagee. A Bench of this Court held him to be entitled. The Court was clearly of opinion that the auction-sale was not a nullity.

Again, in the case of *Madan Mukund Lal* v. *Jamna Kaulapuri* (4) a Bench of this Court laid it down that where a sale has been had of mortgaged property in execution of a simple money decree and the sale confirmed, the title of the auction-purchaser becomes complete.

In a case reported in *Kishan Lal* v. *Umrao Singh* (5) exactly the same view was taken.

A contrary view seems to have been taken by Dillon, J., in the case of *Jhabba Lal* v. *Chajju Mal* (6), but the case of *Tara Chand* v. *Imdad Husain* (1) and the cases reported in *Mangli Prasad* v. *Pati Ram* (3) and *Madan Mohund Lal* v. *Jamna Kaulapuri* (4) do not seem to have been brought under the notice of the learned Judge. It seems to me that with the exception of this last-mentioned case, and another recent decision to which I shall presently refer, all the decisions of this Court have been in favour of the view that the sale at the instance of a mortgagee of mortgaged property is not a nullity, and that if no objection is taken before the confirmation, such objection cannot be taken later.

In the case of *Sirdar Singh* v. *Ratan Lal* (7) the facts were as follows: Nandan Singh executed a mortgage in favour of Ratan Lal. Ratan Lal sued in 1898, but only asked for a simple money decree which was granted. In execution of this decree he purchased the property himself. The sons of Nandan Singh were not made parties to the suit in which the decree had been obtained, and they then brought a suit to redeem the mortgage and get possession. A Bench of this Court was of opinion that the plaintiffs were entitled to redeem. With regard to this case, I can only say that in my opinion with regard to the cases governed by section 99 the restrictions on a mortgagee acquiring the equity of redemption ought to be confined to the provisions of the section, and that in future the substituted provisions of the Code of Civil Procedure should regulate the rights of mortgagors and mortgagees in this respect. If, however, the learned Judges who decided the case of *Sirdar Singh* v. *Ratan Lal* (7) intended to decide that a sale in contravention of section 99 was, even after confirmation a complete nullity, such a decision was contrary to the cases previously decided in this High Court with the exception of the one case I have already mentioned. While I admit that the question is not free from difficulty I think we ought not, without grave reason, to depart from a series of rulings of this High Court, and for this reason I do not intend to refer to the rulings of the other High Courts at any great length.

The case of *Ashutosh Sikdar* v. *Behari Lal Kirtania* (8) was a reference to the Full Bench of the Calcutta High Court. The questions were, (1) whether when a sale has been held in contravention of the provisions of section 99 of the Transfer of Property Act, the sale is a nullity, or an irregular and voidable sale, and (2) whether the right of redemption of the mortgagor is or is not affected by such sale. Rampini, A. C. J., said in answer to the first question:

"I think we must, after the expression of opinion of their Lordships of the Privy Council in *Khairajmal* v. *Daim* (9), reply that a sale held in contravention of the provisions of section 99 of the Transfer of Property Act is not a nullity, but an irregular and voidable sale. In my opinion such a sale can be avoided before confirmation of sale by an application under section 244 of the Code of Civil Procedure, without its being necessary for the applicant to show more than that the provisions of the Transfer of Property Act have been contravened. But after confirmation the sale can only be avoided by an application under section 244, provided that the applicant proves that owing to fraud or other reasons he was kept in

(3) 1 A. L. J. 360.
(4) 2 A. L. J. 123; A. W. N. (1908) 48.
(5) 30 A. 146; 5 A. L. J. 121; A. W. N. (1908) 49.
(6) 4 A. L. J. 787, A. W. N. (1908), 1; 3 M. L. T. 182.
(7) 24 Ind. Cas. 612; 12 A. L. J. 855; 36 A. 516.
(8) 35 C. 61; 11 C. W. N. 1011; 6 C. L. J. 320.
(9) 2 A. L. J. 71; 1 C. L. J. 584; 7 Bom. L. R. 1; 9 C. W. N. 201; 32 C. 296; 32 I. A. 23 (P. C.).

ignorance of the sale proceedings preliminary to the sale.

"The case should, therefore, be remanded to the Subordinate Judge to be disposed of after inquiry into these matters and after decision of any other issues that may arise in the case. The costs will abide the result.

"It seems neither necessary nor advisable for us to answer the second question put by the referring Bench."

It seems to me the reason why the learned Acting Chief Justice did not answer the second question was that the answer to the first question answered the second, unless the applicant should prove that he was kept in ignorance of the sale proceedings preliminary to the sale.

Brett, Mitra and Woodroffe, JJ., all agreed. Mookerjee, J., referred in a more elaborate judgment at length to the various rulings on the question, but I have no reason to think that he intended to differ from the other members of the Bench.

It is true that Woodroffe, J., was party to a subsequent decision in the case of *Pancham Lal Chowdhury* v. *Kishun Pershad Misser* (10). With great respect I must confess to be quite unable to reconcile the two decisions. It seems to me that if the equity of redemption is sold in execution of a decree and purchased either by a third party, or by a mortgagee with the leave of the Court, the equity of redemption is transferred from those persons who previously held it to the purchaser and that the result is that if that sale is neither void nor set aside, there is no longer a right to redeem left in the previous owners of the equity of redemption. On the whole, I see no sufficient reason for overruling the previous decisions of this High Court, and I would, therefore, allow the appeal, stating at the same time, though it is perhaps hardly necessary to do so, that we express no opinion on the question whether the plaintiffs have ex-proprietary rights in the *sir* lands. The claim clearly is not a matter for the Civil Court.

BANERJI, J.—I am entirely of the same opinion and have very little to add. The learned Vakil for the respondents laid considerable stress on the fact that the plaintiffs were no parties to the suit in which the decree against Amir Singh was obtained, in execution whereof the equity of redemption in the property in question was put up for sale and purchased by the mortgagee. In the recent rulings of this Court and of their Lordships of the Privy Council, it has been held that in the case of a joint Hindu family the manager of the family represents the whole family. The present plaintiffs must, therefore, be deemed (if they existed at the time) to have been represented by Amir Singh in the suit which was brought against him, and they were thus parties to that suit. As the learned Chief Justice has observed, the plaintiffs cannot claim a higher title than that which Amir Singh could have set up in respect of the mortgage made by him. If Amir Singh could not maintain the present suit, no more can the plaintiffs.

This leads to the question whether by reason of the provisions of section 99 of the Transfer of Property Act, the auction-sale at which Rani Dharam Raj Kunwar purchased the equity of redemption was a nullity. As has been pointed out by the learned Chief Justice, the course of rulings in this Court has been that such a sale is merely voidable, and not having been avoided before confirmation, it binds the mortgagor and those whom he represented as the managers of the joint family. I deem it unnecessary to refer to those rulings. The only case in which a contrary view was held was that of *Jhabba Lal* v. *Chajju Mal* (6), decided by Mr. Justice Dillon. With all respect I am unable to agree with him.

The next case on which the learned Vakil for the respondents relies is the recent ruling in *Sirdar Singh* v. *Ratan Lal* (7). In that case Mr. Justice Rafique distinguished the cases reported in *Tara Chand* v. *Imdad Husain* (1), *Banh Bal* v. *Manni Lal* (11), *Kishan Lal* v. *Umrao Singh* (5), on the ground that the sale in those cases was not in favour of the mortgagee but in favour of a third party. With great deference I fail to see any distinction between the case of a purchase by the mortgagee and that of a purchase by a third party. What the section declares is that a mortgagee shall not be entitled

(10) 6 Ind. Cas. 47; 14 C. W. N. 570; 12 C. L. J. 574.

(11) 27 A. 450; 2 A. L. J. 121; A. W. N. (1905) 42.

to bring to sale the equity of redemption of his mortgagor in execution of any claim which he may have, whether arising under the mortgage or not. It does not prohibit the purchase of the property by the mortgagee, if the Court permits him to purchase it and allows a sale to take place. If section 99 does not render a sale in violation of the section absolutely null and void, there is nothing to prevent a mortgagee purchasing under such a sale with the leave of the Court. It has been held by their Lordships of the Privy Council that a mortgagee who purchases with the leave of the Court is exactly in the same position as any other purchaser. Therefore, the fact of the purchaser being a person other than the mortgagee, in my opinion, makes no difference so far as the application of section 99 is concerned. The learned Judges in that case do not, as it seems to me, go the length of holding that a sale in contravention of section 99 is absolutely void. If that is so, and if such a sale is only voidable, it not having been avoided before confirmation, the title of the mortgagor or of those whom he represents or of those who derive title from him passes absolutely to the purchaser, and no right remains in those persons by virtue of which they can claim redemption.

TUDBALL, J.—I concur.

BY THE COURT.—The order of the Court is that the appeal is allowed and the plaintiffs' suit is dismissed with costs in all Courts, including fees in this Court on the higher scale.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 533 OF 1914.

January 14, 1915.

Present:—Mr. Justice Rossignol

HANNU MAL—DEFENDANT—APPELLANT

versus

ATMA RAM—PLAINTIFF—RESPONDENT.

Punjab Pre-emption Act (I of 1913), s. 5—Shop—Building situate in a lane—Part used as shop and part as residential quarters—House or shop.

Where in a pre-emption suit it appeared that the building in suit was situated in a lane not a Bazar and was originally purely residential, but that there had been some subsequent alterations in the structure with the result that the three rooms abutting on the lane could be used as shops, and in fact had been used as such for some time, while the upper storey had been used as residential quarters by different persons including the owner

Held, that as there was no evidence that at the time of the sale or at any time shortly before it the building was used for commercial purposes, it was not a shop and the plaintiff was entitled to pre-empt.

Second appeal from the decree of the Additional Divisional Judge, Delhi Division, dated the 20th October 1913, reversing that of the Munsif, first Class, Delhi, dated the 10th July 1913, dismissing the claim.

Rai Bahadur Pandit *Sheo Narain* and Mr. *Kirkpatrick*, for the Appellant.

The Hon'ble Mr. *Muhammad Shafi*, K. B, for the Respondent.

JUDGMENT.—A preliminary objection comes from respondent that the appeal is time-barred, inasmuch as the appellant is not entitled to reckon out the time spent in the review proceeding, but I think this was a case in which the appellant had a reasonable hope that the learned Additional Divisional Judge might view the spot and change his opinion as the result of that view. I overrule the objection and admit the appeal.

On the merits, my view is that the condition of the premises at the time of sale is a very important factor to the decision whether the building is a residential quarter or a shop. Originally no doubt the building was purely residential and it is situate in a lane, not a bazar. Between 1880 and the time of sale, the structure of the house was altered, and fashioned so that the three rooms abutting on the lane could be used as shops, and at some time no doubt they were used as shops; at the same time, the rear portions and the upper storey of the building were used as residential quarters by different persons, including the owner.

There is, however, no evidence that at the time of the sale, the building was used for commercial purposes, nor is there any evidence that it was used for such purposes at any time shortly before the sale.

In a bazar it might be urged in regard to a building that once a shop it is always a shop, but the maxim has no force

when the building lies in a lane and has been at some time casually used as a shop.

For these reasons I am not prepared to find against the learned Divisional Judge's conclusion that the building is not a shop and I dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 243 OF 1910.

October 29, 1914.

Present:—Sir John Edward Power Wallis, Offg. Chief Justice, and Mr. Justice Seshagiri Aiyar.

RAMASAMY CHETTY—PLAINTIFF—APPELLANT

versus

ALIGIRI CHETTY AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 63, O. XXXVIII, r. 9—Suit under O XXI, r 63, object of—Suit, whether abates, if attachment raised.

The statutory right under Order XXI, rule 63, Civil Procedure Code, is merely to establish the right which the attaching plaintiff claims in the property, *i.e.*, to attach it as the property of the defendant whenever it is his interest to do so. The fact that the attachment before judgment ceases to be operative on the dismissal of the suit by virtue of Order XXXVIII, rule 9, of the Code, does not also cause the suit, under Order XXI, rule 63, to abate.

Appeal against the decree of the District Court of Coimbatore in Original Suit No. 37 of 1910.

Dr. *S. Swaminadhan*, for the Appellant.

Mr. *T. R. Krishnaswami Aiyar*, for Mr. *T. R. Ramachandra Aiyar*, for the Respondents.

JUDGMENT.—The plaintiff's attachment was raised and he sued the claimant to establish his right under Order XXI, rule 63, of the Civil Procedure Code (formerly section 283). The District Judge afterwards dismissed the suit, and it is now contended that as the attachment before judgment, if still subsisting, would have been raised as a consequence of the dismissal of the suit pursuant to Order XXXVIII, rule 9, of the Code of Civil Procedure, the effect of the dismissal of the suit in which the attachment was made was in effect to

cause the suit under Order XXI, rule 63, to abate. No authority has been cited for this novel proposition which we are altogether unable to accept. The statutory suit under Order XXI, rule 63, is to establish the right which the attaching plaintiff claims in the property in dispute. This, in our opinion, is the right to attach the property in question as the property of the defendant whenever it may be his interest to do so and the effect of not suing would be to debar him from claiming to attach such property at any future time. The fact that the attachment effected by him would, if it had not been raised previously, have come to an end by the dismissal of the suit, does not affect his right to sue under Order XXI, rule 63. The appeal must be allowed and the case remanded for disposal according to law.

The costs will abide the result.

Appeal allowed; Case remanded.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 912 AND 1134 OF 1912.

December 1, 1914.

Present:—Mr. Justice Coxe and Mr. Justice Richardson.

IN S. A. No. 912 OF 1912

BASAWAN SINGH—PLAINTIFF—APPELLANT

versus

MAHAMAD FARIZ (HASAN) KHAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

IN S. A. No. 1134 OF 1912

ASLOKE SINGH—PLAINTIFF—APPELLANT

versus

MAHAMAD FARIZ KHAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Usufructuary mortgage—Mortgagee's right to sell—Covenant to pay money, whether promise to pay or conditional statement—Terms in covenant, interpretation of—Presumption.

In an usufructuary mortgage the mortgagee has no right to recover the money by the sale of the mortgaged property unless there is a covenant to pay the money.

Where a mortgage-deed provided "When I or my heirs and representatives shall pay off in cash and in one lump Rs. 250, the amount covered by this *surpeshgi* deed, on the 30th of *Magh* 1311 *F. S.* or on the 30th of *Magh* of any other year after the expiration of the deed, to the said *surpeshgidar* or his heirs and representatives, I shall take back this deed and enter upon possession of the lease-hold property, and I or my heirs shall not apply for redemption of the mortgages without paying off the *peshgi* money. In security of the *peshgi* money

I mortgaged and hypothecated the said lease-hold property:"

Held, that there was no covenant to pay the money and the mortgagee could not give up possession and sue for sale of the property.

Luchmeshar Singh v. *Dookh Mochan Jha*, 24 C. 677, *Pargan Panday* v. *Mahatam Mahto*, 6 C. L. J. 143, referred to.

Appeal against the decree of the District Judge of Saran, dated the 26th of January 1912, reversing those of the Munsif, third Court, at Chapra, dated the 25th of July 1911.

Babus *Baldeo Narain Singh* and *Harihar Prosad Singh*, for the Appellants.

Moulvi *Nur-ud-Din Ahmad*, for the Respondents.

JUDGMENT.

Cox, J.—This appeal arises out of a suit on a mortgage bond. The plaintiff was given possession and his case was that the defendants dispossessed him. He, therefore, sued for the money, to be realised by the sale of the mortgaged property.

The Courts below found that he had never been dispossessed by the defendants. The lower Appellate Court held that, as the mortgage was an usufructuary mortgage, the plaintiff had no right to recover the money by the sale of the mortgaged property.

The plaintiff appeals and on his behalf it is argued that even though he was in possession of the property, there was a covenant to pay the money on which this suit would lie. The question before us is whether there was such a covenant. On this point there seems to be some conflict of judicial opinion. In the case of *Luchmeshar Singh* v. *Dookh Mochan Jha* (1) the covenant runs as follows:—"We give in *bharna* 6 *bighas* 4 *cottas* of land as per boundaries for a term of three years, having paid the principal money in the month of *Chait* 1297 we shall take back the document and the land. If the principal sum be not paid at the time fixed, then all the terms of this *sudbharna* will remain in force."

It was held that these terms did not amount to a covenant to pay. In the case of *Pargan Panday* v. *Mahatam Mahto* (2), the terms were: "I shall re-pay the principal amount on the full moon day of the end of *Jait* 1287 *Fasli*, and take back the bond. If I shall not be able to re-pay the same on the due date of payment, then this document shall remain in tact up to the re-payment of the same. As security for the said amount, I have mortgaged and hypothecated the said field." It was held that this was a covenant to pay.

It appears to me that the covenant in the present deed is less in favour of the plaintiff than either of the two covenants that I have recited. There is no promise to pay money. What is said to be the promise is contained in a conditional statement which runs as follows:—"When I or my heirs and representatives shall pay off in cash and in one lump Rs. 250, the amount covered by this *surpeshgi* deed, on the 30th of *Magh* 1311 *F. S.* or on the 30th of *Magh* of any other year after expiration of this deed, to the said *surpeshgidar* or his heirs and representatives, I shall take back this deed and enter upon possession of the lease hold property, and I or my heirs shall not apply for redemption of mortgage without paying off the *peshgi* money. In security for the *peshgi* money I mortgaged and hypothecated the said lease-hold property." So far as this is a covenant by the mortgagor to do anything at all, it is a promise that he will pay the amount due either on the 30th *Magh* 1311 or on the 30th *Magh* of any other year.

It seems to me to have been the intention of the parties that the plaintiff should have the land for three years at least and that after that the land should remain in his possession until the defendants paid what was due on the 30th *Magh* in any year. It does not seem to me to have been the intention of the parties that the plaintiff should be entitled to insist on giving up possession of the property and recovering the money. This view is strongly supported by the fact that the suit, as appears from a perusal of the plaint and of the issues, was based exclusively on the alleged dispossession which has been disbelieved. In my opinion the decision of the District Judge is right and this appeal must be dismissed with costs.

This judgment governs Second Appeal No. 1134 of 1912, except as regards costs, no one appearing for the respondent.

RICHARDSON, J.—I agree.

Appeals dismissed.

(1) 24 C. 677.
(2) 6 C. L. J. 143.

MAUNG SAN MIN *v.* SANNA.

LOWER BURMA CHIEF COURT.
SECOND CIVIL APPEAL No. 276 OF 1914.
January 14, 1915.
Present:—Mr. Justice Ormond.
MAUNG SAN MIN—PLAINTIFF—APPELLANT
versus
SANNA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), s. 47—Execution and Registration—Operation, date of.

Under section 47 of the Registration Act a registered deed operates from the date of its execution and not of registration.

Mr. *Sin Hla Aung*, for the Appellant.

JUDGMENT.—The plaintiff sued for a declaration that he was the owner of a house which he had bought from one Ma Aye Me, the wife of Po Cho, a Chinaman, on the 8th May 1913. The defendant is a judgment-creditor of Po Cho and he attached the house or attempted to attach the house on the 20th May. The defendant alleges that the sale to the plaintiff was not a *bona fide* one. The Township Court has found that the plaintiff had honestly bought the house from Ma Aye Me, who had a right to sell it. Po Cho had left his wife and had given her authority to sell the house. The District Judge based his judgment upon the assumption that the sale to the plaintiff was made on the 5th June. The sale was by a registered deed which was presented for registration on the 8th May when the parties admitted execution, and receipt of the consideration, but for some reason, which does not appear, it was not actually registered until the 5th June. The District Judge, I think, has overlooked the provisions of section 47 of the Registration Act, under which a registered deed operates from the time of execution in a case such as this There is nothing in the evidence to show that the sale was not *bona fide*: the plaintiff had acquired the ownership in the house before the defendant obtained a decree against the judgment-debtor, and there is nothing to show that the plaintiff knew that the defendant had instituted a suit against Po Cho at that time.

The appeal, therefore, must be allowed with costs and the decree of the Township Court will be restored. The plaintiff will have his costs in all Courts.

Appeal allowed.

SAROJINI DEBI *v.* KIRTIBASH DAS.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 1239 OF 1912.
January 7, 1915.
Present:—Mr. Justice Holmwood and Mr. Justice Mullick.
Srimati SAROJINI DEBI AND OTHERS—PLAINTIFFS—APPELLANTS
versus
Chowdhuri KIRTIBASH DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Adverse possession—Limitation—Eleven years 5 months, possession for—Practice of Settlement Department—Judicial procedure—Possession follows title—Presumption, when raised.

Where 11 years 5 months before suit for possession of a tract of jungle the final Record of Rights was published by the Settlement Department showing the defendants to be in possession at that time:

Held, that having regard to the well-known practice of the Settlement Department, which was itself a kind of judicial procedure, the defendant must have been found to be in possession at least seven months before that record was published.

Thakur Singh v. *Bhageraj Singh*, 27 C. 25; *Rajkumar Roy* v. *Gobind Chunder Roy*, 9 C. 600; 19 I. A. 140, *Mahomed Ali* v *Abdul Gunny*, 9 C. 744; 12 C. L. R. 257, *Runjeet Ram Panday* v. *Goburdhan Ram Panday*, 20 W. R. 25, referred to.

The presumption that possession follows title in those kinds of cases must depend upon the circumstances of the case.

Appeal against the decree of the District Judge of Cuttack, dated the 19th of August 1911, reversing that of the Munsif, Second Court of Cuttack, dated the 2nd of December 1910.

Babus *Mohendra Nath Roy* and *Manmotha Nath Roy*, for the Appellants.

JUDGMENT.—This second appeal arises out of a suit relating to a tract of jungle 1¾ acres in extent covered with canes. The plaintiffs' title appears to have been established in both Courts. But the learned Judge in the Court of appeal below has found that the plaintiffs' suit is barred by limitation. He has based his decision on the fact that eleven years five months before suit the final Record-of-Rights was published by the Settlement Department showing the defendants to be in possession at that time, and he has drawn the inference that having regard to the well-known practice of the Settlement Department, which is itself a kind of judicial procedure, the defendants must have been found to be in possession at least seven months before that Record was published; and he further points out that that being the case, the plaintiffs have not

attempted to show that they were dispossessed at any time within that short period of seven months. On the contrary they date their dispossession to a very recent period.

We have carefully considered the authorities that have been laid before us, the cases of *Thakur Singh* v. *Bhogeraj Singh* (1), *Rajkumar Roy* v. *Gobind Chunder Roy* (2), the Full Bench case of *Mahomed Ali* v. *Abdul Gunny*(3), and the Privy Council case of *Ramjeet Ram Panday* v. *Goburdhan Ram Panday* (4), and we are of opinion that in the circumstances of this case the learned Judge was justified in drawing the inference of fact from facts that he has done and that there is no error of law. As was pointed out by the Full Bench in *Mahomad Ali* v. *Abdul Gunny* (3), the presumption that possession followed title in these kinds of cases must depend upon the circumstances of the case. The mere fact that the Judge does not refer to the allegation that the plaintiffs cut canes within three or four years of suit as rebutting the inference he draws, is not an error of law. If he has overlooked certain evidence it is a matter for review, or it may be that he has not considered it of sufficient value to outweigh the presumption arising from the Record of Rights subsequent to publication.

The result is that the appeal is dismissed without costs, as no one appears for the respondents.

Appeal dismissed.

(1) 27 C. 25.
(2) 19 C. 660; 19 I. A. 140.
(3) 9 C. 744; 12 C. L. R. 257.
(4) 20 W. R. 25.

LOWER BURMA CHIEF COURT.
FIRST CIVIL APPEAL NO. 91 OF 1914.
January 4, 1915.
Present:—Mr. Justice Ormond.
ABDUL KAREEM—PLAINTIFF—APPELLANT
versus
Shaik BURRAY SAIB—DEFENDANT—RESPONDENT.

Jurisdiction of Small Cause Court—Suit for accounts—Consent of parties.

A Small Cause Court has no jurisdiction to entertain suits for accounts, and consent of parties does not give a Court jurisdiction which it has not got.

Mr. *Anklesaria*, for the Appellant.

Mr. *Ausam*, for the Respondent.

JUDGMENT.—The plaintiff sued the defendant in the Small Cause Court for one-third share of the profits of the defendant's refreshment business, which the defendant agreed to pay the plaintiff by way of remuneration for looking after the defendant's business, whilst the defendant was away in India. The defendant, in his written statement, says, *inter alia*, that it is a suit for accounts. The case was not heard by the Court but by consent of the parties it was referred to a Commissioner to ascertain what the profits of the business were, if any. The Commissioner found that there were no profits or that the plaintiff had not shown that there were any profits. The learned Judge of the Small Cause Court upon objection of the Commissioner's report upheld the report and has dismissed the suit.

The plaintiff now appeals. The Counsel for the respondent as a preliminary objection contends that the Small Cause Court had no jurisdiction, inasmuch as the suit was one for an account. The appellant's Advocate admits that the suit was one for an account and that the Small Cause Court had no jurisdiction, but he contends that he should not be mulcted in costs and that the plaint should be returned to be presented to the proper Court. The suit was clearly one for an account and the Small Cause Court had no jurisdiction to entertain it. Assuming that the defendant submitted to the jurisdiction of the Court, the consent of the parties cannot give a Court jurisdiction which it has not got. The appeal must, therefore, be allowed and the suit dismissed on the gound that the Small Cause Court had no jurisdiction to entertain it. The plaintiff must pay the defendant's costs in both Courts; the defendant by allowing the matter to go before the Commissioner may have done so, feeling confident that he could oust the plaintiffs on the merits, and he did not undertake not to raise the question of jurisdiction if the plaintiff appealed. I know of no authority which is for allowing the plaint to be returned at this stage.

The suit is, therefore, dismissed for want of jurisdiction and the plaintiff will pay the defendant's costs in both Courts.

Suit dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 117 OF 1914.

November 24, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Hannay.

CHAVALI SUBBANNA, *alias* SUBBARAYUDU, AND ANOTHER—DEFENDANTS—APPELLANTS

versus

TULLURU VENKATARAYUDU AND OTHERS—PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), s. 109—Presumption, rebutting of—Burden of proof—Landlord and tenant, relation of, proof of—Rental agreement, inadmissible in evidence—Oral evidence, whether admissible.

Where a written rental agreement is inadmissible in evidence, oral evidence, though not admissible to prove the terms of the tenancy or period of the lease, is still admissible to prove that the relationship of landlord and tenant exists between the parties.

When the existence of the relationship of landlord and tenant is once proved to exist its continuance is presumed under section 109 of the Evidence Act and the burden of proving the contrary lies upon the person who denies the relationship.

Amir Ali v. Aykub Ali Khan, 25 Ind. Cas. 500; 41 C. 347; 19 C. L. J. 428, followed.

Second appeal against the decree of the Court of the Additional Temporary Subordinate Judge of Guntur, in Appeal Suit No. 176 of 1912, preferred against that of the Court of the Principal District Munsif of Guntur in Original Suit No. 593 of 1911.

Mr. *A. Viswanadha Aiyar*, for the Hon'ble Mr. *B. N. Sarma*, for the Appellants.

Mr. *M. C. Parthasarathy Aiyangar*, for the Respondents.

JUDGMENT.—We must accept the Subordinate Judge's finding that the sales in 1st plaintiff's favour were real transactions and that the 1st plaintiff was not the *benamidar* of any other person.

As regards the lands (items 1 and 2), we think that the Subordinate Judge (on appeal) intended to accept and did accept the evidence of the 1st plaintiff and his witnesses that the 1st plaintiff directly enjoyed the lands till ten years before suit. The decision of the question whether there was an oral lease afterwards of the lands to the defendants, becomes unnecessary.

Coming to the house site, item 3, the Subordinate Judge accepts the evidence of P. W. No. 7, which proves that the relationship of landlord and tenant existed between the 1st plaintiff and Venkanna in about 1892. Oral evidence to prove such relationship is admissible, even if the rental agreement is not admissible in evidence and even if the terms of the tenancy (such as the period, the rate of rent, the covenants of the lease, etc.) cannot be proved by oral evidence. [See *Amir Ali* v. *Aykub Ali Khan* (1)]. Under section 109 of the Evidence Act it is for the 1st defendant to prove that that relationship ceased to exist before Venkanna's death which took place within twelve years before suit. The 1st plaintiff's possession, therefore, of the house site continued till 12 years before suit and his claim is not barred even as regards the house site. The second appeal fails and is dismissed with costs. The decree of this Court will, however, make it clear that the site alone of item 3 is decreed to the plaintiffs and that the defendants are at liberty to remove the superstructure at any time before delivery, through Court, is made to the plaintiffs of the site.

Appeal dismissed.

(1) 25 Ind. Cas. 500; 41 C. 347; 19 C. L. J. 428.

ALLAHABAD HIGH COURT.

EXECUTION SECOND CIVIL APPEAL No. 1171 OF 1914.

January 13, 1915.

Present:—Mr. Justice Chamier.

BHAGWANT DATT AND OTHERS—DECREE-HOLDERS—APPELLANTS

versus

RAJAB CHOWDHURY AND ANOTHER—JUDGMENT-DEBTORS—RESPONDENTS.

Execution—Decree cannot be executed against persons who were no parties to it—Practice.

A decree passed by the Appellate Court against the defendants who were not parties to the appeal, cannot be executed against them.

Second appeal from the decision of the Additional Judge of Gorakhpur, reversing the decree of the Munsif of Bansi.

RAJENDRA PROSAD JHA v. UPENDRA NATH JHA.

Dr. *S. N. Sen*, for the Appellants.

Dr. *S. M. Sulaiman*, for the Respondents.

JUDGMENT.—The facts of this case are very simple. The appellants brought a suit against two sets of defendants. The Court of first instance dismissed the suit against the first set, but decreed it against the second set. The latter appealed making the appellants only parties as respondents. The Appellate Court found that the second set of defendants were not liable for the claim, allowed the appeal and dismissed the suit against them. It went on, however, apparently *per incuriam* to say that it passed a decree against the first set of defendants. The appellants now seek to execute the decree against the first set of defendants, who object on the ground that they were not parties to the decree sought to be executed. The Munsif threw out the objection on the ground that it is not open to a Court executing a decree to challenge it in any way. On appeal the Subordinate Judge allowed the objection and dismissed the application for execution. It appears to me that the view taken by the Subordinate Judge is correct. It is true that this Court has frequently held that a Court executing a decree is not entitled to challenge the correctness of it, and that it has been held in some cases that such a Court cannot even inquire whether the Court which passed the decree had jurisdiction to do so, but it appears to me that the present case stands on an entirely different footing from any of those to which reference has been made. In the present case though the Appellate Court said: "I pass a decree against the first set of defendants," it took no steps towards giving effect to its decision. It did not make those defendants parties to the appeal as it might have done, and in the decree, as prepared, the names of the first set of defendants do not appear at all. In my opinion the appellants are not entitled to take out execution against the first set of defendants. I dismiss this appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 397 OF 1913.

November 24, 1914.

Present:—Mr. Justice Coxe and Mr. Justice Richardson.

RAJENDRA PROSAD JHA—DECREE-HOLDER—APPELLANT

versus

UPENDRA NATH JHA AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 65—Auction sale, bid in, whether can be withdrawn.

If a person goes to bid at a sale and in full knowledge of the condition offers bids for the property, and the property is knocked down to him, the mere fact that the Court has subsequently the discretion to confirm or annul the Nazir's auction, does not leave it open to the bidder to withdraw his bid.

Appeal against the order of the District Judge of Sonthál Parganas, dated the 6th of August 1913, affirming that of the Subordinate Judge of Deoghar, dated the 9th of June 1913.

Mr. *S. P. Sinha*, (with him Babu *Mohini Mohan Chatterjee*), for the Appellants.

Dr. *Sarat Chandra Basak*, (with him Babu *Bepin Chandra Bose*), for the Respondent.

JUDGMENT.

COXE, J.—The facts in this case as I gather from the judgments of the Courts below are as follows: The property in question was put up to sale on the 5th February and then knocked down by the Nazir for Rs. 5,000 to the decree-holder. The papers were then submitted to the Subordinate Judge in order, apparently, that he might exercise the discretion given to him under condition No. 3 of the sale proclamation. The next day the decree-holder came in, and asked that the sale might be set aside on the ground that the proclamation had not been properly published. This application was refused. A month later he came in again and asked that he might be allowed to withdraw his bid. This has been refused both by the Subordinate Judge and by the District Judge on appeal, and the decree-holder comes up to this Court in second appeal.

A preliminary objection has been taken that no second appeal lies. It certainly appears to me that there has been no adjudication of any rights of the parties and that, therefore, the preliminary objection ought to succeed; but it is not necessary to decide this point, because it appears to me that on the merits the appeal must fail.

It has been suggested by the learned Pleader for the appellant in reply that the property was not, as a matter of fact, knocked down by the Nazir. It is quite clear from the judgments that this was never questioned in the Courts below, and on looking into the record I find that it was not questioned in the cross-examination of the Nazir. It was contended, however, that the Nazir could not finally sell the property and that the auction remained incomplete until the Judge had decided whether or not the bid should be accepted. It may possibly be the case that in the Mofussil the Nazir frequently takes the orders of the Court before he completes the sale of a property. Except condition No. 3 of the proclamation of sale to which I will refer later, I can find no authority for this practice. Rule 65 prescribes that the sale shall be conducted by the officer of the Court, and it is the Nazir's business under that section to carry out and complete the sale. The warrant, of which a form is given in Appendix E No. 27, commands the bailiff of the Court to sell the property by auction and it seems clear to me that this command is not obeyed, if the Nazir, as is contended on behalf of the appellant, merely has to make a list of the offers from the various bidders, and submit the same to the Court, in order that the Court may decide what bids should be accepted and may in fact sell the property itself. The third condition of the proclamation of sale certainly gives the Court as well as the Nazir discretion to decline acceptance of the highest bid, when the price offered appears so clearly inadequate as to make it advisable to do so. In my opinion this condition must be read with rule 65 and form No. 27. It appears to me to give the Court a quasi-revisional discretion in the matter, and not to require the Court itself to knock down the property. Nor do I think that because the 3rd condition of the proclamation of sale reserves a certain discretion to the Court, it necessarily follows that the bid is incomplete, as against the bidder, until the Court has exercised that discretion. If a person goes to bid at a sale and, in full knowledge of this condition, offers bids for the property, and the property is knocked down to him, the mere fact that the Court has subsequently the discretion to confirm or annul the Nazir's auction, does not leave it open to the bidder to withdraw his bid. That the sale was complete seems to me clear from the appellant's petition of the 7th February. In that petition he did not ask to withdraw the bid. He asked that the sale might be set aside on the ground that the sale proclamation was not properly published. He, therefore, was then perfectly satisfied that a complete sale had been effected.

Our attention has been drawn to two cases on behalf of the appellant. One is *Kenaram* v. *Kailash Chandra* (1) and the other is *Askutosh Chatterjee* v. *Sudhindra Chandra Moulik* (2). In the first case, however, the property had not been knocked down and that circumstance distinguishes the case from the present one. The second case was one under section 115 of the Civil Procedure Code, and the only question was whether it was desirable to interfere in the interest of justice, and the learned Judges decided that it was not. They did not lay down any rule of law.

I think, therefore, that the decision of the Court below is right and the appeal is dismissed with costs, the hearing-fee being assessed at three gold *mohurs*.

RICHARDSON, J.—I agree. I think there is much doubt whether the order of the first Court declining to give way to the attempt of the plaintiff-decree-holder to withdraw the bid which he had himself made and upon which the hammer had fallen, was a decree within the meaning of the definition in section 2 of the Code of Civil Procedure, but let it be assumed that the order was a decree and the appeal before us is competent. Let it further be assumed that the first Court had a discretion to allow the decree-holder (the appellant before us) to withdraw his bid. Even so, I can find nothing in the mode in which that discretion, if a discretion exists, was exercised, which would justify us in interfering in appeal or in saying that the discretion should have been differently exercised.

I agree that the appeal should be dismissed with costs.

Appeal dismissed.

(1) 19 Ind. Cas. 904; 18 C. L. J. 53.
(2) 13 Ind. Cas. 597.

BUDHU KHAN *v.* HANUMAN PERSHAD.

ALLAHABAD HIGH COURT.

CIVIL REVISION APPLICATION No. 109 OF 1914.

January 8, 1915.

Present:—Justice Sir George Knox, KT.

BUDHU KHAN—DEFENDANT—APPLICANT

versus

HANUMAN PERSHAD—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s 115—Revision—Principal and agent—Objection as to right of agent, whether can be taken for first time in High Court—Procedure.

The objection, whether the plaintiff is or is not the agent of a particular person on whose behalf he has sued to recover money in the Court of Small Causes, cannot be taken for the first time in the High Court in revision.

Parvatibai v. *Venayak Pandurang*, 12 B. 68, followed.

Application for revision against a decision of the Small Cause Court Judge of Allahabad, dated the 7th May 1914.

Mr. *Nihal Chand*, for the Applicant.

Mr. *G. L. Agarwala*, for the Respondent.

JUDGMENT.—The applicant for revision in this case is one Budhu Khan, who describes himself as a broker at Allahabad. A suit was brought against Budhu Khan and one Gaya Din in the Court of Small Causes at Allahabad. In that suit one Hanuman Pershad apparently represented himself as an agent of His Highness the Maharaja of Darbhanga and got a decree against the applicant and Gaya Din. No objection appears to have been taken upon the point whether Hanuman Pershad was or was not an agent of the Maharaja. The point is, however, taken for the first time in this application for revision. I am not prepared to entertain it when raised for the first time at this stage. I prefer to follow the principles laid down in the case of *Parvatibai* v. *Vinayak Pandurang* (1).

A second point is raised in the application, *i.e.*, that in face of the lease executed by Gaya Din no decree should have been passed against the applicant who acted as a broker only. This point was considered by the Court of Small Causes and the Court came to the conclusion that Budhu was the lessee. though Gaya Din's name was put in the lease. The Court found that Budhu was not a broker but a lessee and was liable for the balance of the claim made.

(1) 12 B. 68.

ARUNACHELLAM CHETTY *v.* RAMAN CHETTY.

This being a Small Cause Court suit, I consider substantial justice has been done and I dismiss the application with costs.

Application dismissed.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 205 OF 1912.

November 12, 1914.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Spencer.

A. R. S. ARUNACHELLAM CHETTY—PLAINTIFF—APPELLANT

versus

RAMAN CHETTY AND ANOTHER—DEFENDANTS—RESPONDENTS.

Principal and agent—Misappropriation by agent—Termination of agency—Suit to recover money—Cause of action against agent and his legal representatives, whether same—Limitation Act (IX of 1908), Sch. I, Arts. 62, 89, 120.

A suit to recover money alleged to have been misappropriated by the defendants' father, acting as the plaintiff's agent, is barred by time if brought more than three years after the termination of the agency and also after the amount due was ascertained by arbitration.

Where the defendants are sued as the representatives of their deceased father, the cause of action against them is the same as against their father; and if the suit would be barred against him if he had lived, it is also barred against them.

Article 120, Schedule I, of the Limitation Act is not applicable to a suit brought against the representatives of a deceased agent, and while Article 89 applies to a suit against an agent for acts committed during the continuance of his agency, the Article applicable in respect of money payable by him after the termination of his agency would be Article 62.

Natesayyan v. *Ponnusami*, 16 M. 99; 3 M. L. J. 1, overruled.

Mallesam Naidu v. *Jugala Panda*, 23 M. 292; *Periasami Mudaliar* v. *Seetharama Chettiar*, 27 M. 243; 14 M. L. J. 84 (F B), followed.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Ramnad at Madura, in Original Suit No. 10 of 1911 (Original Suit No. 3 of 1910, on the file of the Court of the Subordinate Judge of Ramnad).

Mr. *S. T. Srinivasa Gopalachariar*, for the Appellant.

Mr. *T. V. Gopalaswamy Mudaliar*, for the Respondents.

JUDGMENT.

SANKARAN NAIR, J.—The suit is brought by the plaintiff to recover a certain sum of

money alleged to have been misappropriated by his agent Palaniappa, the defendants' father. The Judge dismissed his claim except with reference to a few items. The plaintiff appeals.

When the plaintiff's agents appointed to succeed Palaniappa inspected the accounts, it is said they found that he was liable to pay the plaintiff about Rs. 30,000 misappropriated by him. The dispute was referred to arbitration; and it was settled that Palaniappa should pay the plaintiff more than Rs 3,000. The suit, so far as this item of claim is concerned, is rightly held by the Subordinate Judge to be barred by limitation. It is brought more than three years after the termination of the agency and also after the amount due was ascertained by arbitration.

There is another item of claim. The plaintiff says that in January or February 1907, he dicovered that Palaniappa had been guilty of misconduct or fraud with reference to certain matters. The Subordinate Judge has held that these matters also were included in the reference to arbitration. The appellant's Counsel disputes before us the correctness of that finding and refers to an entry made in the accounts alleged to have been received from the defendants' father after the arbitration proceeding. The plaintiff knows what matters were referred to arbitration. No evidence is given on his side to show that these were not included in the reference. The probabilities are they were all included. I agree with the Judge in his finding.

It is then argued that, though the claim against the father may be barred, it is not barred against the sons. This argument proceeds on the basis that the cause of action against the sons is different. The decisions are against the appellant. The defendants are sued as the representatives of their deceased father and as the suit would be barred against him if he had lived, it is also barred against the defendants. The appeal is dismissed with costs.

SPENCER, J.—It is argued that the Subordinate Judge was wrong in holding that items 3 and 5 were covered by the award of arbitrators and that it dealt only with items 1 and 2.

It does not appear from the evidence of the plaintiff or the evidence of the two witnesses who state that they arbitrated in the matter, what were the items referred to arbitration. Assuming, however, that items 3 and 5 were not included in the reference to arbitration, the accounts, Exhibit B series, show clearly that none of the transactions were within three years of suit. The defendants' father died in April 1909 and the suit was brought on December 11th, 1909 against his minor sons. I am clearly of opinion that there would be no different cause of action against the sons from the cause of action against the father. The decision in *Natesayyan* v. *Ponnusami* (1), which was cited by the appellant's Counsel, has been overruled on this point by subsequent decisions in *Mallesam Naidu* v. *Jugala Panda* (2) and *Periasami Mudaliar* v. *Seetharama Chettiar* (3).

There is no reason why Article 120 of the Limitation Act should be applied to a suit brought against the representatives of a deceased agent, when the Article applicable to a suit against the agent for acts committed during the continuance of his agency would be Article 89 and limitation would run from the termination of his agency; and the Article applicable in respect of money payable by him after the termination of his agency would be Article 62. In either case the limitation period is only three years and, therefore, these claims are barred. I agree that the appeal should be dismissed with costs.

Appeal dismissed.

(1) 16 M. 99; 3 M. L. J. 1.
(2) 23 M. 292.
(3) 14 M. L. J. 84, 27 M. 248 (F. B.).

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 819 OF 1913.

January 5, 1915.

Present:—Mr. Justice Piggott.

RAMUJAGAR PANDE AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BHAGIRATHI AND OTHERS—DEFENDANTS—RESPONDENTS.

Res judicata—Incorrect specification in plaint—Decree accordingly—Acquiescence by plaintiff—Further suit on same cause of action, whether maintainable.

RAMUJAGAR PANDE v. BHAGIRATHI.

Where a litigant, who is fully aware of the facts which constituted his cause of action, mismanages his litigation and fails through his own mismanagement to obtain from the Courts the full reliefs to which he is entitled, neither he nor his transferees are entitled to maintain any further suit upon the same cause of action.

Therefore neither a reversioner to the estate of a deceased, who brought a suit to set aside a sale made by the widow of the deceased and wrongly described the extent of the property claimed by him and on a decree being passed acquiesced in that decree and also in its interpretation, nor the transferee of that property is entitled to maintain a further suit for the property.

Amanat Bibi v. *Imdad Husain*, 15 C. 800; 15 I. A. 106; 12 Ind. Jur. 255; 5 Sar P. C. J. 214; Rafique and Jackson's P. C. No. 103, *Venkata Viraraghavayyangar* v. *Krishnasami Ayyangar*, 6 M. 344; 7 Ind. Jur. 358, *Bhup Singh* v. *Gulab Rai*, A. W. N. (1886) 269, distinguished.

Second appeal from the decision of the District Judge of Benares, dated the 23rd April 1913.

Dr. *S. M. Suleman*, for the Appellants.

The Hon'ble Mr. *Gokul Prosad*, for the Respondents.

JUDGMENT.—The facts of this case must now be dealt with as determined by the findings returned by the lower Appellate Court on the issues remanded by me in my order of the 17th of June 1914. One *Musammat* Sheo Rani was in possession of a certain *zemindari* share with a Hindu widow's estate. On July 16th 1873, she executed a deed of sale transferring this share to the predecessor-in-title of the principal defendants-respondents. She died on the 10th of August 1905. The reversioner to the estate of Sheo Tahal, husband of *Musammat* Sheo Rani, was *Musammat* Gulabi Kunwar, who is impleaded in this suit as defendant No. 6. She brought a suit to recover possession of the property transferred by the deed of the 16th July 1873, by avoidance of the transfer, on the ground that the said transfer was valid only for the life-time of *Musammat* Sheo Rani, and she obtained a decree. It so happened, however, that in the sale-deed in question the share thereby transferred was described in a manner which was both ambiguous and inaccurate. *Musammat* Gulabi Kunwar in bringing her suit copied into her plaint the description of the property as she found it in the sale-deed, and the decree was framed accordingly. When she applied for possession under her decree the Court executing the decree put a certain interpretation on the terms of the decree, with the result that *Musammat* Gulabi Kunwar only obtained possession of a small fraction of the property which had been actually transferred by the sale-deed of July 16th, 1873. She has since executed a deed transferring to the present plaintiffs or their predecessors-in-title whatever rights she still possessed in the *zemindari* share, which had formerly belonged to Sheo Tahal. The present suit was filed on the 7th of January 1912. In the plaint as drafted, the position taken up was one which is clearly unsustainable in view of the findings which have now been returned by the lower Appellate Court. The plaintiffs alleged that what was transferred by the sale-deed of July 16th 1873 was, not the entire share which had belonged to Sheo Tahal and was then in possession of his widow, *Musammat* Sheo Rani, but only that small fraction of the said share in respect of which *Musammat* Gulabi Kunwar had obtained possession under her decree of June 12th, 1906. With regard to the rest of the share it was alleged that the principal defendants had obtained possession of the same, not under the sale-deed of July 16th, 1873, but by virtue of a distinct transaction which constituted them trustees on behalf of *Musammat* Sheo Rani for her life-time. That position has necessarily been abandoned in view of the findings already referred to. It is, however, contended that, upon a correct statement of facts, the present suit is maintainable and the plaintiffs are entitled to a decree. When *Musammat* Gulabi Kunwar brought the suit which resulted in the decree of June 12th, 1906, she undoubtedly intended to claim, and presumably did claim, whatever property passed to the principal defendants under the sale-deed of July 16th, 1873. By an oversight she wrongly described the extent of the property claimed by her in her plaint, and she has acquiesced in a decree under which she has obtained a small fraction only of the property to which she was entitled. It is contended for the appellants under these circumstances that, as transferees from *Musammat* Gulabi Kunwar, they are now entitled to claim upon the same cause of action, namely, the invalidity of the sale-deed of July 16th, 1873, to confer any title extending beyond

the life-time of the vendor Sheo Rani, the rest of the property which *Musammat* Gulabi Kunwar failed to obtain possession of under the decree of June 12th, 1906. This contention is supported by reference to various decided cases, of which the most important are *Amanat Bibi* v. *Imdad Husain* (1), *Venkata Viraraghavayyangar* v. *Krishnasami Ayyangar* (2); and *Bhup Singh* v. *Gulab Rai* (3). The general principles therein laid down are that a right which a litigant possesses without knowing or ever having known that he possesses it, can hardly be regarded as a portion of his claim, and that a litigant cannot be required to include in his suit the claim for a relief based upon facts of which he is in ignorance. I do not think these rulings cover the present case. *Musammat* Gulabi Kunwar knew that her father's share had been transferred by her mother under the sale-deed of July 16th, 1873, and that the vendees were in possession thereof under that deed. She got into trouble because she framed her suit without previously consulting the village-papers for a correct specification of this share, but copied down without question the specification given in the sale-deed, which subsequently was proved to be both ambiguous and inaccurate. She has acquiesced in the decree passed upon the incorrect specification given in her plaint, and in an interpretation of that decree which was seriously unfavourable to her. Her case is that of a litigant who, while fully aware of the facts which constituted her cause of action, has mismanaged her litigation and has failed through her own mismanagement to obtain from the Courts the full relief to which she was entitled. Neither she nor her transferees are, in my opinion, entitled now to maintain any further suit upon a cause of action which arisees from the sale of July 16th 1873, and accrued to them on the death of *Musammat* Sheo Rani on the 10th of August 1905. This appeal, therefore, fails and is dismissed with costs, including fees on the higher scale.

Appeal dismissed.

(1) 15 C. 500 at p. 506; 15 I. A. 106; 12 Ind. Jur. 255; 5 Sar. P. C. J. 214; Rafique and Jackson's P. C. No 103.

(2) 6 M. 344; 7 Ind. Jur 358.

(3) A. W. N. (1886) 209.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 879 OF 1912.

January 7, 1915.

Present:—Mr. Justice Holmwood and Mr. Justice Mullick.

CHUNI AHIR—PLAINTIFF—APPELLANT

versus

KHEM CHAND DUSADH AND OTHERS—DEFENDANTS—RESPONDENTS.

Rent-decree, when executed as money decree—Purchaser of right, title and interest of usufructuary mortgagee, position of—Right of re-entry—Second appeal—Party, whether entitled to make a new case

Where several different holdings are included in one rent decree, the decree can only be executed as a money decree and nothing but the right, title and interest, if any, of the judgment-debtor in the holdings can pass to a purchaser on sale of the holdings in execution of that decree.

Hridoy Nath Das Choudhury v. *Krishna Prosad Sircar* 34 C 298, 6 C. L. J. 153; 11 C. W. N. 497, and *Nanda Lal Mukherjee* v. *Sadhu Charan Khan*, 7 C L J. 96, followed.

Therefore, a purchaser of the right, title and interest of a mortgagee is not entitled to *khas* possession if before his suit for possession the mortgage is redeemed

A party is not entitled to make a new case in second appeal.

Appeal against the decree of the Second Sub-Judge at Arrah, dated the 13th January 1912, setting aside that of the Officiating Munsif, third Court, at Arrah, dated the 14th December 1910.

Babu *Chandra Sekhar Prasad Singh*, for the Appellant.

Mr. *J. W. Chippendale*, for the Respondents.

JUDGMENT.—This second appeal arises out of a suit for recovery of possession of 1 *bigha* 8 *cottahs* of land. The plaintiff's allegation was that the defendant No. 7 held 8 *bighas* 1½ *cottahs* of *kasht* land partly ancestral and partly by purchase in *Mouza* Shiritola, that the landlord brought a suit for rent of the various holdings which made up this 8 *bighas* and odd, specifying them in his plaint, and that he got a decree and that the various holdings were sold and specified in the sale-certificate which was given to the plaintiff-purchaser. It appears that the land in dispute, on the finding of the Subordinate Judge in appeal, formed part of the *guzashta* holding of the defendants Nos. 1 to 6. That holding consisted of 3 *bighas* and odd, of which 1 *bigha* 2 *cottahs* was admittedly sold to *Musammat* Manbarn and

has become apparently a separate holding in her hand, and 1 *bigha* 9 *cottahs* was given in usufructuary mortgage to defendant No. 7 in 1893. There remained, therefore, a considerable portion of defendants Nos. 1 to 6; original holding in their hands, and it cannot be said that the portion mortgaged to defendant No. 7 was anything more than a part of a holding. Moreover, several different holdings having been included in one rent-decree, on the authority of the cases of *Hridoy Nath Das Chowdhury v. Krishna Prosad Sircar* (1) and *Nanda Lal Mukherjee v. Sadhu Charan Khan* (2), the decree can only be executed as a money decree, and nothing but the right, title and interest of defendant No. 7, mortgagee, can have passed to the plaintiff.

The learned Subordinate Judge has held that the defendants redeemed the mortgage and are in possession of the land, and he, therefore, considers that the plaintiff is not entitled to *khas* possession, even if he be a *bona fide* purchaser about which he has strong doubts. We at one time thought that it might be necessary to remand the case to the lower Appellate Court for a more clear finding as to what he means by some reasons to suspect that there was collusion and that the defendant No. 7 had himself purchased the land in the name of the plaintiff. But in the view we take it is unnecessary to remand the case. The appeal must fail, on the simple ground that the plaintiff has purchased nothing more than the right title and interest of defendant No. 7 and that, that right, title and interest had at the time he brought this suit ceased to exist.

It is urged before us by the appellant that he is at least entitled to re-enter as usufructuary mortgagee, having purchased the right, title and interest of the former usufructuary mortgagee. But unfortunately for him he strenuously denied that there was any usufructuary mortgage at all, and we cannot, therefore, allow him to make this new case in second appeal.

The result is that the appeal is dismissed with costs.

Appeal dismissed.

(1) 34 C. 238; 6 C. L. J. 153, 11 C, W. N. 497.
(2) 7 C. L. J. 96.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 97 OF 1912.

December 16, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Napier.

MOOTHA AND OTHERS—DEFENDANTS—APPELLANTS

versus

KANDAM VITTIL SANKUNNI NAIR AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 182—Step-in-aid of execution—Application for execution of mortgage-decree wrongly returned as defective, not re-presented—Civil Procedure Code (Act XIV of 882), s. 238.

An application for execution of a mortgage-decree for sale, wrongly returned for want of a certificate under section 238 of the Civil Procedure Code, 1882, although not re-presented is a step-in-aid of execution within the meaning of Article 182 of Schedule I of the Limitation Act.

Appeal against the order of the District Court of South Malabar in Appeal Suit No. 216 of 1911, preferred against that of the Court of the District Munsif of Parapanangadi in Execution Petition No. 1673 of 1910 in Original Suit No. 529 of 1900.

Mr. *A. Sundaram*, for the Appellants.

Mr. *C. Madharan Nair*, for the Respondents.

JUDGMENT.—The question is whether Execution Petition No. 761 of 1905 was a step-in-aid of execution in accordance with law. It is urged by the appellants that it was not so, because it was returned for want of a certificate under section 238 of the Code of Civil Procedure then in force and was not re-presented. The decree under execution was, however, one for sale on a mortgage, and no attachment of the mortgaged property was necessary. Section 238 applies only to petitions for attachment. The Court was, therefore, wrong in returning the execution petition as defective. The petition not having been defective and the failure to present it again after its return being, therefore, immaterial, it must be held to have been a step-in-aid of execution in accordance with law.

The appeal is not pressed with reference to the application dated 6th February 1903.

The appeal against appellate order is, therefore, dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

CIVIL RULES Nos. 291 AND 324 TO 333 OF 1914.

December 8, 1914.

Present:—Mr. Justice Holmwood and Mr Justice Carnduff.

Mohant Gosain MADHVANAND RAM—PETITIONER

versus

MADHU MAHTO AND OTHERS—OBJECTORS—OPPOSITE PARTIES.

Bengal Tenancy (Act VIII of 1885), s. 140, scope of—Remedy against distraint—Ex parte order, Court's inherent power to review—Civil Procedure Code (Act V of 1908), s. 151—Inherent power, object of.

Section 140 of the Bengal Tenancy Act does not afford the only remedy against a distraint made erroneously or on insufficient materials.

The Court which passes an *ex parte* order has the power to review it, as the Court has an inherent power to deal with an application to set aside an order made *ex parte* and to set it aside on a proper case being substantiated.

Bibi Tasliman v. *Harihar Mahto*, 9 C. W. N. 81; 32 C. 253 (F. B.), referred to and followed

Section 151 of the new Code of Civil Procedure is intended to enlarge the discretion of Courts and to discourage technicalities.

Dr. *Sarat Chandra Bysack* and Babu *Harihar Prasad Singh*, for the Petitioner.

Babu *Kulwant Sahay*, for the Opposite Parties.

JUDGMENT.—This was a Rule calling on the opposite party to show cause why the order purporting to cancel the previous order of distraint should not be set aside, on the ground that it was passed without jurisdiction.

We are not prepared to hold that section 140 of the Bengal Tenancy Act affords the only remedy against a distraint made erroneously or on insufficient materials, nor that any Court which passed an *ex parte* order has not the power to review it. Were we to do so, we should have ourselves to revise the original order, as it was clearly made on an insufficient finding not complying with the provisions of section 121 of the Bengal Tenancy Act. But it was held by the Full Bench in the case of *Bibi Tasliman* v. *Harihar Mahto* (1) that the Court has an inherent power to deal with an application to set aside an order made *ex parte* and to set it aside on a proper case being substantiated. There is nothing either in the Bengal Tenancy Act or the Code of Civil Procedure which militates against this view. On the contrary section 151 of the new Code of Civil Procedure seems expressly to emphasize such a view.

The Rule is, therefore, discharged with costs. This order will govern the 11 cases before us and there will be a single hearing fee of two gold *mohurs*.

Rules discharged.

(1) 9 C. W. N. 81; 32 C. 253 (F. B.).

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 75 OF 1914.

December 9, 1914.

Present:—Mr. Justice Hannay.

CHAKRAVADHANULA SURYANARAYANA—PETITIONER

versus

CHAKRAVADHANULA VENKATA RATHAMMA AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 115, O. XXI, r. 66—Civil Rules of Practice (Madras), r. 189—Attachment of debt—Court, duty of, to inquire as to its existence—Receiver, appointment of, whether irregular—Jurisdiction.

Where an application for attachment of a debt is made the Court is not bound to satisfy itself as to the existence of the debt and if it appoints a Receiver in consonance with rule 189 of the Civil Rules of Practice (Madras), it does not fail to exercise a jurisdiction vested in it by law or act with material irregularity in the exercise of such jurisdiction within the meaning of section 115 of the Civil Procedure Code.

Seriah v. *Muthanachary*, 10 M. 194 and *Harilal Anthabhai* v. *Abhesang Meru*, 4 B. 323, distinguished.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsif of Narasapur, in Execution Petition No. 389 of 1913, in Small Cause Suit No. 10891 of 1911 on the file of the Court of the Small Causes, Madras.

Mr. *P. Narayanamurthi*, for Mr. *G. Venkataramiah*, for the Petitioner.

Mr. *P. Somasundaram*, for the Respondents.

JUDGMENT.—The point urged before me is that the District Munsif ought to have inquired into and decided the plea of discharge set up by the garnishee and that by not doing so, the Court either failed to exercise a jurisdiction vested in it or acted with material irregularity in the exercise of that jurisdiction. The argument was that until the Court is satisfied that there is an existing debt, it cannot proceed

to pass orders for the appointment of a Receiver or for sale of the debt under rule 189 of the Civil Rules of Practice. The decision in *Seriah* v. *Muckanachary* (1) is relied upon in support of the contention that an inquiry should be held. In that case it is observed that under section 287 (*e*), corresponding to Order XXI, rule 66, clause 4, of the present Code, the Court has power to summon any person it thinks necessary in order to ascertain the nature and value of the property and that "if there is notice or reasonable cause to suppose that there is no debt due, the Court not only can, but ought to satisfy itself on the point." The reference to section 287 shows that the observation only applies to a case where sale is ordered, and it is evident from the citation of the case *Harilal Amthabhai* v. *Abhesang Meru* (2) and *Seriah* v. *Muckanachary* (1) that it was in the interests of the auction, purchaser that inquiry was considered necessary. It seems to me, therefore, that the case of *Siriah* v. *Muckanachary* (1) is hardly in point here. Assuming, however, that the principle would apply, there is no rule or provision of law which prescribes the course to be adopted by the Court in circumstances such as the present, in order to satisfy itself as to the existence of the debt. Then, although the garnishee puts forward a document (Exhibit I) as evidence of the discharge set up by him, the decree-holder himself contended that Exhibit I evidenced a sham transaction intended to defraud creditors. The lower Court in paragraph 4 of its order makes some observations which tend to show that it was inclined to accept that contention, and though it has not recorded a specific finding on the point, I take it that it was not satisfied that the plea of discharge was true. In these circumstances, I am unable to hold that the lower Court has failed to exercise a jurisdiction vested in it by law or has acted with material irregularity in the exercise of such jurisdiction. In the circumstances of the case, the lower Court appears to have acted in consonance with rule 189 of the Civil Rules of Practice by appointing a Receiver instead of ordering sale. The petition is dismissed with costs.

Petition dismissed.

(1) 10 M. 194
(2) 4 B. 323.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2499 OF 1911.

March 24, 1911.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

KARTIK CHANDRA SARKAR—DEFENDANT—APPELLANT

versus

HARA GOBIND GHOSE—PLAINTIFF—RESPONDENT.

Mortgage, conditional sale—Foreclosure suit—Decree nisi—Time from when begins—Six months allowed for redemption—Decree absolute—Decree-holder put in possession—Restitution—Transfer of Property Act (IV of 1882), s. 86—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 2—Judicial orders, construction of.

A decree *nisi* in a foreclosure suit on the basis of a conditional mortgage may either direct an account to be taken of what will be due to the plaintiff or declare the amount due. Where the Court orders that an account be taken of what would be due to the plaintiff, the day to be fixed by the Court under section 86 of the Transfer of Property Act (IV of 1882) rule 2, Order XXXIV, of the Code of Civil Procedure (Act V of 1908) is to be within six months not from the date of the order *nisi*, but from the date of declaring in Court the amount due.

In construing judicial orders, wherever practicable, they should be so interpreted as to be consistent with and not in contravention of law.

Brojo Lal Roy v. *Tara Prasanno*, 3 C. L. J. 188, referred to.

Where a decree-holder has obtained possession of the mortgaged property through Court on the basis of the decree absolute which was erroneously made, he is bound to make restitution to the mortgagor.

Parkinson v. *Hanbury*, (1867) L. R. 2 H. L. 1; 36 L. J. Ch. 292; 16 L. T. 248; 15 W. R. 642, followed.

Second appeal from a decision of the District Judge of Khulna, dated the 3rd February 1911, affirming that of the Sub-Judge of that place, dated the 25th May 1909.

Babus *Sarat Chunder Roy Chowdhury* and *Dhirendra Krishna Ray* (for Babu *Gobinda Chandra Chakravarti*), for the Appellant.

Babus *Mohendra Nath Roy* and *Haripada Chatterjee*, for the Respondent.

JUDGMENT.—The substantial question in controversy in this appeal relates to the validity of a decree absolute made in a foreclosure suit on the basis of a conditional mortgage. The suit was commenced on the 14th November 1904. The judgment was delivered on the 21st September 1908, by which it was directed that an account be taken of what would be due to the plaintiff for principal and interest on the mortgage and for costs of the suit and interest at six per cent. per annum from the date up to the date of payment, and the defendants were directed

to pay the amount to the plaintiff within six months from the date of the decree. The accounts were subsequently taken, and so far as we can gather, on the 22nd January 1909 the decree was signed and a statement was inserted therein to the effect that Rs. 2,859-14-8 was due from the defendants to the plaintiff. This decree was made absolute on the 25th May 1909. Subsequently the decree-holder obtained delivery of possession of the mortgaged property through Court. The defendant contends that the decree absolute could not have been passed till after the 22nd July 1909, inasmuch as he was entitled to redeem within six months from the date of the decree. In reply, the mortgagee, decree-holder, argues that the period of six months should be deemed to run from the 23rd September 1908 and that consequently the right of redemption expired on the 23rd March 1909. The Courts below have overruled the contention of the judgment-debtor. In our opinion the view taken by the District Judge cannot be supported.

Section 86 of the Transfer of Property Act, which is applicable to this case and which has been substantially reproduced in rule 2 of Order XXXIV of the Code of 1908 is in these terms: "In a suit for foreclosure, if the plaintiff succeeds, the Court shall make a decree, ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage, and for his costs of the suit (if any) awarded to him on the day next hereinafter referred to, or declaring the amount so due at the date of such decree, and ordering that, upon the defendant paying to the plaintiff or into Court the amount so due, on a day within six months from the date of declaring in Court the amount so due, to be fixed by the Court, the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall transfer the property to the defendant free from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims, and shall, if necessary, put the defendant into possession of the property; but that if the payment is not made on or before the date to be fixed by the Court, the defendant shall be absolutely debarred of all right to redeem the property."

It is plain that the decree *nisi* may either direct an account to be taken or declare the amount due. No difficulty arises when the Court is in a position to embody in its decision the amount due. But where, as here, the Court orders that an account be taken of what would be due to the plaintiff on the day referred to, subsequently a question of some nicety arises as to the mode in which the rights of the parties are to be worked out. It will be observed that the day to be fixed by the Court is to be within six months from, not the date of the order *nisi*, but from the date of declaring in Court the amount due. Consequently, when the accounts are directed, they must be kept open till the very last moment; that is, up till the moment when the Court determines the final date for payment and simultaneously declares with reference thereto the amount payable. In the case before us, this provision was overlooked, and the Subordinate Judge did not declare in Court the amount due before the 22nd January 1909, when the amount was entered in the decree drawn up on that date. From his judgment, it is perfectly plain that he intended to allow the defendant six months' time to redeem. This six months, under section 86, must run, not from the 23rd September 1908 when the judgment was delivered, but from the 22nd January 1909 when the amount due was declared in Court. We observe that the Subordinate Judge in his judgment directs the defendant to pay the amount due within six months from the date of the decree. The expression "date of decree" has, no doubt, a technical meaning, as under rule 7 of Order XX of the Code of Civil Procedure, the decree shall bear date the day on which the judgment was pronounced. But it is plain that the Subordinate Judge intended by the expression 'date of the decree' the date when the decree was actually drawn up and signed by him, embodying a declaration of the amount due. To attribute any other meaning to the judgment would be to hold that the Subordinate Judge acted in contravention of the clear provisions of section 86 of the Transfer of Property Act. It is an elementary rule for construction of judicial orders that wherever practicable, they should be so interpreted as to be consistent with, and not in contravention of, law: *Brojo Lal Bai* v.

KHAGARAM DAS v. RAM SANKAR DAS.

Tara Prasanna (1). In this view, the decree *nisi* could not have been made absolute before the expiry of six months from the 22nd January 1909, and the order of the 25th May 1909 must be deemed premature.

The question next arises, what is the most equitable method whereby rights and obligations of the parties may be worked out in view of the fact that the decree-holder has already obtained delivery of possession of the mortgaged property through the Court on the basis of the decree absolute, which, we have found, was erroneously made, and must consequently be discharged? The judgment-debtors cannot rightly be called upon to pay the whole of the redemption money and be left to pursue a separate remedy for restitution against the mortgagee. In the events which have happened the foundation for the delivery of possession to the mortgagee disappears, and the mortgagee must now be deemed to have been improperly in possession of the premises. He is consequently bound to make restitution to the mortgagor on the principle explained by the House of Lords in *Parkinson* v. *Hanbury* (2). See also *Anandrav* v. *Ravji* (3), *Ramji* v. *Chinto* (4); *Ramshet* v. *Pandhari* (5).

We direct accordingly that this appeal be allowed, that the decree of the District Judge as also the decree absolute made by the Subordinate Judge on the 25th May 1909 be discharged, and that the case be remitted to him with instructions to carry out the directions embodied in this judgment. The Subordinate Judge will, in the *first* place, determine the amount realised by the mortgagee from the property in his possession. This sum will carry interest at 6 per cent. per annum from the end of each year. The Subordinate Judge will, in the *second* place, determine the amount due from the mortgagor to the mortgagee on the footing that Rs. 2,859-14-8 was due to him on the 23rd March 1909, and will allow interest on such sum from that date at 6 per cent. per annum. The difference between the two sums thus determined will be declared payable by the defendant to the plaintiff and the defendant will be called upon to pay such sum in Court to the credit of the mortgagee within one month from the date on which the amount found due is notified to him. If the amount is paid within the period fixed, the defendant will be declared owner of the property and will be restored to possession thereof, unless the mortgagee has previously surrendered possession in his favour, as he has expressed a desire to do in this Court. If the amount is not so deposited, and if no ground is established for an order for extension of time in terms of the proviso to sub-rule (2) of rule 3 of Order XXXIV of the Code, the decree absolute will be passed. When such decree is passed, the right of redemption will be deemed to have been extinguished. We may add that if the mortgagee decides to surrender possession of the property at once to the mortgagor, steps for re-delivery of possession must be taken through the Court, so that no question may hereafter arise as to the reality of the change in possession, if any. There will be no order for costs at any stage of these proceedings.

Appeal allowed.

(1) 8 C. L. J. 188.
(2) (1867) L. R 2 H L. 1; 36 L. J. Ch. 202; 16 L. T. 243; 15 W. R. 642.
(3) 2 B H C. R. 214.
(4) 1 B. H C R 199
(5) 8 B. H. C. R. 236.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 396 OF 1910.

June 15, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

KHAGARAM DAS AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

RAM SANKAR DAS PRAMANIK AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), ss. 16, 74—Interest, penal—Court, power of, to grant relief—Penal stipulation as to interest, test of—Unconscionable or extravagant bargain, how determined—Stipulation for accelerating payment, when penal—Domination of Will—Undue influence.

A Court is competent to grant relief whenever the rate of interest appears to the Court to be penal.

Section 74 of the Contract Act as amended in 1899 is comprehensive enough to cover all cases where the contract contains "any stipulation by way of penalty."

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The test to determine whether a contract contains a stipulation by way of penalty is, was the agreement to pay the damage for the breach of covenant or contract unconscionable and extravagant, such as no Court ought to allow to be entered into. In order to determine what is unconscionable and extravagant no hard and fast rule can be laid down, the particular facts and circumstances of each case should be considered.

A stipulation merely accelerating payment of the whole debt on default of payment of one or more instalments is not, by itself, by way of penalty. But the position is very different where the entire sum, which the creditor had agreed to receive in instalments without interest, is not only made repayable in one sum, but is also made to carry interest at an unusual rate. The Court may, in view of all the circumstances of the case, regard the stipulation for the payment of interest at an exorbitant rate, as a penalty.

Where the stipulation was made that upon default of payment of one or two instalments not only would the whole balance due become forthwith payable, but would carry interest at the rate of 75 per cent. per annum:

Held, that the covenant for payment of interest at this rate was a penalty.

The urgent need of money on the part of the borrower does not of itself place the lender in a position to dominate his will within the meaning of section 16 of the Contract Act But where the creditors are in a position to take advantage of the embarrassment of their debtors the bargain is unconscionable.

Appeal against the decree of the Sub-Judge of Rungpore, dated 12th May 1912.

Babus *Joges Chander Roy*, *Abinas Chunder Guha* and *Hem Chunder Sen*, for the Appellants.

Babu *Brojendra Nath Chatterjee*, for the Respondents.

JUDGMENT.

MOOKERJEE, J.—This is an appeal by the plaintiffs to enforce a mortgage security executed in their favour on the 9th June 1904. The history of the transactions between the parties prior to the mortgage may be briefly narrated. On the 24th July 1895, the plaintiffs advanced to the defendants a sum of Rs. 375 to carry interest at 24 per cent. per annum. On the 25th January 1899, the defendants gave the plaintiffs a bond for Rs. 600 in renewal of the promissory note of the 24th July 1895. The bond carried interest at the rate of 75 per cent, per annum. In 1901, the plaintiffs sued to recover their money. The Court held that the plaintiffs should not be allowed interest at 75 per cent. per annum and made a decree for the amount named in the bond with interest at 24 per cent. per annum. The amount decreed was Rs. 1,060 and this carried interest at 6 per cent. per annum till realisation. On the 8th June 1903, the plaintiffs advanced to the defendants a sum of Rs. 300 on a promissory note which carried interest at one pice per rupee per day, that is, at the rate of 570 per cent. per annum. On the 9th June 1904, accounts were taken between the parties, and it was found that Rs 1,230 was due on the decree and Rs. 2,010 on the promissory-note. The creditors, however, agreed to receive Rs. 100 in cash and an instalment mortgage bond for Rs. 1,500. The mortgage instrument provided for the payment of this sum of Rs. 1,500 in ten instalments spread over five years, with the condition that if default was made in the payment of one or two instalments, the creditors would be at liberty to realise the whole sum due together with interest thereon at 75 per cent. per annum from the date of default. Ample security was given for the sum named and the plaintiffs accepted the instalment bond. They then commenced this action on the 5th July 1909 on the allegation that only Rs. 200 had been paid by the debtors, that default had been made in the payment of one instalment and that they had become entitled to realise the entire sum secured less the amount paid, with interest thereon at 75 per cent. per annum from the date of default. The claim was for Rs. 1,300 as principal money and Rs. 3,949-14 as interest thereon from 15th June 1905 to the date of the institution of the suit. The substantial defence was that the claim for interest was not enforceable. The Subordinate Judge has accepted this view, and has made a decree for Rs. 1,300 with interest thereon at 24 per cent. per annum from 15th June 1905 till the date of realisation. The plaintiffs have appealed to this Court and have contended that interest should have been decreed at 75 per cent. per annum. On behalf of the appellants reference has been made to the cases of *Sunder Koer* v. *Sham Krishen* (1), *Miajan* v. *Abdul Jubbar* (2),

(1) 34 C. 150; 5 C. L. J. 106; 54 I. A. 9; 4 A. L. J. 109; 11 C. W. N. 249; 17 M. L. J. 43 9 Bom L. R. 304; 2 M. L. T. 75 (P. C.).

(2) 10 C. W. N. 1020.

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Kirti Chunder v. *Atkinson* (3); *Umesh Chandra* v. *Golap Lal* (4); *Mackintosh* v. *Crow* (5); *Prayag* v. *Shyam Lal* (6); *Arjan Bibi* v. *Asgar Ali* (7); *Sankaranarayana Vadyar* v. *Sankaranarayana Ayyar*(8); *Poma Dongra* v. *Gillespie*(9); *Bank of Bengal* v. *Vyabhoy* (10); *Juji Kamti* v. *Annai Bhatta*(11); *Ganesh* v. *Vishnu* (12); *Meghraj* v. *Ganga Bakhsh*(13). On behalf of the respondents a two-fold argument has been advanced, *viz*, *first*, that the stipulation for payment of interest on default at 75 per cent. per annum was by way of penalty and, *secondly* that, as the circumstances of the case show, the creditors were in a position to dominate the will of the debtors, the stipulation for payment of interest at an exorbitant rate was not enforceable. In support of these positions, reference has been made to the cases of *Maneshar Bakhsh Singh* v. *Shadi Lal* (14); *Baldeo Singh* v. *Bulaki Das* (15); *Dhanipal Das* v. *Maneshar Bakhsh Singh* (16); *Velchand* v. *Lieut. A. Flagg* (17); *Public Works Commissioner* v. *Hills* (18). We are of opinion that the contention of the defendants must prevail.

The *first* contention of the respondents is that the stipulation for the payment of interest at an exorbitant rate upon the entire amount secured by the mortgage in the event of default of payment of one or two instalments was in the nature of a penalty. Before we examine this argument in the light of judicial decisions, it is desirable to point out that in the solution of this question, no real assistance can be derived from the class of cases in which there is a stipulation for payment of interest at an advanced rate on default of payment of principal or interest on the due date or the other class of cases in which on default of payment of principal or interest, stipulation is made for payment of compound interest at the same rate as the simple interest originally agreed to be paid or at a higher rate. The case before us falls within the class where there is a stipulation for payment of interest at a specified rate, if the principal or a part thereof is not paid on the due date. One of the earliest examples of this class of cases is the decision in *Motaji* v. *Sheikh Husen* (19), where a promissory-note, after stipulating for the re-payment of the sum due by monthly instalments without interest, provided that on default of payment of any one instalment, interest would be payable at the rate of 75 per cent. per annum. It was ruled that the stipulation for interest was in the nature of a penalty. This view was followed in *Para* v. *Govind* (20), where a promissory-note provided for re-payment of the sum due without interest within three months from the date thereof, and for interest at 75 per cent. per annum in the event of default in punctual payment; it was ruled that the rate of interest was a penalty. The Court overruled the contention that the creditor was entitled to enforce the contract strictly under Act XXVIII of 1855, which abolished all usury laws. Section 2 of the Act provides that in any suit in which interest is recoverable, the amount shall be adjudged or decreed by the Court at the rate, if any, agreed upon by the parties, and if no rate shall have been agreed upon, at such a rate as the Court shall deem reasonable. The Court held that the Statute did not destroy the equitable jurisdiction of the Courts to relieve against a penalty. A similar view was taken in *Bansidhar* v. *Bu Ali Khan* (21). There the defendant agreed to re-pay to the plaintiff a loan of Rs. 50 on a certain date, and, in default, to pay interest at Re. 1 per day, that

(3) 10 C. W. N. 640.
(4) 31 C. 233, 7 C. W. N. 876.
(5) 9 C. 689, 13 C. L. R. 102.
(6) 31 C. 138.
(7) 13 C. 200.
(8) 25 M. 343; 11 M. L. J. 421.
(9) 31 B. 348; 9 Bom. L. R. 143.
(10) 16 B. 618.
(11) 17 M. 382.
(12) 32 B. 37; 9 Bom. L. R. 1164.
(13) 7 Ind. Cas. 296, 7 A. L. J. 729.
(14) 3 Ind. Cas. 385; 10 C. L. J. 76; 31 A. 386; 6 A. L. J. 707; 11 Bom. L. R. 864; 13 C. W. N. 1069; 6 M. L. T. 71; 12 C. C. 300, 19 M. L. J. 438 (P. C.).
(15) 6 Ind. Cas. 203; 7 A. L. J. 591.
(16) 33 I. A. 118; 4 C. L. J. 1; 1 M. L. T. 205; 3 A. L. J. 495; 9 C. C. 188; 8 Bom. L. R. 491; 10 C. W. N. 849; 16 M. L. J. 292; 28 A. 570 (P. C.).
(17) 13 Ind. Cas. 853; 36 B. 164; 14 Bom. L. R. 18.
(18) (1906) A. C. 368; 75 L. J. P. C. 69; 94 L. T. 33; 22 T. L. R. 589.
(19) 6 B. H. C. R. 8.
(20) 10 B. H. C. R. 382.
(21) 3 A. 260.

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is at the rate of 730 per cent. per annum. It was held that, looking at the entire instrument, the amount of interest appeared to be in the nature of a penalty, because "one rupee per diem for failure to pay Rs. 50 is, as interest, an extortionate amount, for which no adequate consideration is shown and which no man would contract absolutely to pay." The contention that the Court was fettered by Act XXVIII of 1855 was overruled, and it was said that if any other view were taken, there would be no limit to the extravagant and extortionate extent to which the most usurious claims might not be carried in the name of "interest." This decision accords with that in *Chuhar Mal* v. *Mir* (22), where interest payable on default at the rate of 37½ per cent was held penal. In *Kunjbehari Lal* v. *Ilahi Bakhsh* (23) and *Maya Ram* v. *Naubat* (24), where the interest stipulated to be paid on default of payment without interest on a specified date was 24 per cent, it was held to be not penal; the rate, it was said, was not so exorbitant as to justify reduction by the Court. The principle recognised in these cases lies at the root of the decision in *Vythilinga* v. *Ravana Sundarappa* (25), where the defendant had agreed to re-pay a loan of Rs. 10 within 15 days, and, on default, to pay interest at the rate of one anna per rupee per diem, that is, at the rate of 2,250 per cent. per annum. It was ruled that the stipulation for interest was penal, though the Court was not agreed upon the question whether section 74 of the Indian Contract Act covered the case. The uniformity of the current of decisions we have analysed, was arrested by the case of *Arjan Bibi* v. *Asgar Ali* (7), where the bond provided for the re-payment of the loan within a certain period, and, on default, for interest at 150 per cent. per annum from the date of the bond. The Court held that the stipulation for payment of interest was enforceable, as the case fell within section 2 of Act XXVIII of 1855 and was not covered by section 74 of the Indian Contract Act (as it then stood), inasmuch as the bond mentioned only one rate of interest and did not provide for the payment of two rates of interest. This view was adopted in *Gokal Chand* v. *Khwaja Ali Shah* (26), though the opposite position was immediately afterwards accepted in *Kanhaya Lal* v. *Narain Das* (27). In *Sankaranarayana Vadyar* v. *Sankaranarayana Ayyar* (8), the bond provided for re-payment of the sum due in twevle instalments, with the stipulation that in the event of default, the debtor should become liable to pay the whole amount of the loan with interest at the rate of 180 per cent. per annum. The Court held that the rate could not be said to be exorbitant, "having regard to the relations between the parties and the circumstances in which the defendant undertook the obligation which he failed to fulfil." To the same effect is the decision in *Chinna Venkatasami* v. *Pedda Kondiah* (28) (where, however, the rate of interest was only 12 per cent. per annum) as also in *Periasami* v. *Subramanian Asari* (29). Notwithstanding the small group of cases to which we have referred, where a restriced view was taken of the authority of the Court to relieve against a penalty, the tide has turned back, and the more modern cases repudiate the doctrine that any rate of interest, however exorbitant, cannot be deemed penal. Thus in *Miajan* v. *Abdul Jubbar* (2), where there was a stipulation for the payment of interest at the rate of 75 per cent. per annum from the date of the bond on failure to pay the principal sum in two instalments on specified dates, the Court held that the stipulation was in the nature of a penalty and declined to follow *Arjan Bibi* v. *Asgar Ali* (7), *Sankaranarayana Vadyar* v. *Sankaranarayana Ayyar* (8), as authorities for any inflexible rule of law. This view was adopted in *Velchand* v. *Lieut. A. Flagg* where 60 per cent interest on an account originally made up very largely of interest at an exorbitant rate was treated as penalty. It is obvious that each case must be treated on its own circumstances; thus, while in *Annamalai* v. *Sellappa* (30), interest at 36 per cent. was held not penal, in *Ganapathi* v. *Sundara Thevan* (31), compound interest at Rs. 300 per cent on

(22) 2 A. 715.
(23) 6 A. 64.
(24) A. W. N. (1885) 62.
(25) 6 M. 167.
(26) 32 P. R. 1890.
(27) 99 P. R. 1894.
(28) 26 M. 445.
(29) 14 M. L. J. 136.
(30) 12 Ind. Cas. 78; 10 M. L. T. 77; (1911) 2 M. W. N. 367.
(31) 14 Ind Cas 511; 22 M. L. J. 354.

default of payment on due date was deemed a penalty [See also *Salem Town Bank Ld.* v. *Vencatachariar* (32); *Sampat* v. *Chango* (33)]. We adopt the principle, consequently, as fairly deducible from the more modern decisions that the Court is competent to grant relief whenever the rate of interest appears to the Court to be penal. This view has now been adopted by a Full Bench of the Madras High Court in *Avathani Muthukrishnier* v. *Sankaralingam Pillai* (34). It is not of much moment to consider whether the Court can grant such relief in the exercise of its equitable jurisdiction or under section 74 of the Indian Contract Act as amended in 1899. It is sufficient to observe that although the section was originally framed to deal with the doctrine of penalty and liquidated damages as understood in the Law of England, it is in its present form comprehensive enough to include the type of cases now before us, because it covers all cases where the contract contains "*any stipulation by way of penalty.*" The question consequently reduces in any concrete case to this: Does the contract contain a stipulation by way of penalty? In the solution of this question, the observations of Lord Mersey in *Webster* v. *Bosanquet* (35) may be usefully borne in mind. The test is, was the agreement to pay the damage for the breach of covenant or contract unconscionable and extravagant, such as no Court ought to allow to be entered into? No hard and fast rule can, however, be laid down as to what may or may not be unconscionable or extravagant to insist upon in the circumstances of the particular case. As Lord Halsbury said in *Clydebank Engineering and Shipbuilding Company* v. *Yzquierdo Castaneda* (36), it is impossible to lay down any abstract rule as to what it may or may not be extravagant or unconscionable to insist upon, without reference to the particular facts and circumstances which are established in the individual case. In the same case, Lord Davey added: "You are to consider whether it is extravagant, exorbitant or unconscionable at the time when the stipulation is made—that is to say, in regard to any possible amount of damages which may be conceived to have been within the contemplation of the parties when they made the contract." It need not be disputed that a stipulation merely accelerating payment of the whole debt on default of payment of one or more instalments is not, by itself, by way of penalty: *Burden, Ex parte, Neil, In re* (37); *Sterne* v. *Beck* (38); *Wallingford* v. *Mutual Society* 39); Illustration (*f*) to section 74 of the Indian Contract Act. But the position is very different, where the entire sum, which the creditor had agreed to receive in instalments without interest, is not only made repayable in one sum, but is also made to carry interest at an unusual rate. The Court may, in view of all the circumstances of the case, regard the stipulation for payment of interest at an exorbitant rate as a penalty. In the case before us, the history of the previous transactions between the parties shows that a very considerable portion of the sum (Rs. 1,500) secured by the mortgage was interest on the original sums advanced by way of loan. The decree, which had been obtained by the creditors, carried interest at 6 per cent. per annum, while the promissory-note carried interest at such an exorbitant rate (Rs. 570 per cent. per annum) that no Court could possibly enforce payment thereof. When the creditors received payment of Rs. 100 in cash and agreed to receive the balance (Rs. 1,500) in instalments without further interest and spread over five years, the transaction was by no means too favourable to the debtors, who were made to furnish ample security.

In these circumstances, when the stipulation was made that upon default of payment of one or two instalments, not only would the whole balance due become forthwith payable, but would carry interest at the rate of 75 per cent per annum, we may properly hold that the covenant for payment of interest

(32) 9 Ind. Cas. 197; (1911) 1 M. W. N. 134; 9 M. L. T. 368.
(33) 10 Ind. Cas. 738, 7 N. L. R. 46.
(34) 18 Ind. Cas 417; 36 M. 229; 18 M L. T. 20, 24 M. L J. 135.
(35) (1912) A. C. 394; 81 L. J. P. C. 205; 106 L. T. 357; 28 T. L R. 271.
(36) (1905) A. C. 6; 74 L. J. P C. 1; 21 T. L. R. 58.
(37) (1881) 16 Ch. D. 675; 44 L. T 525; 29 W. R. 879.
(38) (1863) 1 De. G. J. & S. 595, 8 L. T 858, 2 N. R. 346; 11 W. R. 791; 32 L. J. Ch. 682.
(39) (1880) 5 A. C. 685 50 L. J. Q. B. 49; 43 L. T. 258; 29 W. R. 81.

at this rate was a penalty, that is, it does not represent the damages which the creditors were likely to suffer by reason of the default of the debtors, but was rather intended as an effective means to secure punctual performance of the contract. In our opinion, the Subordinate Judge very properly declined to allow the plaintiffs interest at 75 per cent. per annum.

The *second* contention of the respondents is that the Court should decline to enforce the covenant for payment of interest at 75 per cent. per annum in view of the provisions of section 16 of the Indian Contract Act as amended in 1899. There is considerable force in this contention, as the case is of the type mentioned in illustration (*c*) of section 16. We need not dwell at length, however, on this aspect of the case ; it is sufficient to point out that when the mortgage was executed for Rs. 1,500, the debtors were in a position of extreme embarrassment. The creditors held a decree which they could execute any moment and sell up their properties, and the case for the defendants is that they threatened to do so. At the same time the creditors held a promissory-note which carried interest at the ruinous rate of 570 per cent. per annum. There can be no question that the creditors were in a position to dominate the will of their debtors, within the meaning of section 16, and although the latter furnished ample security, the creditors made the best bargain they could ; they obtained a covenant for interest at 75 per cent., that is, interest at the very rate which had been disallowed by the Court in 1901, even when they were in the position of unsecured creditors. It need not be disputed, as has been repeatedly laid down, that urgent need of money on the part of the borrower does not, of itself, place the lender in a position to dominate his will within the meaning of section 16 : *Sundar Koer* v. *Sham Krishen* (1) ; *Ganesh* v. *Vishnu* (12) ; *Umesh Chandra* v. *Golap Lal* (4); *Chatring Moolchand & Co.* v. *Whitchurch* (40); *Debi Sahai* v. *Ganga Saha* (41); *Meghraj* v. *Ganga Baksh* (13); *Meghraj* v. *Hargayan* (42); *Sri Chand* v. *Niadar Singh* (43).

(40) 32 B 206; 9 Bom. L. R. 1296.
(41) 6 Ind. Cas. 572, 32 A 589; 7 A. L. J. 745.
(42) 7 Ind. Cas. 261; 7 A. L. J. 655; 32 A. 590 *note*.
(43) 10 Ind. Cas. 14, 8 A. L. J. 407.

But, in the case before us, it is not necessary for the debtors to rely upon this doctrine ; here the facts make it clear that the creditors were in a position to take advantage of the embarrassment of their debtors and the bargain they made was unconscionable ; consequently, there is a concurrence of the two elements which must combine to attract the operation of section 16: *Davis* v. *Maung Shwe Go* (44), *Subba Chariar* v. *Muthuveeram Pillai* (45).

We desire to add, however, that the decree of the Subordinate Judge is erroneous, and if there had been a cross-appeal by the defendants, we would have varied it. The Subordinate Judge has allowed interest at 24 per cent. per annum till realisation. This is clearly wrong. Interest at such rate should have been allowed only up to the date fixed for re-payment and redemption by the decree, and interest thereafter should have been allowed only at 6 per cent. per annum. We are also of opinion that the rate of 24 per cent. allowed by the Subordinate Judge is too high; in view of the fact that the sum secured by the mortgage was composed largely of interest at a high rate on the original loan and that the debtors had furnished ample security, the justice of the case would have been met if interest had been allowed at 12 per cent. Finally, the Subordinate Judge has allowed the plaintiffs full costs of the suit (inclusive of the Court-fees and hearing fee), though he has decreed the claim for less than half the amount; in ordinary course, each party should have been allowed costs to the extent of his success ; at any rate, the plaintiffs should not have got costs on the amount not decreed in their favour. It is thus plain that the appellants have no reason whatever to complain of the decree of the Subordinate Judge which is really too favourable to them.

The result is that this appeal fails and is dismissed with costs. We assess the hearing fee at thirty gold *mohurs*.

BEACHCROFT, J.—I agree on the ground that the provision for interest at 75 per cent. was a stipulation by way of penalty.

Appeal dismissed.

(44) 11 Ind. Cas. 801, 38 I. A. 155; 38 C. 805; 14 C. L. J. 250, 15 C. W. N. 934, 13 Bom. L. R. 704; 8 A. L. J. 1193; 10 M. L. T. 455; (1911) 2 M. W. N. 79; 21 M. L. J. 1127 (P. C.); 4 Bur. L. T. 229.
(45) 14 Ind. Cas. 264; 36 M. 553; 24 M. L. J. 545.

SUKHIA BEWA *v.* SECRETARY OF STATE.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 287 OF 1913.

December 11, 1914.

Present:—Mr. Justice D. Chatterjee and Mr. Justice Mullick.

SUKHIA BEWA—OPPOSITE PARTY—APPELLANT

versus

SECRETARY OF STATE FOR INDIA IN COUNCIL—APPLICANT—RESPONDENT.

Succession Certificate Act (VII of 1889), ss. 18, 26—Succession certificate, revocation of—Jurisdiction—Succession certificate granted by Subordinate Judge—District Judge, whether can revoke—Regulation V of 1799—Intestate—Succession—District Judge, power of.

Ordinarily the revocation of a succession certificate must be made by the Court which granted it, if it still exercises jurisdiction in that district.

Therefore, a certificate granted by a Subordinate Judge invested with the powers of a District Court in certificate cases under section 26 of the Succession Certificate Act cannot be revoked by a District Judge if the former is still exercising jurisdiction.

The jurisdiction of a District Judge under Regulation V of 1799 is of a limited character and is more administrative than judicial. He can act thereunder only if there is no claimant

Therefore, a District Judge has no jurisdiction in an intestate case to ignore the claim of one who has obtained a certificate, until it is revoked by a competent Court.

Appeal against an order of the District Judge of 24-Parganas, dated the 26th May 1913.

Babu *Harendra Kumar Sarbadhicary*, for the Appellant.

Babu *Rani Charan Mitter*, for the Respondent.

JUDGMENT.

D. CHATTERJEE, J.—One Dhyan Singh, an ex-convict from the Andamans, having died intestate, an application for a succession certificate was made by a minor, named Pandu Singh, through his mother Sukhia Bewa on the allegation that the said Sukhia Bewa was the widow and the said Pandu Singh was the son of the said deceased; a certificate was granted by the first Subordinate Judge at Alipore acting as a Court invested with the powers of a District Court under the Certificate Act. The Collector of Alipore was informed that the claimants were not the legal representatives of the deceased and that the certificate had been obtained by a fraud on the Court. On this information the Collector made some enquiry and then applied to the District Judge for taking proceedings under Regulation V of 1799 and this case was numbered as Intestate Case No. 12 of 1913. In this case the learned Judge issued a notice upon Sukhia Bewa to show cause why the Succession Certificate should not be cancelled and after taking evidence, revoked the certificate and ordered the issue of notice for claimants. Having passed this order in Intestate Case No. 12 of 1913, the learned Judge recorded an order of revocation in the Certificate Case No. 51 of 1912 in the Court of the first Subordinate Judge of Alipore and it is this order of revocation that is appealed against.

It is contended that the order of the learned Judge is incompetent. Section 26 of the Succession Certificate Act, VII of 1889, empowers the Local Government to invest Courts inferior to that of the District Judge with the powers of a District Court under the Act, and declares that the Courts so invested would have concurrent jurisdiction with the District Court in the exercise of all the powers conferred by the Act on District Courts, provided that an appeal from such inferior Court would lie to the District Court.

In this case the certificate was granted by the Subordinate Judge of Alipore and an appeal lay to the District Judge. As no appeal had been made, the order granting the certificate was final. Section 18, however, provides for the revocation of certificates granted under the Act, for certain causes. This revocation can be made at any time when the circumstances enumerated in the section are proved, irrespective of the finality of the grant by reason of no appeal having been filed against the same. But who is to make the revocation in a case where the grant is by an inferior Court? The appellant contends that the revocation can be made only by the Court which made the grant. Section 18 does not make any specification in this matter: it is true that clause (2) mentions the concealment of a material fact from the Court as a reason for revocation and the Trial Judge would perhaps be in a better position to judge about such concealment, but that by itself does not seem to exclude the jurisdiction of a Court of concurrent jurisdiction. Section 27 provides for the surrender of a revoked certificate to the

Court which granted it. This seems to indicate that ordinarily the revocation must be made by the Court which granted the certificate; this, however, must be so only when the Court granting the certificate is still exercising jurisdiction in the District. In this case the 1st Subordinate Judge of Alipore is still invested with the powers of a District Court in certificate cases and the learned Judge had no jurisdiction to make the revocation. It is true that he could withdraw the case to his own Court under sub-section 4 of section 26, but that power could be exercised only when the case was pending decision. The learned Judge has made a further mistake in making the revocation in the intestate case: his jurisdiction under the Regulation is of a limited character and is more administrative than judicial. He can act thereunder only if there is no claimant: in the present case the appellant was a rightful claimant under the certificate and the learned Judge was bound to respect the same until it was revoked by a competent authority. It has been said that this is a mere irregularity not affecting the merits of the case and we should not, therefore, interfere. I have held, however, that there was no jurisdiction and in the face of that finding this argument cannot be of any avail. The order of revocation, therefore, must be set aside with costs, two gold *mohurs*.

MULLICK, J.—I agree.

Order set aside.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 306 OF 1911.

January 12, 1915.

Present:—Mr. Justice Holmwood and Mr. Justice Mullick.

RAMANUGRAH NARAYAN SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

CHUNI LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Succession Certificate Act (VII of 1889), s. 4—Practice—Suit by representative of deceased—Probate or Letters of Administration obtained—Succession certificate, whether necessary—Suit, whether to be dismissed if certificate not previously obtained.

Where Probate or Letters of Administration have been obtained as regards the estate of a deceased, a Succession Certificate is not necessary under section 4 of Act VII of 1889 to entitle a person to sue.

Where a Succession Certificate is necessary to entitle a plaintiff to maintain a suit, it should be allowed to be produced before a decree is passed and the suit should not be dismissed because the Succession Certificate has not been obtained previously.

Mohammad Zahoor Ali Khan v. *Musammat Thakoorance Rutta Koer*, 11 M. I. A. 468; 9 W. R. (P. C.) 9; 2 Suth. P. C. J. 107; 2 Sar. P. C. J. 320, 20 Eng. Rep. 177 and *Raja Rup Singh* v. *Rani Bausi*, 11 I. A. 149; 7 A. 1; 4 Saraswati's P. C. J. 533; A. W. N. (1884) 246, followed.

Appeal against the decree of the Sub-Judge of Gaya, dated the 19th June 1911.

Babus *Umakali Mukherjee*, *Siva Nandan Roy* and *Jnanranjan Chatterjee*, for the Appellants.

Babus *Provas Chandra Mitter* and *Jatindra Nath Sen*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs to recover a certain deposit made in a Bank, known by the name of Sheo Lal Majhilal in the town of Gaya, by their uncle and predecessor, Bisseswar Dayal. The plaintiffs are the three minor nephews of Bisseswar and his brother, Pasupat Nath, who has obtained Letters of Administration to his Will. The case is that Bisseswar Dayal and Dudhnath, who predeceased him leaving his son plaintiff No. 3, and plaintiff No. 4 are members joint in mess and estate in a *Mitakshara* family. Bisseswar died in February 1908, leaving a Will dated the 2nd January 1908, of which Will Pasupati Nath obtained Letters of Administration, with a copy of the Will annexed, to the property and credits of Bisseswar on the 22nd September 1910. From the Will it appears that the testator admitted that he was fully joint with his brothers as regards the ancestral property, which he sets out in Schedule I, and his statement in the 3rd column of Schedule I must be taken to mean that his share would be ⅓rd on partition, but that no partition had ever taken place. He also had a considerable amount of immoveable and moveable property acquired by him alone, and he gives a list of that in Schedule II. But it appears that that list is not complete, inasmuch as another item is mentioned in the body of the Will which is not included in Schedule II. The parties went into evi-

dence on the merits and both parties say here before us that they are anxious for a decision on the merits.

The learned Judge has dismissed the suit on a preliminary point and we think that he has erroneously decided that point. He says that the fact that Bissesswar Dayal made a Will negatives the theory that he was joint with the plaintiffs. That was his first error. We have shown that the Will itself clearly shows that he was joint with the plaintiffs. He further says that they cannot get a decree until they produce the Succession Certificate. This is his second error. Section 4 of Act VII of of 1889 is perfectly clear on the point that Probate or Letters of Administration evidencing the grant of Letters for administration of the estate of the deceased is sufficient to render a Succession Certificate unnecessary.

It has been argued before us that those Letters of Administration are not with a copy of the Will annexed. It is only in cases of intestacy that Letters of Administration without copies of the Will annexed are given, and it is apparent from the alternative words —a Probate or Letters of Administration— that the section includes Letters of Administration with a copy of the Will annexed. Even if a Succession Certificate had been necessary we must point out to the learned Judge in the Court below that the practice of the Courts in India approved by this Court has always been to allow the Succession Certificate to be produced before the decree is passed and not to dismiss the suit outright because the Succession Certificate has not yet been obtained. However, we do not think that any Succession Certi cate is necessary, because the plaintiff No. 4 has obtained Letters of Administration to the estate of Bissesswar.

Then it is argued that the plaintiff No. 4 did not bring the suit upon the basis of the Letters of Administration and that, therefore, he cannot be allowed to amend the plaint now so as to alter the character of his suit. We think that this is a very technical view to take of the pleadings. Paragraph 9 of the plaint says that the Will was proved in solemn form before the District Judge of Gorakhpur and Letters of Administration with a copy of the Will was granted on the 27th May 1910. Following hat, paragraph 10 says that the plaintiffs are entitled to recover the whole amount from the defendants. The Letters of Administration are, therefore, clearly referred to, and the case falls within the remarks of the Privy Council in *Mohummud Zahoor Ali Khan* v. *Musammat Thakooranee Rutta Koer* (1) and the case of *Raja Rup Singh* v. *Rani Baisni* (2). The case in *Mohummud Zahoor Ali Khan* v. *Musammat Thakooranee Rutta Koer* (1) was somewhat of the same nature as the present case. The nature of the transaction and the status of the obligor, their Lordships say, make it peculiarly desirable that the Appellate Court should have the benefit of the judgment of the Court below on the issues on the merits, and they, therefore, allowed an amendment of the plaint in what is a much stronger case against such amendment than the present; for we are of opinion that this case could have proceeded on paragraphs 9 and 10 of the plaint without any amendment, and that the question of the Letters of Administration, the question of survivorship and the question of inheritance could have been gone into upon the plaint as it stands. But as the parties are still anxious that the verbal amendment should be made so as to make the two paragraphs clear, we think it right to accede to their prayer and to expand paragraph 10 of the plaint so as to enable all these pleas which are referred to in the plaint itself to be specifically included. Paragraph 10 would be amended as follows: that the plaintiffs are entitled to recover the whole amount from the defendants, as plaintiffs Nos. 1 to 3 are the nephews and plaintiff No. 4 is the brother of the deceased depositor, who has left no issue or widow. Whether this is under the Will or by survivorship or by inheritance does not appear to us to be very material. But if the defendants desire to give any evidence to show that the plaintiffs are not entitled on either of those grounds to any share in any money that may be found due to Bissesswar's estate, they are at liberty to give evidence on the point; and it shall further be added to paragraph 10, that the plaintiff No. 4 is entitled to recover the

(1) 11 M. I. A. 468; 9 W. R. (P. C.) 9; 2 Suth. P. C. J. 107; 2 Sar. P. C. J. 320; 20 E. R. 177.

(2) 11 M. I. A. 149 at p. 155; 7 A. 1; 4 Saraswati's P. C. J. 533; A. W. N (1884) 246.

whole amount from the defendants on behalf of the other plaintiffs as Administrator to the estate of Bissesswar. The case will then be tried on the merits.

The result is that the appeal is decreed. The decision of the Court below and its decree on the preliminary point is discharged and the case is remanded to the lower Court for decision on the merits.

The appellants are not entitled to any costs in this Court as their own defective pleadings seem to have got them into this trouble; but the costs of the suit in the lower Court will abide the result of the final decision.

The Court-fee paid on the memorandum of appeal will be refunded to the appellants.

Appeal decreed; Case remanded.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 36 OF 1914.

December 16, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Napier.

ANNASAMI SASTRIGAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

A. S. RAMASAMI SASTRIGAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 38—Maintenance—Suit based on agreement—Claim not made by maintenance-holder—Jurisdiction.

In a division between two Hindu brothers, *S* and *V*, it was agreed that their mother would live with *S* and that *V* would pay *S* therefor a certain quantity of paddy by way of maintenance. *V* fell into arrears. On the death of both *S* and *V*, the sons of *S* sued the sons of *V* for the arrears due in the Small Cause Court.

Held, that the suit, not being by the maintenance-holder or for maintenance, but being based on a contract was not one 'relating to maintenance' within the meaning of Article 38, Schedule II, of the Provincial Small Cause Courts Act and that it was, therefore, cognizable by the said Court.

Ramaswamy Pantulu v. *Narayanamoorthy Pantulu*, 14 M. L. J. 480, followed.

Saminatha Ayyan v. *Mangalathammal*, 20 M. 29; *Bhup Singh* v. *Lachman Kunwar*, 26 A. 321; A. W. N. (1904) 13, distinguished.

Appeal, under clause 15 of the Letters Patent, against the order of the Hon'ble Mr. Justice Miller, in Civil Revision Petition No. 824 of 19 2, dated 27th November 1913, and reported in 22 Ind. Cas. 39, preferred against the decree of the Court of the Subordinate Judge of Mayavaram, in Second Civil Suit No. 323 of 1912.

Mr. *K. S. Jayaram Iyer*, for the Appellants.—*Ramaswamy Pantulu* v. *Narayanamoorthy Pantulu* (1) is no authority on the point. There was no discussion on the question and the decision itself requires re-consideration. The phrase "relating to" is far wider than the word "for." In the old Act, XI of 1865, the language is "suit for maintenance." The language in section 4 of the Pensions Act of 1871 is exactly similar. Under that Act also the decisions go to show that if, in its inception and original character, the right claimed comes within the purview of the Act, the Civil Courts have no jurisdiction to entertain a suit, even though the right claimed may not come directly within the provisions of the Act. See *Vasudev Sadashiv* v. *Collector of Ratnagiri* (2), *Babaji Hari* v. *Rajaram Ballal* (3), *Syed Mahommed Isaack Mushyack* v. *Arzoon Nissa Begam* (4), *Vyankaji* v. *Narjarao Apajirao* (5). See also *Bhup Singh* v. *Lachman Kunwar* (6) and *Saminatha Ayyan* v. *Mangalathammal* (7).

Mr. *T. R. Venkatarama Sastri*, for the Respondents.

JUDGMENT.—The only question argued here, which was raised before the learned Judge, is whether the suit is excluded from the jurisdiction of the Court of Small Causes on the ground that it is covered by Article 38, Schedule II, of Act IX of 1887.

We think that *Ramaswamy Pantulu* v. *Narayanamoorthy Pantulu* (1) is in point, and that the fact that the plaintiffs sued here on an agreement, not on a determination of their joint liability with that of the defendants by a decree, is not material. The point is that the money is not claimed by a maintenance-holder or as maintenance,

(1) 14 M. L. J. 480.
(2) 2 B. 90; 4 I. A. 110.
(3) 1 B. 75.
(4) 4 M. 341.
(5) 16 B. 537.
(6) 26 A. 321; A. W. N. (1904) 13.
(7) 20 M. 29.

but solely on a contract. And in those respects, *Saminatha Ayyan* v. *Mangalathammal* (7) and *Bhup Singh* v. *Lachman Kunwar* (6) are distinguishable. As the claim is not, in our opinion, one relating to maintenance, we concur with the learned Judge and dismiss the Letters Patent Appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEALS FROM ORIGINAL DECREES NOS. 91 AND 339 OF 1912.

February 4, 1915.

Present:—Mr. Justice Chatterjee and Mr. Justice Chapman.

Maharaja RUNJIT SINGH—DEFENDANT—APPELLANT

versus

JNANENDRA NATH SEN GUPTA—PLAINTIFF—RESPONDENT.

Putni Regulation VIII of 1819—Putni *tenure, sale of—Irregularity in service and publication of notice of sale, effect of.*

A due publication of the notices prescribed by Regulation VIII of 1819 forms an essential portion of the foundation on which the summary power of sale is exercised and makes the *zemindar* who institutes the proceedings exclusively responsible for its regularity.

Maharajah of Burdwan v. *Tarasundari Debi*, 9 C. 619 at p 622; 13 C. L. R. 34; 10 I. A. 19; 7 Ind. Jur. 212; 4 Sar. P. C. J 414 and *Maharani of Burdwan* v. *Krishna Kamani Dasi*, 14 C. 365; 14 Ind. Jur. 275; 4 Sar. P. C. J. 772, referred to

The provision for the advertisement of sale in the Collectorate is very material and is not directory but mandatory, and failure to duly observe it is a sufficient ground for setting aside a sale.

Appeals against original decrees of the Subordinate Judge of Murshidabad, dated the 30th March 1912.

Dr. *Rash Behary Ghose*, Babus *Basanta Kumar Bose*, *Hemendra Nath Sen*, *Satish Chandra Ghose*, *Priya Sanker Mazumdar*, *Sridhar Das Gupta* and *Probodh Chandra Mukherjee*, for the Appellant.

IN NO. 91 OF 1912

Babus *Mohendra Nath Roy* and *Bankim Chandra Mukerjee*, for the Respondent.

IN NO. 339 OF 1912

Babu *Kalidas Sarkar*, for the Respondent.

JUDGMENT.—These two appeals arise out of two suits for setting aside a *putni* sale in which the *zemindar* is the purchaser. Appeal No. 91 arises out of the suit brought by the *patnidars* and No. 339 out of the suit brought by the *dar-putnidar* of some of the *mouzas* covered by the *putni*. The grounds on which the sale is impeached are the same in both suits, namely, irregularities in the service and publication of the notices required by law and irregularities in the conduct of the sale. The Court below has set aside the sale and the purchaser, the *zemindar*, has filed these appeals. It is contended on his behalf

(1) that the findings as to the irregularities are not justified by the evidence on the record;

(2) that the provisions of the Putni Regulation are directory and it is not necessary that they should be followed in every detail;

(3) that the plaintiffs have not shown that they suffered any injury by reason of the irregularities complained of;

(4) that the irregularties, even if proved, do not vitiate the sale.

We shall first see if the irregularties complained of are proved.

Under section 8 of the Putni Regulation the *zemindar's* application for sale and notice that the defaulting property is to be sold on the 1st of *Jyestha* if the arrears are not paid before that, have to be stuck up in some conspicuous part of the *kutchery*.

The Nazir of the Collectorate who was examined as a witness produced a bundle of papers stuck up in respect of the sale of the 15th of May 1911. This bundle does not contain the original application of the *zemindar*. Even the notice that has been exhibited as being in respect of the disputed *mehal*, Exhibit A, is in respect of a different *mehal* altogether, bearing a different *jama* and a different number and owned by a different *putnidar*. This may be due to some mistake in the Court below in marking one document for another, but no notice of this was taken by the appellant until it was pointed out by the learned Vakil for the respondent. But supposing this was a mistake for the correction of which no

steps have been taken by the appellant, there is nothing to show that the original application was stuck up. Our attention has been drawn to Exhibit C, the notice to the *putnidar*, which mentions that the original petition is going to be stuck up in the *Saddar Kutchery*, but that is no evidence that it was stuck up in the Collectorate and the whole bundle produced by the Nazir did not contain this. The appellant has, therefore, failed to prove that the original application was stuck up.

As regards the sticking up the Nazir says that the *ishtahar* (notice of sale) was hung upon a board in the verandah, but it used to be taken down by the Muktears and placed on his table to be hung up again at the close of the day. The appellant's witness Muktear Purna Chandra Chatterjee admits that this used to be so formely when he used to go to the Nazarat, but he is not aware of the present practice. We agree with the learned Subordinate Judge that this way of dealing with the notices is proved and does not make out that continuous unobstructed presentation to the notice of the public which the law contemplates. In the case of *Bejoy Chand Mahatap* v. *Atulya Chandra Bose* (1), the sticking up of the notice from 10 to 5 in the day during Court hours was held to be not in conformity with the Regulation. This view was considered to be an *obiter dictum* in the case of *Sachi Nandan Dutta* v. *Maharaj Bejoy Chand Mahtap Bahadur* (2) by Brett and Gupta, JJ., and the learned Judges held that this sort of publication was sufficient to meet the requirements of the Regulation. The present case is, however, distinguishable in that in it the notice bundle was removed from the notice board and placed on the table in the Nazir's room for the inspection of the Muktears, so that although the notices might be on the board in the night and during short times when the Muktears did not remove them to the Nazarat, they were not on the board during the greater portion of the Court hours. There is no evidence that the public had notice of the removal or had access to the Nazarat. It is not for the Muktears alone that these notices are meant, and we agree with the learned Subordinate Judge that the sticking up was not in accordance with the requirements of the Regulation. A similar notice is to be stuck up in the *Sadar Kutchery* of the *zemindar*, but the appellant's Nazir says he only hung up a list of the defaulting *mehals* with the names of the defaulters and the amounts due. This is not strictly in accordance with the letter of the law, but we agree with the learned Subordinate Judge that this may be taken as a substantial compliance.

Then the notice in the Mofussil was served in the *kutchery* of the *dar-putnidar*, althought it incorrectly states that it was served in the *kutchery* of the *putnidar*. Now the *dar-putni* is in respect of three only of the six *mauzas* covered by the *putni*. The *dar-putnidar's kutchery*, however, is in the principal village on the defaulting tenure and we agree with the learned Subordinate Judge that service there was good service.

As regards the conduct of the sale several irregularities are complained of. One is that the public had not unobstructed access to the place of sale and the sale was, therefore, not in a public *kutchery* as required by the law. It is clear from the evidence that the sale was in the Court-room of the Collector and, therefore, in a public *kutchery*, but it is also clear that the *chaprasees* of the Collector who were placed at the wicket gate for keeping order did not allow many persons to enter for preventing overcrowding. The learned Subordinate Judge has believed this evidence and we have no hesitation in agreeing with him.

Then it is urged that the sale took place too early, *i.e.*, before 12 o'clock, the usual hour for holding these sales. There is no evidence as to at what particular time this sale took place, as no one referred to his watch. The Collector is under the impression that he commenced sale at 12 but he is not quite sure. There is evidence that the Muktears remarked at the time that the sale was too early and they had to hurry to the *ejlas* to look after the interests of their clients. The law, however, does not require that the sale should be at any particular hour and the defaulter cannot impeach the

(1) 32 C. 953; 3 C. L. J. 46.
(2) 11 C. W. N. 729.

sale as illegal merely on the ground that it took place earlier than usual; he may, however, be permitted to show that he was misled to his prejudice by the deviation from the usual practice. Now supposing the sales of the day commenced at or very near 12, if the formalities enjoined by the law had been observed, the sale of this property would have taken place much later and the plaintiffs could have paid up the money, which they no doubt brought to the *kutchery* but could not pay as they could not enter the sale room before the sale on account of the excessive zeal of the *chaprasees* of the Collector.

Section 10 of the Regulation requires that the lots shall be called up successively in the order in which they may be found in the notice. If the lots in the several notices of the Nawab Bahadur, Maharaja Tagore, Maharaj Bahadur Singh and the appellant Maharaja were called one after another and orders were passed on each before the property in suit was reached, it would have taken a good deal of time and the plaintiffs who came with the money in arrears would have been able to pay to the Muktear according to the usual practice and save their property. The earlier lots, however, were passed over as the *zemindar's* would not proceed with the sales, having probably received the arrears, and the sale of this property was finished in 3or 4 minutes, the *zemindar's* Muktear being the only bidder. The section further directs that the observance of the forms mentioned in the section shall be recorded in a separate *rubakari* to be held upon each lot sold. There was a *rubakari* but it was not prepared at the time of the sale; it is signed not by the Collector, but by a Deputy Collector and is dated the 18th May 1911 corrected into 15th May 1911. It is clear it was not prepared at the time of the sale.

Then the 15 per cent. of the purchase-money was not deposited as required by section 9.

These are the irregularities and we agree with the Court below that they are proved. In the case of *Maharajah of Burdwan* v. *Tarasundari Debi* (3) their Lordships of the Judicial Committee say: "Their Lordships desire to point out that the due publication of the notices prescribed by the Regulation forms an essential portion of the foundation on which the summary power of sale is exercised, and makes the *zemindar*, who institutes the proceeding exclusively responsible for its regularity". In another case, the *Maharani of Burdwan* v. *Krishna Kamini Dasi* (4) their Lordships say: "Their Lordships have to construe the Regulation. They find a process prescribed by it, which its framers thought it indispensable to fix, for the observance of which they have declared the *zemindar* to be exclusively answerable, and which is calculated to protect all persons interested in the estate against injury by the working of a very swift and summary remedy given to the *zemindar*." Some of the irregularities found in this case might not be of much consequence but they are certainly deviations from the rules laid down in the Regulation, but there are others, such as the advertisement in the Collectorate, which are very material and cannot by any means be called directory only and not mandatory.

As regards injury, the learned Subordinate Judge has found in favour of the plaintiffs and we are of the same opinion. In fact the matter was not pressed before us. There are, we think, sufficient reasons for setting aside the sale. We, therefore, dismiss these appeals with costs. We assess the hearing fee in Appeal No. 339 at 5 gold *mohurs*. We do not interfere with the order of the lower Court as to costs in that Court.

Appeals dismissed.

(3) 9 C. 619 at p. 622; 13 C. L. R. 34; 10 I. A. 19; 7 Ind. Jur. 212; 4 Sar. P. C. J. 414.

(4) 14 C. 365 (P. C.); 14 Ind. Jur. 275; 4 Sar. P. C. J. 772.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1212 OF 1914.

January 18, 1915.

Present:—Mr. Justice Piggott.

BHULÁN—DEFENDANT—APPELLANT

versus

WAZIR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 27—Remand, evidence taken on—Appellate Court, discretion of—High Court, power of, to interfere in second appeal.

BHULAN v. WAZIR.

A High Court is not justified in second appeal in interfering with the discretion of the lower Appellate Court to the extent of refusing to recognize the additional evidence taken on remand under Order XLI, rule 27, of the Code of Civil Procedure.

Second appeal from the decision of the Additional District Judge of Aligarh, dated the 30th May 1914.

Mr. *Mohan Lal Sandal*, for the Appellant.

JUDGMENT.—This was a suit for possession of a house. On the pleadings in the Court of first instance it was admitted that one Chand owned a house which was situated in an enclosure shown as enclosure No. 21 in the map of the village *abadi*, and that it was described as the second of three houses in the said enclosure in the explanatory statement (*khasra*) appended to the said map. The plaintiffs claimed that the house in suit was the said house of Chand, while the defendant replied that this was not so, but on the contrary the plaintiffs were still living in a house in the said enclosure which was the house No. 2 belonging to Chand referred to in the settlement *khasra*. The lower Appellate Court caused certain further evidence to be taken, and then came to a finding that the house in suit is the house No. 2 belonging to Chand referred to in the Settlement map and *khasra*. It has also recorded a finding that the house in suit was occupied by permission of the plaintiffs by one *Musammat* Nasiban, who died recently. These are clear findings of fact and this appeal cannot succeed unless the defendant-appellant can show cause for interference with these findings in second appeal. It has not been shown to me that there is any force in the pleas taken in the third and fourth paragraphs of the memorandum of appeal. The District Judge had before him admissions by the parties that the house belonging to Chand, situated within the boundaries of plot No. 21, was the property of the plaintiffs. The defendant said that the house in question was the one in which the plaintiffs were living at the time of the institution of the suit. The District Judge came to the conclusion that this was not the case, because the house in which the plaintiffs were living was situated partly outside the boundaries of plot No. 21 and was shown to have been built after the preparation of the Settlement *khasra* and map which were plaintiffs' documents of title. There was no suggestion before the Court that either of the other two houses admittedly situated within the limits of plot No. 21 was the house described in the Settlement *khasra* as the house of Chand. On the pleadings, and on the evidence before him, the District Judge was entitled to come to the finding which he has recorded in favour of the plaintiffs. The only difficulty about the case is that suggested in the first two paragraphs of the memorandum of appeal. The Court of first instance had dismissed the plaintiffs' suit, on the ground that the evidence before it was not sufficient to prove that the house in suit was the house which had formerly belonged to Chand. When the case first came before the District Judge he recorded an order, dated the 28th of April 1914, to the effect that the conclusion arrived at by the first Court appeared correct on the evidence before that Court. He proceeded, however, to direct further evidence to be taken under Order XLI, rule 27, of the Code of Civil Procedure. The additional evidence taken was that of a Commissioner, who was ordered to take certain measurements on the spot to enable the Court definitely to satisfy itself as to the manner in which the Settlement map applied to existing facts. The learned District Judge presumably acted under Order XLI, rule 27, clause (1) (*b*), and it cannot be denied that, in the absence of some measurements such as those which were taken by the Commissioner on remand, it was practically impossible to understand how the Settlement map applied to the existing facts of the case and the suit would have to be decided more or less by conjecture. The real question is whether the District Judge was justified in ordering further evidence to be taken, and might not have been content with dismissing the appeal before him on the simple ground that the plaintiffs, on whom the burden of proof lay, had failed to prove their case. I do not think, however, that this Court would be justified in second appeal in interfering with the discretion of the lower Appellate Court to the extent of refusing to recognize the additional evidence taken on remand. If this is so, this appeal must necessarily fail and I dismiss it accordingly.

Appeal dismissed.

MG. TUN U *v.* PALLANIAPPA CHETTY.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 201 OF 1913.

February 8, 1915.

Present:—Sir Charles Fox, KT., Chief Judge, and Mr. Justice Hartnoll.

MG. TUN U—PLAINTIFF—APPELLANT

versus

Y. P. S. P. L. PALLANIAPPA CHETTY AND ANOTHER—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), ss. 5, 14, Sch. I, Art. 11—Civil Procedure Code (Act V of 1908), O XXI, r. 63—Removal of attachment—Appeal and revision—Advocate's act, how far binding on his client—Agent—Negligence.

Under Order XXI, rule 63, Civil Procedure Code, an order on the application for removal of attachment is conclusive, subject to a regular suit to establish the right to the attached property, and under Article 11 of the Limitation Act one year is allowed for such a suit. Therefore, it would be culpable negligence on the part of an Advocate to file an appeal or revision notwithstanding the plain provisions of Order XXI, rule 63, Civil Procedure Code, and the time spent in such appeal or revision cannot be excluded under section 14 of the Limitation Act, as the plaintiff would be bound by his Advocate's negligence under the ordinary rule that, if a person employs an agent, he is bound by what his agent does in the course of his employment.

Kura Mal v. *Ram Nath*, 28 A. 414; A. W. N. (1906) 67; 3 A. L. J. 218, distinguished.

Section 5 of the Limitation Act leaves it to the discretion of an Appellate Court to exclude the time, whereas section 14 obliges a Court to exclude time if it finds a certain state of facts.

Messrs. *Rutledge* and *Kyaw Htoon*, for the Appellant.

Mr. *J. R. Das*, for the Respondents.

JUDGMENT.

Fox, C. J.—Some land was attached in execution of a decree obtained by the respondent against the legal representatives of one Pa Gale. The appellant applied for removal of attachment on the ground that the land was his. His application failed: the order dismissing it was made on the 15th March 1912. He appealed to the Divisional Court against this order. The appeal was rejected on the 29th April 1912 on the ground that no appeal lay against the order. The plaintiff presented an application in this Court on the 28th May 1912 asking for revision of the order. This application was dismissed on the 3rd September 1913 on the ground that there was no power to revise the order. He filed a suit to have his title declared on the 9th September 1913. This has been dismissed as barred by limitation under Article 11 of the first Schedule of the Limitation Act.

For the plaintiff it was contended that he was entitled to have excluded the time taken in prosecuting the abortive appeal and application for revision.

Sub-section (1) of section 14 of the Act says that in computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which from defect of jurisdiction or other cause of a like nature is unable to entertain it. The course which the plaintiff should have pursued is very clearly indicated in rule 63 of Order XXI of the Civil Procedure Code, which says that where a claim or an objection is preferred to an attachment, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive. Article 11 of the Limitation Act gives one year from the date of the order for the institution of such suit.

With such plain provisions staring him in the face, it was sheer culpable negligence on the part of the Advocate who was then acting for the plaintiff to incur the risk of the plaintiff losing all remedy by filing the appeal and the application for revision. If the plaintiff is bound by the acts of his Advocate no case for exclusion of time under section 14 of the Act is made out, because proceeding contrary to a clearly expressed provision of law cannot be regarded as prosecuting another civil proceeding in good faith, in the sense in which the words "good faith" are defined in the Act, *viz.*, done with due care and attention. It is urged, however, that the plaintiff should not be held bound by what was done for him by his Advocate and that as he employed a lawyer and did according as he was advised by him, the plaintiff personally prosecuted the appeal and application in good faith, and he is entitled to the exclusion of the time they took up. The case of *Kura Mal* v. *Ram Nath* (1) was cited in support of this proposition. This was a decision in a

(1) 28 A. 414; A. W. N. (1906) 67; 3 A. L. J. 218.

case in which the question was whether the power under section 5 of the Act to admit an appeal after time should have been exercised. The section leaves it to the judicial discretion of an Appellate Court to do so, whereas section 14 obliges a Court to exclude time if it finds a certain state of facts. I do not think that section 14 should be restricted to the plaintiff personally. There is nothing in the wording so restricting it, and the ordinary rule that if a person employs an agent he is bound by what his agent does in the course of his employment, should apply. If it were otherwise, the same method would have to be applied to many other provisions of law in which mention is made of a plaintiff only. Order III of the Civil Procedure is based on the principle that the acts of the agent in legal proceedings are the acts of the principal, and the latter is bound by them, and may have to suffer for them if they are wrong. A person resident, say, in Europe and having some legal proceedings conducted in this country by an authorized agent could scarcely be heard to say in such a case as the present that he must be allowed time, because he personally acted with due care and attention.

In my opinion the District Court's decision was right, and I would dismiss the appeal with costs, two gold *mohurs*.

HARTNOLL, J.—I concur.

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 563 OF 1913.

July 30, 1914.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Beaman.

LACHIRAM DAGDURAM MARWADI—PLAINTIFF—APPELLANT

versus

JANA YESU MANG AND ANOTHER—DEFENDANTS—RESPONDENTS.

Execution—Consent decree—Variation of terms, whether allowed in execution.

A consent decree can only be varied by consent. Therefore, no modification of a consent decree can be allowed in execution on grounds not recognised in the decree itself as giving a right of such modification.

Second appeal from the decision of the District Judge of Ahmednagar confirming that of the Subordinate Judge at Parner.

Mr. *A. G. Desai*, for the Appellant.

Mr. *D. C. Virkar*, for the Respondent.

JUDGMENT.—In this case we think that the learned Judge was wrong in not enforcing the decree according to its terms. The decree is quite explicit. The first instalment is to be paid on or before the 1st of March 1908. Thereafter the defendant is to go on paying to the plaintiff an instalment every year. If the defendant fail to pay any two instalments at the proper time, the plaintiff is to take the property into his possession by right of ownership. The learned Judge of the lower Appellate Court has held that the first two instalments were paid too late, but were accepted, and that subsequent two instalments have not been paid in time. There has been, therefore, a default with regard to the last two instalments which entitled the plaintiff to take possession of the property. The case is very similar to *Bapu* v. *Vithal* (1), which we recently decided, following the decision of Mr. Justice North in *Australasian Automatic Weighing Machine Co.* v. *Walter* (2), where it was held that a consent decree can only be varied by consent. There is no consent here, and as pointed out by this Court in *Suguna* v. *Sadashiv* (3), it is obvious that no modification of a decree can be allowed in execution upon grounds not recognised in the decree itself as giving a right of such modification. The decisions cited by the learned District Judge, *Krishnabai* v. *Hari Govind* (4) and *Balambhat* v. *Vinayak Ganpatrav* (5), are inapplicable where the relation of landlord and tenant is not created by the decree. We, therefore, set aside the decree of the lower Appellate Court and remand the case in order that the decree may be executed according to its terms. The respondents must pay the costs throughout.

Decree set aside.

(1) 27 Ind. Cas. 134; 16 Bom. L. R. 670 *note*.
(2) (1891) W. N. 170.
(3) 26 B. 710; 4 Bom. L. R. 527.
(4) 31 B. 15, 8 Bom. L. R. 813. 1 M. L. T. 370.
(5) 10 Ind. Cas. 746; 35 B. 239, 3 Bom. L. R. 154.

KASHMIRO BIBI v. HATIM ALI KHAN.

ALLAHABAD HIGH COURT.

CIVIL REVISION APPLICATION No. 107 OF 1914.

January 8, 1915.

Present:—Justice Sir George Knox, KT.

Musammat KASHMIRO BIBI—AUCTION-PURCHASER—APPLICANT

versus

HATIM ALI KHAN—APPLICANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 89—Prior mortgagee of property sold at auction—Right to set aside sale.

A prior mortgagee of a property sold at auction has an interest in the property by virtue of a title acquired before the sale; he is as such entitled to apply to have the sale set aside under Order XXI, rule 89, of the Civil Procedure Code.

Ram Shankar Lal v. *Ganesh Prasad*, 4 A. L. J. 278; A. W. N. (1907) 97; 2 M. L. T. 248, 29 A. 385 (F. B.); *Muhammad Ahmadullah Khan* v. *Ahmad Said Khan*, 10 Ind. Cas. 863, 8 A. L. J. 356; 33 A. 481; *Srinivasa Ayyangar* v. *Ayyathorai Pillai*, 21 M. 416; 3 M. L. J. 54, referred to.

Civil revision against an order of the District Judge of Allahabad, dated the 10th March 1914.

Mr. *Damodar Das*, for the Applicant.

Mr. *A. Haider* (with him Messrs. *Muhammad Yusaf* and *Abdul Bari*), for the Respondent.

JUDGMENT.—Certain property, to wit one anna 8 pies 10 *karants* seven *jaw* out of a 3-annas share in *Mouza* Pauran, *Mahal* Talab Ali, was sold in execution of a decree.

The notification of sale is to be found on the record as paper 11 C. The language used is very specific. The Court gave notice to would-be purchasers that it was selling not the interest in certain lands, but was selling a well-defined and specific part of immoveable property. There is no allusion to any charges or incumbrances on the property and the ordinary meaning of the notification of the sale, which any purchaser would have a right to put upon it, was that this clearly defined and specific property was being sold by the Court.

After the sale and within the period allowed by law Hatim Ali came forward and in an application, which is to be found as 18A on the record, applied to have the sale set aside on depositing in Court the 5 per cent. of the purchase-money for payment to the purchaser and the amount specified in the proclamation of sale for payment to the decree-holder. In his application Hatim Ali does state incidentally that he was a *murtahin mukuddam* or prior mortgagee of the property sold.

The Munsif of Allahabad in whose Court this application was filed allowed it and set aside the auction-sale. The learned Judge of Allahabad to whom an appeal from this order was presented by *Musammat* Kashmiro Bibi agreed with the view taken by the Court of first instance and dismissed the appeal. *Musammat* Kashmiro Bibi was the auction-purchaser and she applied to this Court in revision, on grounds that the Courts below had no jurisdiction to entertain the application of Hatim Ali, that Hatiffl Ali Khan was a prior mortgagee of this property and this being the case, he was not a person who held an interest in the property sold by virtue of a title acquired before the sale and he had no *locus standi* and the Courts acted without jurisdiction in accepting and coming to a decision upon his application. There was a further plea that the Courts below acted with material irregularity in setting aside the sale of the property at the instance of such a person as Hatim Ali.

The line which the learned Vakil for the applicant took in argument before me was that the property sold in this case was the equity of redemption over the one anna, etc., share and this being the case, he was not a person who had acquired an interest in the property by virtue of a title acquired before such sale.

In support of his contention reference was made to several rulings passed before the present Code of Civil Procedure came into force. I do not mention those rulings because the language used in section 310A was very different from the language now used in Order XXI, rule 89, which has taken the place of section 310A. But special stress was laid amongst those rulings on the Full Bench ruling of this Court in *Ram Shankar Lal* v. *Ganesh Prasad* (1), in which it was held that the words "property comprised in the mortgage" as used in section 85 were probably intended to denote no more than the estate or interest which is the subject of any particular mortgage, that is, if the mortgage be a mortgage of the absolute estate in the land, then

(1) 4 A. L. J. 278; A. W. N. (1907) 97; 2 M. L. T. 248; 29 A. 385 (F. B.).

the land itself, if it be a puisne mortgage, then the interest in the land of the mortgagor, that is, the equity of redemption.

The principle laid down in that ruling would strongly favour the contention of the learned Vakil. He continued to draw attention to a ruling of this Court in *Muhammad Ahmadullah Khan* v. *Ahmad Said Khan* (2). That case, however, was a very peculiar case and cannot be safely relied upon as having universal application. The decree-holder in that case held two decrees against the same judgment-debtor, the one being a decree for sale on two mortgages and the other a simple money decree, and caused part of the mortgaged property to be sold by auction. After it was sold and purchased by a stranger the same decree-holder applied to get the sale set aside. The learned Judges refused to consider the decree-holder as a person entitled to apply under Order XXI, rule 89. The line which was adopted is not without interest so far as the present case is concerned. It was held that "ordinarily a mortgagee of the property sold is a person who has an interest in it, and in view of the provisions of rule 89, he would be competent to make an application, but we have to consider the facts of this particular case. Here the holder of the decree for money was also the holder of two mortgages in respect of the property of which he sought to have a sale. He caused the property to be sold either free from the mortgages or subject to the mortgages. If it was sold free from the mortgages, he must be deemed to have adandoned his mortgages and in that case he has no interest, in the property sold. If he caused the property to be sold subject to the mortgages, the sale only related to the interest of the mortgagor, that is, his right of redemption. In this right of redemption the mortgagee has no interest."

In the present case the property which the Court has professed to sell and which was sold was the property *i.e.*, the one-anna odd share in *Moura* Pauran, *Mahal* Talab Ali, and in that property Hatim Ali Khan had undoubtedly an interest by a title acquired before the sale. The Court had jurisdiction to entertain the application. Under the special circumstances of the case when the Court entertained his application, all that it knew was that certain immoveable property had been sold in execution of the decree and that the person applying had a right by virtue of a title acquired before the sale to have the sale set aside. The plea then that the Court had no jurisdiction does not prevail with me.

There remains the question, whether the Court, when it was in possession of the facts of the case, acted with material irregularity in setting aside the sale of the property at the instance of a person who had under Order XXI, rule 89, acquired a title before the sale, still to be answered.

Looking to the very wide language used in Order XXI, rule 89, I am not prepared to hold that Hatim Ali Khan did not hold an interest in the property. The language of section 85 of the Transfer of Property Act differs considerably from the language used in Order XXI, rule 89. Ordinarily I should have followed the ruling of this Court in *Muhammad Ahamadullah Khan* v. *Ahmad Said Khan* (2), but that case, as I have already said, is a very peculiar case and the Judges had before them the peculiar circumstances of the applicant.

Srinivasa Ayyangar v. *Ayyathorai Pillai* (3), which was a case decided before the present Code came into force, was a very similar case to the one before me and it was held that a mortgagee came within the words "owner of immoveable property" of section 310A of the former Code. Hatim Ali Khan did in my opinion hold an interest in the property sold by virtue of a title acquired before the sale and he could apply to have it set aside.

The pleas taken fail and the application is dismissed.

As regards costs, there is this important fact that Hatim Ali was called upon by the Court which was selling the property to produce his mortgage-deed at the time it was making an inquiry into the property sold, but he did not produce the mortgage-deed. Under such circumstances I make the order that each party bear its own costs.

Application dismissed.

(2) 10 Ind. Cas. 803; 33 A. 481; 8 A. L. J. 350.

(3) 21 M. 416; 8 M. L. J. 54.

AGRA v. EMPEROR.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 462 OF 1914.

October 13, 1914.

Present:—Mr. Justice Scott-Smith.

AGRA AND OTHERS—CONVICTS—APPELLANTS

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 105 (2), 147, 304, 325—Right of private defence of property, limitations of—Unlawful assembly—Common object—Death caused by some members—Liability of all members

The Penal Code does not give any right of private defence of property in regard to which an offence under section 403 or 411 of the Code has been committed.

Section 105 (2) of the Penal Code applies to cases of theft only. Where more than 25 persons went in a body to enforce the right or supposed right of one of them to an animal by removing it from the house of a third person, and after they had removed it and gone some distance, they were followed by that person, who was consequently attacked and beaten by some of them and died by a blow on the head:

Held, that the assembly was an unlawful assembly within the meaning of section 141, Penal Code, and the force used by some of them in beating the deceased being in prosecution of their common object, all were guilty of rioting, but all could not be convicted of an offence under section 304, Penal Code, as the offence could not be said to have been committed in prosecution of the common object, nor was it such as the members of the assembly know to be likely to be committed in prosecution of that object.

Where a man receives only one blow on the head and dies, and there is no evidence to show which of the two persons attacking him gave that blow, neither of the two will be convicted under section 304 but both of them can be convicted of an offence under section 325 of the Penal Code.

Appeal from the order of the Magistrate, first Class, exercising enhanced powers under section 30, Criminal Procedure Code, Lyallpur, dated the 21st May 1914, convicting the appellants.

Mr. *Beechey*, for the Appellants.

Mr. *Broadway*, Assistant Legal Remembrancer, for the Respondent.

JUDGMENT.—In this case 26 persons, appellants, have been convicted under section 304, part II, Indian Penal Code, read with section 149, of culpable homicide of Ahmda, who died as a result of fracture of the skull caused by a blow inflicted upon him on the 25th of February 1914. Bahadra and Agra, appellants, who are said to have been the persons who actually struck the deceased, have been sentenced to seven years' rigorous imprisonment, and all the other appellants have been sentenced to three years' rigorous imprisonment each. Mr. Beechey has filed a joint appeal on behalf of all the convicted persons and has argued for them all jointly.

There is not really very much dispute about the main facts in this case. It is common ground that on the 25th of February 1914 two of the appellants, Hassu and Pathana, went to the *haveli* of Mathela (P. W. No.) and took away from there a buffalo, which Hassu alleged to be his, which had strayed away from his house nearly a year before. Mathela and his relation Ahmda, coming to know that the buffalo had been taken away, followed them and at some distance from the *haveli* a fight took place in the course of which Ahmda received a severe blow on the head from which his death resulted a few days later. Mathela received only some trivial injuries. According to the prosecution theory all the other appellants came with Hassu and Pathana at the time when the buffalo was removed. According to the evidence for the prosecution when Mathela and Ahmda overtook the appellants, only four of them, Bahadra, Agra, Allah Ditta and Moman, turned back and Bahadra and Agra struck Ahmda, and the other two beat Mathela. After the occurrence Hassu made a report at Kilianwala *thana* in regard to the buffalo. In this report Hassu frankly admitted that he had seized his buffalo and was going away with it when certain persons came after him and attempted to rescue it and, in the fight which ensued, he and his companion Pathana and the men of the other party all received injuries. He went on to say that on the alarm being raised Bahadra, Moman, Agra, Allah Ditta, Sadeq and Palla, caste Dhaniwal, who were searching for a strayed she-camel, had come up and rescued them and that the buffalo was with their help taken to a certain well. He said he had left the buffalo with his companion Pathana at that well and had come to make a report. Upon this report the Police started a case in regard to the buffalo under section 411, Indian Penal Code, and it was only on the 28th of February, while the inquiry in that case was going on, that Mathela made his present statement in regard to the occurrence. The lower Court has examined the reasons given by Mathela

for his delay in reporting the occurrence to the Police. His chief reason, that he was senseless and unable to go to the *thana*, has been held to be false. The delay appears really to have been due to the fact that Mathela took Ahmda to the Lyallpur dispensary and afterwards returned to his village. Jhanda (P. W. No. 3) stated that he did go to the *thana* to make a report but it was not taken down, and he was told to bring the wounded person there. Hassu had already reached the *thana* and had made his report and it is, therefore, quite probable that the Police refused to credit Jhanda's story without some further evidence such as the production of the injured person. Having regard to all the circumstances of the case, I do not think very great importance should attach to Mathela's delay in reporting the occurrence. The Magistrate has devoted a great deal of space in his judgment to discussing whether the buffalo belongs to Mathela or to Hassu. He appears to have wavered a good deal and to have been in doubt as to whom it belonged to. But he has found that Hassu possibly believed the buffalo to be his own in good faith. He does not believe that Pathana and Hassu went in broad day-light with a number of other persons in order to commit a theft of one buffalo, and I quite agree with him in this view. I think it can hardly be said on the evidence that Hassu has proved the buffalo to be his own property. At the same time, there is a great deal of evidence to the effect that it is his property and I think he probably went to Mathela's *haveli* and seized it, believing in good faith that it was his animal which had strayed away about a year previously. The next question is whether Hassu and Pathana went alone and removed the buffalo or whether they were accompanied by the rest of the appellants. In this connection Mr. Beechey has laid a great deal of stress on the fact that Hassu and Pathana belong to the Multan District and have no connection with the Vahniwal accused who are said to have joined them in removing the buffalo. It is, however, admitted that six of the other appellants came up at the time of the fight and though no confliction is established between the other appellants and Hassu and Pathana, there is no reason why Mathela and the other prosecution witnesses should name them falsely Mr. Beechey comments on the fact that the eye-witnesses all belong to Mathela's village and are his distant collaterals. This, however, is what one would expect from the fact that the village is a very small one. It is also quite natural to find Mathela's fellow-villagers to be the eye-witnesses in a case of this sort. They would probably have been in the neighbourhood at the time of the occurrence, and there is no reason why they should not have seen the facts to which they depose. They have no enmity with any of the appellants, and, on the whole, there do not appear to be sufficient grounds for disbelieving their evidence. I consider then that it is established by the evidence that the 26 appellants went in a body to Mathela's *haveli* with the object of removing the buffalo, which Hassu claimed and honestly believed to be his. I find that they did in fact remove the buffalo, and that after they had gone some distance they were followed by Mathela and Ahmda and that then probably some abuse was given on each side, and the four appellants named by prosecution witnesses, Agra, Bahadra, Allah Ditta and and Moman, turned back and beat them. The other appellants took no active part in the beating.

Mr. Beechey urges that even accepting this finding his clients have committed no offence. His argument is that a man whose cattle have been stolen, is entitled to seize them out of the possession of another man with whom he finds them and that in order to effect his purpose he is entitled to take with him a large body of other men. He bases his argument on section 105, part II, Indian Penal Code, which lays down that

"The right of private defence of property against theft continues till the offender has effected his retreat with the property, or the assistance of the public authorities is obtained, or the property has been recovered."

And in support of his argument he cites *Jarha Chamar* v. *Surit Ram* (1), and

(1) 7 Cr. L. J. 49; 3 N. L. R. 177.

SUPPA THEVAN v. RAMASWAMI AIYAR.

Baij Nath Dhanuk v. *Emperor* (2). In my opinion, the argument of Counsel has no force. In the present case there was no allegation that Mathela had stolen the buffalo. Hassu's report made on the 19th of February, *i. e.*, six days before the occurrence, was that his buffalo strayed away from the grazing ground. Under these circumstances the buffalo might have been misappropriated by somebody and might have changed hands several times, and Mathela might easily have acquired it in a perfectly honest manner. In any case, it could not be said that he acquired it by theft, though he might possibly have received it dishonestly within the meaning of section 411, Indian Penal Code. The Code does not give any right of private defence of property in regard to which an offence under section 408 or 411, Indian Penal Code, has been committed. Moreover, in the present case there was obviously ample time for the appellants to have had recourse to the proper authorities with a view to recover the possession of the buffalo. Instead of invoking the proper authorities, they took the law into their own hands and went in a body to enforce Hassu's right or supposed right to the animal. Under these circumstances I have no difficulty in holding that the appellants constituted an unlawful assembly within the meaning of section 141, Indian Penal Code.

The next question is of what offence should the appellants be convicted. Mr. Broadway frankly admits that they could not all have been convicted of culpable homicide under section 304, Indian Penal Code. It cannot be said that that offence was committed in prosecution of the common object of the unlawful assembly; nor was it such as the members of that assembly knew to be likely to be committed in prosecution of that object. The very fact that the appellants went in such numbers would negative the idea that any such consequence as did occur was likely to take place. The common object of the assembly was to take away the buffalo and when Mathela and Ahmda came up to get it back, force was used by some of the appellants in order to drive them away. This force was used in prosecution of the common object of the unlawful assembly, and, therefore, I hold that all the appellants are guilty of rioting.

As regards Bahadara and Agra, it is proved that they attacked Ahmda, but, according to medical evidence, he only received one blow on the head, and there is no evidence to show which of these two appellants gave him that blow. Under these circumstances and following *Emperor* v. *Bhola Singh* (3), I am of opinion that neither of these two persons can be convicted of an offence under section 304, Indian Penal Code. I think, however, it can safely be held that when they attacked him they intended or knew that they were likely to cause him grievous hurt. I, therefore, accept the appeal, and, setting aside the order of the lower Court, convict Agra and Bahadra of an offence under section 325, Indian Penal Code, and all the other appellants of an offence under section 147, Indian Penal Code. I do not think this is a case in which a heavy punishment should be given. At the same time the act of the appellants was a lawless one and was likely to lead to a serious fight. The sentences will be as follows:

Two years' rigorous imprisonment each to Bahadra and Agra, and one year's rigorous imprisonment to each of the other appellants. These sentences will not include any solitary confinement. The appeal is accepted and the convictions are altered and the sentences reduced as above stated.

Appeal accepted;
Sentence reduced.

(2) 1 Ind. Cas. 973; 13 C. W. N. 677; 9 Cr. L. J. 443.

(3) 29 A. 282, A. W. N. (1907) 51; 4 A. L. J. 907; 5 Cr. L. J. 180.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 832 OF 1914.
CRIMINAL REVISION PETITION NO. 685 OF 1914.

February 19, 1915.

Present:—Mr. Justice Ayling.

SUPPA THEVAN AND OTHERS—ACCUSED—PETITIONERS

versus

RAMASWAMI AIYAR—PROSECUTION WITNESS NO. 1—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 107—

CHUNILAL MANI LAL *v.* EMPEROR.

Jurisdiction of Magistrate to take action—Dispute as to immoveable property—Breach of the peace.

The jurisdiction of a Magistrate to take action under section 107 of the Code of Criminal Procedure is not ousted merely because the breach of the peace relates to immoveable property.

Emperor v. *Abbas*, 12 Ind. Cas. 833; 14 C. L. J. 429; 39 C. 150; 12 Cr. L. J. 560; 16 C. W. N. 83, followed.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Sub-Divisional Magistrate of Pattukotah in Miscellaneous Cases Nos. 3 to 13 of 1914.

Mr. *T. R. Venkatarama Sastri*, for the Petitioners.

Mr. *M. D. Devadoss*, for the Public Prosecutor.

Mr. *R. Sadagopalachariar*, for the Respondent.

ORDER.—The mere fact that the dispute out of which a breach of the peace is likely to arise relates to immoveable property does not deprive a Magistrate of the power to take action under section 107 of the Criminal Procedure Code, instead of section 145 [vide *Emperor* v. *Abbas* (1)]. The petition is dismissed.

Petition dismissed.

(1) 12 Ind. Cas. 833; 14 C. L. J. 429; 39 C. 150; 12 Cr. L. J. 560; 16 C. W. N. 83.

BOMBAY HIGH COURT.

CRIMINAL REVISION APPLICATIONS NOS. 316 AND 317 OF 1914.

November 23, 1914.

Present:—Mr. Justice Heaton and Mr Justice Shah.

CHUNILAL MANI LAL—ACCUSED

versus

EMPEROR—PROSECUTOR.

Abkari Act (Bom Act V of 1878), s. 43—Mhowra flowers—Consigned by railway—Found at an intermediate station for transhipment—Possession—Consignor, whether guilty

The accused consigned at a Railway Station certain *mhowra* flowers for conveyance to Nandod. The Railway Company took possession of these goods and in the course of the conveyance to Nandod they were found at Ankleshvar, a place where they naturally would be in the course of this transport. Ankleshvar being a place in a prescribed area within which even the possession of *mhowra* flowers without a permit is unlawful the accused was charged and convicted for possessing *mhowra* flowers without a permit under section 43 of the Abkari Act:

Held, that the applicant was not guilty of the possession of the flowers, and in the absence of any evidence that he conspired with the Railway Company that these goods should be conveyed without a permit, he was not guilty of even abetting the offence.

Criminal applications for revision against the order of the the District Magistrate of Broach, varying the conviction and sentences passed by the Second Class Magistrate at Ankleshvar.

Mr. *G. K. Parekh*, for the Accused.

Mr. *S. S. Parkar*, Government Pleader, for the Crown.

JUDGMENT.—After hearing what has been said in this case on both sides, we think that there is no ground whatever for prosecuting the present applicant. He consigned certain *mhowra* flowers partly at the Nadiad and partly at the Umreth stations of the Railway Company for conveyance to Nandod. The Railway Company took possession of these goods and in the course of the conveyance to Nandod they were found at Ankleshvar, a place where they naturally would be in the course of this transport. But Ankleshvar is a place in a prescribed area within which even the possession of *mhowra* flowers without a permit is unlawful. Assuming, which we do not for a moment admit, that the conveyance by railway from Nadiad and Umreth through Ankleshvar to Nandod did amount to a transport within or an import into or a possession of these *mhowra* flowers within a prescribed area, yet the offence, if any, was committed, to put it compendiously, by the Railway Company. The accused personally did not possess the *mhowra* flowers within the prescribed area or transport them within or import them into or export them from that area. Therefore quite plainly to our minds he is not guilty of the offence of which he was accused and of which he was convicted. But it is said that even if not guilty of that offence, he is guilty of abetting it. Why? We do not know. There is not a particle of evidence, not even a suggestion, that he conspired with the Railway Company that these goods should be conveyed without a permit. So far as the evidence shows, it was no business of his to inquire or to trouble himself whether the Railway Company did or did not obtain a permit. It was sufficient for him to do his business, which was to consign the goods and possibly to pay for their conveyance, and it was very natural and very

proper that he should leave the Railway Company to do their business which would include, if it is necessary, the obtaining of a permit for the purpose of this transport.

We, therefore, set aside the convictions and direct that the fines and sums of money paid in respect of the confiscated goods be, in each of these two cases, returned to the applicant.

Convictions and sentences set aside.

PUNJAB CHIEF COURT.

CRIMINAL REVISION APPLICATION No. 81 OF 1911.

November 13, 1914.

Present:—Mr. Justice Rossignol.

KADIR BAKHSH AND OTHERS—ACCUSED—PETITIONERS

versus

SUNDAR LAL—COMPLAINANT—RESPONDENT.

Transfer of case—Dispute about mosque between Hindus and Muhammadans—Criminal Procedure Code (Act V of 1898), s. 528.

It is desirable that a suit relating to a mosque between Hindus and Muhammadans should be tried by some European Magistrate.

Application, under section 528, Criminal Procedure Code, for the transfer of the case of *Sunder Lal v. Kadir Bakhsh* from the Court of the Magistrate, first Class, Gurgaon, to the Court of an European Magistrate either in the same district or in any other district.

Mr. *Asquith*, for the Petitioners.

JUDGMENT.—I think it is desirable that the District Magistrate or some other European Magistrate should investigate this case, as it involves the right to a building described by petitioners as a mosque. They are Muhammadans whilst respondent-complainant is a Hindu.

I order accordingly.

Application allowed.

BOMBAY HIGH COURT.

CRIMINAL REVISION APPLICATION No. 332 OF 1914.

December 2, 1914.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

BHAGU DHONDI—ACCUSED.

versus

EMPEROR—PROSECUTOR.

Penal Code (Act XLV of 1860), s. 497—Evidence Act (I of 1872), s. 50—Actual fact of marriage must be proved—Conduct not sufficient.

To justify a conviction under section 497 of the Penal Code, the actual fact of marriage must be proved in some way or another.

The evidence that the man and woman spoke of each other as husband and wife and that some of those who were acquainted with them spoke of them as man and wife, proves nothing more than conduct, and under section 50 of the Evidence Act conduct alone is not sufficient to prove marriage.

Criminal application for revision from the order of the Sessions Judge of Poona, confirming the conviction and sentence passed by the first Class Magistrate, Poona.

Mr. *Campbell* (with him Mr. *V. G. Ajinkya*), for the Accused.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

HEATON, J.—This is a peculiar case, because although the applicant (we are dealing with the matter in revision) was convicted under section 497 of the Indian Penal Code, it does not seem to have occurred to anybody in the Court of the trying Magistrate that it was necessary definitely to prove the marriage; the marriage of course being that of the complainant and the woman with whom, he alleged, the accused had committed adultery. But it is necessary specifically to prove a marriage in a case under section 497. This, I think, is so clear that I need say nothing more about it beyond referring to section 50 of the Evidence Act. That section indicates quite clearly that conduct alone is not a sufficient basis for finding a marriage proved in a case of this kind. But as a matter of fact the evidence proves nothing more than conduct. It proves only that the man and woman spoke of each other as wife and husband and that some of those who were acquainted with them spoke of them as man and wife. But not a single witness deposed to a marriage. The actual fact of a marriage must

be proved in some way or another to justify a conviction under section 497. Now, these people may be married; there is absolutely no reason for supposing that they are not. Therefore, were this an ordinary case the defect which has been indicated would be remedied by remanding the case in order that evidence might be taken on the question of marriage. But this, as it happens, is not an ordinary case. The events which led up to it happend very nearly two years ago. In some form or another these events have been before the Courts practically without intermission almost since they occurred. Both sides have suffered. The accused in this particular case has been in jail for somewhere about or nearly four months. Therefore, we have to ask ourselves whether justice really requires that this case should be remanded. On the whole I have come to the conclusion that justice will be satisfied in the very peculiar and special circumstances of this case quite as well by wiping out, as it were, these proceedings as by continuing them in order to ascertain whether all the requirements of the law necessary for a convicition have been fulfilled.

Therefore, I think that the conviction and sentence should be set aside, and the applicant acquitted and the fine, if paid, ordered to be refunded to the applicant.

It may be said that although the conviction of adultery is not legally established on the present evidence, the conviction under section 451 is. But that does not necessarily follow, because the conviction under section 451 requires proof that the house trespass was for the purpose of committing an offence, the only one of the purposes mentiyned in the section which apparently would fit the circumstances of this particular case; so that apparently the conviction under section 451 is just as closely affected as that under section 497 by the defect which I have mentioned.

SHAH, J.—I concur.

Conviction set aside.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 760 OF 1914.

June 23, 1914.

Present:—Mr. Justice Shadi Lal.

SITA RAM—ACCUSED—PETITIONER

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 437—Further inquiry—Discharge after fully considering whole evidence—Notice to accused.

An order of further inquiry under section 437, Criminal Procedure Code, 1898, is improper and is liable to be set aside on revision if the whole evidence on the record has been duly considered and the order of discharge is not manifestly perverse or foolish, etc.

Emperor v. *Kira*, 11 Ind. Cas. 132; 12 Cr. L. J. 364; 10 P. R. 1911 Cr; 205 P. L. R. 1911; 24 P. W. R. 1911 Cr., followed.

Although before directing further inquiry notice to the accused is not absolutely necessary yet according to the general principle of criminal jurisprudence an order to the prejudice of an accused should not ordinarily be passed without giving him an opportunity of being heard.

Dulla v. *Emperor*, 2 P. R 1901 Cr.; 82 P L. R. 1901 and *Wahid Ali* v. *Emperor*, 32 C. 1090; 8 Cr. L. J.120, followed.

Petition, under section 439 of the Criminal Procedure Code, for revision of the order of the District Magistrate, Jhelum, dated the 12th of March 1914, reversing that of the Additional District Magistrate, Jhelum, dated the 3rd of March 1914, and under section 437 of the Criminal Procedure Code, directing that a further inquiry be made into the case by the Sub-Divisional Officer, Pind Dadan Khan.

Mr. *Nand Lal*, for the Petitioner.

JUDGMENT.—The order directing further inquiry in this case cannot be upheld and should be set aside.

It appears that the Munsif after the conclusion of the civil suit passed an order under section 476 of the Criminal Procedure Code for prosecution of the petitioner for offences under section 467 and 471/109, Indian Penal Code. The complaint by the Munsif was inquired into by Sheikh Fazal Ilahi, Additional District Magistrate, who, after hearing all the evidence that the prosecution had to adduce, came to the conclusion, which was agreed to by the Public Prosecutor, that the case was not one of forgery or of using as genuine a forged document and that the complaint as originally filed must fail. The Magistrate

was also of opinion that the only possible offence of which the accused might be guilty was that of fabricating false evidence which is punishable under section 193, Indian Penal Code, and after considering the evidence for and against the accused he found that the document used in evidence before the Munsif was not proved to be false. In consequence of that finding he dicharged the accused.

The learned District Magistrate has, on the motion of the Public Prosecutor and without issuing notice to the petitioner, quashed the order of discharge, on the ground that in his opinion there was a *prima facie* case of an offence punishable under section 193, and ordered further inquiry into that offence by another Magistrate. It is not alleged that the Trial Magistrate did not record any evidence which the prosecution wanted to produce, and I must take it that the object of further inquiry is the re-hearing of the case upon the same material. Now a Full Bench of this Court have laid it down in clear and unequivocal language that generally speaking further inquiry after discharge is improper, unless the order of discharge was manifestly perverse or foolish or was based upon a record of evidence which was obviously incomplete, *vide, Emperor* v. *Kiru* (1). The order of discharge in the present case does not, in my opinion, belong to one of the classes mentioned by the Full Bench and further inquiry directed by the Magistrate is not, therefore, warranted by the rule laid down by this Court. On this ground alone, the order sought to be revised is liable to be set aside.

But it is urged before me that as the offence under section 193 was not mentioned in the complaint made by the Munsif under section 476, Criminal Procedure Code, the Criminal Court has no jurisdiction to try the accused for that offence. If this contention be correct, the proceedings in pursuance of the District Magistrate's order would be *coram non judice*. The point, however, is not free from difficulty and as my decision on it, in this case, would be *obiter dictum* I do not consider it necessary to deal with it.

(1) 11 Ind Cas. 132, 12 Cr L. J 364; 10 P. R. 1911 Cr.; 24 P. W. R. 1911 Cr.; 206 P. L. R. 1911.

It seems to me that this is a case in which the Magistrate ought to have issued notice to the accused before passing order for further inquiry. It is true that it is not as a matter of law obligatory on a Court to issue a notice upon the accused before directing a further inquiry under section 437, Criminal Procedure Code, but according to the general principle of criminal jurisprudence an order to the prejudice of the accused should not ordinarily be passed without giving him an opportunity of being heard, *vide Wahed Ali* v. *Emperor* (2) and *Dulla* v. *Emperor* (3).

Accordingly I accept this application for revision and set aside the order directing futher inquiry into the case of the petitioner.

Application accepted.

(2) 32 C. 1090; 3 Cr. L. J. 120.
(3) 2 P. R. 1901 Cr.; 32 P. L. R. 1901.

CALCUTTA HIGH COURT.

CRIMINAL MISCELLANEOUS REVISION No. 60 OF 1914.

April 23, 1914.

Present:—Mr. Justice Holmwood and Mr. Justice Sharfuddin.

ASHRAF ALI—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 497, 498, scope of—Confession of one of accused materially corroborated as to others—Bail, whether to be granted to others.

The rule laid down in section 497 of the Code of Criminal Procedure, 1898, for the guidance of Courts other than the Hight Court is a rule founded upon justice and equity and one which should be followed by the High Court as well as by every other Court subordinate to it, unless anything appears to the contrary.

The extended powers given to the High Court under section 498 of the Criminal Procedure Code are certainly not to be used to get rid of the very reasonable and proper provisions of section 497 of the Code.

Where one of the accused, under sections 307 and 337 of the Penal Code, made a confession implicating himself and the petitioners and the confession was corroborated by such of the evidence as was recorded by the Magistrate who was inquiring into the case, the High Court refused bail, holding that the evidence put forward was such that if believed it would amount to material corroboration of the confession.

PAHLWAN v. EMPEROR.

Criminal revision against the order of the Sessions Judge of Chittagong, dated the 21st March 1914.

Mr. *H. P. Ghose* and Babu *Chandra Sekhar Sen*, for the Petitioners.

Mr. *Orr*, Deputy Legal Remembrancer, for the Crown.

JUDGMENT.—This was a Rule calling upon the District Magistrate of Chittagong to show cause why the Petitioners should not be admitted to bail. It is opposed by the Crown represented by the learned Deputy Legal Remembrancer, and the District Magistrate has submitted an explanation in which he points out that one of the accused, who was captured at the time, has made a long confession implicating himself and the other persons who are now praying for bail before this Court, that the confession has been corroborated to a certain extent by evidence which has been recorded by the Magistrate who was inquiring into the case, and in a few days' time Mr. Higgins, the complainant, who was assaulted, will be in a position to give his evidence and we do not know what light it may throw on the matter. But what we have to consider in this case is whether the corroboration is in the nature of material corroboration at law, and from the account which has been placed before us by the learned Counsel appearing in support of the Rule, we must say that, so far as it goes, it is what the law considers material corroboration. Of course we do not, and we should not, think of throwing out any opinion as to whether this evidence is to be believed. We do not desire to prejudice the case in any way. We merely state that the evidence which is put before us through the learned Counsel is, if believed, evidence which in law amounts to material corroboration, and we think that the rule laid down in section 497 for the guidance of Courts other than the High Court is a rule founded upon justice and equity and one which should be followed by us as well as by every other Court unless anything appears to the contrary. The extended powers given to the High Court under section 498 are certainly not to be used to get rid of this very reasonable and proper provision of the law.

For these reasons we think that at the present stage of the case bail should not be given. It will, of course, be within the competence of the lower Courts to admit the petitioners to bail at any time after Mr. Higgins is examined, or whenever it should appear that the *prima facie* case against them has in any way been weakened.

The Rule is discharged.

Rule discharged.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 1898 OF 1914.

December 18, 1914.

Present:—Sir Alfred Kensington, KT., Chief Judge.

PAHLWAN AND ANOTHER—CONVICTS—PETITIONERS

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 498—Enticing away married woman—Discarded wife living in her father's house—Protection—Knowledge or belief of her being wife of another man—Revision—Criminal Procedure Code (Act V of 1898), s. 439.

A husband who openly discarded his wife for many years and recognised her as a free agent to go where she liked, has no ground for complaining under section 498 of the Penal Code even if she is enticed away by another man from her father's house where she lives.

In such a case it cannot be said either that her father has the care of her on behalf of her husband or the man enticing her away had the knowledge or belief of her being the wife of the complainant.

Petition for revision under section 439 of the Criminal Procedure Code of the order of the District Magistrate, Mianwali, dated the 23rd September 1914, affirming that of the Magistrate, second Class, Mianwali, dated the 16th September 1914, convicting the petitioners.

Mr. *Nand Lal*, for the Petitioners.

JUDGMENT.—Whatever the real facts about this peculiar case may be, I find it difficult to understand the grounds upon which the lower Courts have thought it right to convict the petitioners under section 498 or 498/109, Indian Penal Code.

The complainant is aged 40 and the woman *Mussammat* Ali about 25. It is clear from the Magistrate's long judgment that there

was a good deal of doubt whether the complainant had or had not divorced her some years ago. During the pendency of these criminal proceedings the woman instituted a civil suit for declaration that she had been divorced, and from a certified copy produced before me it appears that the Civil Court has since given her a decree, dated the 23rd October 1914. This decree has been given *ex parte* and may not carry much more weight than the Magistrate's earlier finding to the contrary, but it, at any rate, goes to show that there is a good deal to be said for the woman's story.

The more important question is, however, whether either of the petitioners had any reason for believing the woman to be the complainant's wife and here both her own story of the irregular life which she has been long leading and the remaining evidence in the case, all lead to a reasonable conclusion that they could have had no such knowledge or belief.

It is certain that the woman left her husband years ago, whether she was formally divorced or merely turned out and discarded as a wife. She then lived more or less continuously with her father, Jhinda, having by her own account irregular intercourse with other men from time to time through a period of several years. This part of her story is supported to a material extent by the report made by her father to the Police on the 15th April 1914, which eventually led to the present prosecution.

There is nothing to suggest that her father had the care of her on behalf of the alleged husband, and the essential elements for an offence under section 498, Indian Penal Code, are wanting, even if the woman may have now attached herself to the petitioner, Pahlwan. She must have been long recognised as a free agent to go where she liked, and a young man like Pahlwan could not be expected to know the circumstance of her early life. Her father seems to have resented her last act of misconduct and to have put the complainant up to making a quite unjustifiable complaint. A husband who openly discards his wife for many years has no ground for complain if she elects to go off with some other man, and the assertion that she had left him only two months before is clearly quite untrue.

Even if it be assumed that the petitioners enticed the woman away from the father's house, which seems very doubtful, I must find that they have committed no offence in doing so. The revision is allowed. The petitioners are acquitted. Their sentences of imprisonment are set aside and they will be released The additional fines of Rs. 100 on Pahlwan and Rs. 25 on Niazi will be refunded if paid.

Petition allowed.

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION PETITION No. 314B OF 1914.

January 12, 1915.

Present:—Mr. Justice Hartnoll.

MA SHWE HMYIN—PETITIONER

versus

MG. PO CHAT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 488—Maintenance of children—Mother dissuading children from father's custody to enable her to claim them maintenance—Father, liability of

Where a father has custody of his minor children and is maintaining them properly, the mere fact that they go and live with their mother would not make him liable to be charged for maintenance under section 488, Criminal Procedure Code, though he refuses to maintain them unless they return to his custody.

Review of the order of the Township Magistrate of Kayan, dated the 7th of August 1914, passed in Civil Miscellaneous No. 32 of 1914.

Mr. *Halkar*, for the Petitioner.

Mr. *F. C. Brown*, for the Respondent.

JUDGMENT.—The evidence clearly shows that Ma Shwe Hmyin and Mg. Po Chat were divorced some six years ago and that the fault must have been on Ma Shwe Hmyin's side, since Mg. Po Chat is a wealthy man and on divorce Ma Shwe Hmyin obtained no share of the property. After the divorce it is proved that the minor children, Ma Thein Me and Me Ba Tin, lived with their father and were under his guardianship. They sometimes stayed with their elder sister, Ma Thein. Some few months ago they left their father's house and went to live with their mother. It is suggested that the latter persuaded them to go to her, so that she could claim maintenance for them from their father, which she is now doing and

which is the subject of the present proceeding. I think that this suggestion is probably correct. In any case the father has been their guardian all along since the divorce and has been maintaining them. He wishes to have their custody now and to look after them. There has been on his part, in my opinion, no such neglect nor refusal to maintain as comes within the meaning of section 488 of the Code of Criminal Procedure. The case is not unlike that of *In re Venkatasubbaiyan* alias *Samaiyan* (1).

I dismiss the application.

Application dismissed.

(1) 2 Weir 632.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 1140 OF 1914.

July 31, 1914.

Present:—Mr. Justice Scott-Smith.

EMPEROR—PROSECUTOR

versus

BHAGWAN DAS—ACCUSED.

Excise Act (XII of 1896), s. 49—Selling medicine containing brandy.

A medical practitioner who puts a little brandy into one of the medicines prescribed and sold by him to a patient, does not thereby sell brandy and contravene the provisions of the Excise Law.

Case reported by the Sessions Judge, Jhelum, with his No. 372, dated the 2nd June 1914, under section 438 of the Criminal Procedure Code.

FACTS.—One Bhagwan Das, a foreign liquor contractor of Pind Dadan Khan, about the 8th or 9th of October last observed two carriers passing his door with a wired and sealed box, of the pattern in which bottles of spirit are usually packed. As they passed one of the carriers said: "This is for Bhagwan Das," to which the other replied "no, not this Bhagwan Das, Bhagwan Das, Doctor." Upon this the liquor contractor began to reflect that the vendors of medicines in Pind Dadan Khan, when in want of spirit for the making up of prescriptions, were in the habit of obtaining it from him, but that "Bhagwan Das, Doctor," the present applicant, was an exception to this rule. He suspected, therefore, that the man had a private supply of spirit which he was in the habit of selling, either as an ingredient in the medicines compounded by him, or otherwise. Five or six days later the Excise Inspector visited Pind Dadan Khan, and to him the liquor contractor communicated his suspicions. The two put their heads together, and got a prescription written in which brandy was one of the ingredients. This prescription was made over to one Govind Sahai, who was given a rupee, and was sent off to the shop of the present applicant to get the prescription made up. The idea of the liquor contractor and Excise Inspector, of course, was that the applicant had his own private supply of brandy, and would be tricked into indenting on that supply in order to make up the prescription. In this pious hope they were completely disappointed, for the evidence of their own emissary, Govind Sahai, himself shows that, when he went to the applicant, the latter remarked that the prescription contained 3 *chhatanks* of brandy, which he told the witness to go and get himself. The witness replied that he knew nothing about such matters and could not go himself, but would pay for the brandy if the applicant would get it for him. The applicant then sent off a man to procure the spirit, which he did from some source unknown, and on his return the prescription was duly completed. For the mixture, for which the applicant himself provided a bottle, he charged Rs. 1-5, of which Rs. 1-3 was paid at the time and annas two later.

The accused on conviction by E. G. F. Abraham, Esquire, Magistrate, first Class, Jhelum District, dated 7th March 1914, was sentenced under section 49 of the Excise Act to pay Rs. 20 as fine.

The present is an application for revision presented by the accused chemist, praying that the conviction and sentence may be set aside, and the proceedings are forwarded for revision on the following grounds:—

It seems to me that the conviction was wrong, on the simple ground that there was no sale by the applicant. No doubt, the applicant procured the brandy from outside, poured it into the mixture, and charged Govind Sahai for the whole mixture; but there is nothing to show how much he

In re PAVALLIMANAKKAL NARAYAN NAMPUDRIPAD.

charged for each ingredient in the mixture, nor is there anything to show where his servant got the brandy from, or what he paid for it. In other words there is nothing to show that the applicant made any profit over the transaction, and, that being so, *Panna Lal* v. *Emperor* (1) is an authority for holding, that the applicant cannot be said to have "sold" to Govind Sahai. In fact, it appears to me that the applicant acted merely as an agent for Govind Sahai, the purchaser, and that the only seller was the unknown person from whom the applicant's servant made the purchase.

Mr. *Nand Lal*, for the Accused.

ORDER.—I fully agree with the Sessions Judge. I think it would be monstrous to hold that a medical practitioner, who put a little brandy into one of the medicines prescribed and sold by him to a patient, thereby contravened the provisions of the excise law and sold brandy.

I agree that there was no such sale as contemplated in the Excise Act and I, therefore, accept the revision, and set aside the conviction and sentence, and acquit Bhagwan Das and order refund of the fine.

Revision accepted.

(1) 2 Ind. Cas. 102; 31 A. 293; 6 A. L. J. 238, 9 Cr. L. J. 503.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 728 OF 1914.
CRIMINAL REVISION PETITION NO. 611 OF 1914.
February 26, 1915.

Present:—Mr. Justice Ayling.

In re PAVALLIMANAKKAL NARAYAN NAMPUDRIPAD—ACCUSED—PETITIONER,

Penal Code (Act XLV of 1860), s. 176—Failure to report—"Intentionally", meaning of—Co-existent obligation of another no excuse.

Where a person is under a legal duty to report certain facts and fails to report them, he must be presumed to intend to conceal them, unless he can show that he had reason to suppose that the authority to which the report was due had the information from other sources.

The mere fact that another person was also present at the time of the occurrence and was under a similar obligation to report does not justify omission to report.

In re Pandya Nayak, 7 M. 436, 1 Weir 102; *Queen-Empress* v. *Gopal Singh*, 20 C, 316, distinguished.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Joint Magistrate of Palghat, in Criminal Appeal No. 93 of 1914, preferred against that of the Court of the Stationary Second Class Magistrate of Ponnani, in Calendar Case No. 256 of 1914.

Dr. *S. Swaminadhan*, for the Petitioner.

The *Public Prosecutor*, for the Government.

ORDER.—Petitioner in the case was bound under section 8 of Act IV of 1884 to give information to the Police of an explosion of fire-works which resulted in the death of a child. He omitted to do so, and has been convicted of an offence under section 176 of the Indian Penal Code.

The only question is whether his omission should be taken to be intentional. Dr. Swaminadhan for petitioner quotes the cases of *In re Pandya Nayak* (1) and the *Queen-Empress* v *Gopal Singh* (2), but these rulings are only authority for the proposition that where the Police are already in possession of the information, a person cannot be convicted of an intentional omission under section 176, because he fails to perform an entirely superfluous act in furnishing them with the information over again. In the present case, I am not referred to anything from which it would appear that petitioner had any reason to suppose that the Police had been informed of the matter by any one else. The most that can be said is that the Adhigari was also present, who was under a similar obligation to report; but this by itself is no legal justification for petitioner's omission.

It is also argued that the word "intentionally" in the section should be construed in the sense of an intention to conceal the facts which should be reported: but where a person is under a legal duty to report certain facts and fails to report them, he must be presumed to intend to conceal them, unless he can show that he had reason to suppose that the authority to which the report was due had the information from other sources.

The extenuating circumstances of the case have been given due weight by the Sub-

(1) 7 M. 436; 1 Weir 102,
(2) 20 C, 316.

Divisional Magistrate and I find no reaso for interference.

The petition is dismissed.

Petition dismissed.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 1305 OF 1914.

September 6, 1914.

Present:—Mr. Justice Johnstone.

EMPEROR—PROSECUTOR

versus

FAZAL DIN—ACCUSED.

Public Gambling Act (III of 1867), ss. 3 and 4—Keeping gaming house and being present in it—Offence Joint trial, whether illegal.

The joint trial of a person accused of keeping a gaming house and others for being present in it at the time of a Police raid, is not warranted by the provisions of section 239 of the Criminal Procedure Code, and thus being illegal must be set aside

Makhan v. *Emperor*, 5 Ind. Cas. 720, 5 P W.R. 1910 Cr.; 11 Cr. L. J. 211; *Subrahmania Ayyar* v *Emperor*, 25 M. 61; 11 M. L. J. 233; 3 Bom. L. R. 540, 5 C. W. N. 866; 28 I. A. 257 (P C.); 2 Weir 271, referred to.

Case reported by the Additional Sessions Judge at Lahore with his No. 539 of 26th June 1914 under section 438 of the Criminal Procedure Code.

FACTS.—On the report of Gulab Singh, Sub-Inspector, dated 15th August 1913, confirmed by other information, the Sub-Divisional Officer, Kasur, issued a warrant under section 5 of the Gambling Act, III of 1867, in respect of a house situate in the Kasur town, and on 16th August 1913, the instruments of gaming of different kinds such as dice, etc., detailed in Exhibits II and P III, and currency notes of Rs. 30, together with cash in Rs. 14 and silver pieces and pice amounting to Rs. 6-5-1½ were seized there; and all the accused, 22 in number, were found in the house and arrested.

The accused, on conviction by Sardar Sohan Singh, exercising the powers of a Magistrate of the first Class at Kasur in the Lahore District, was sentenced, by order dated 5th May 1914, under section 4/15 of Act III, 1867, to one month's rigorous imprisonment.

The proceedings are forwarded for revision on the following grounds:—

For reasons given in my judgment in Criminal Appeal No. 251/141, decided to-day (copy attached with this Office No. 541 of 27th June 1914), I refer the petition for revision to the Chief Court for order with a recommendation that the conviction be set aside and a retrial ordered separately from Ghulam Haidar, accused, who was tried and convicted under section 3 of the Act.

ORDER.—Nineteen persons have been convicted under the Gambling Act, one Ghulam Haidar under section 3 for keeping a gambling den and the rest under section 4 for frequenting it and gambling there. They have been tried together and the learned Sessions Judge has sent up the records with a recommendation that, inasmuch as under a ruling of this Court. *Makhan* v. *Emperor* (1), the joint trial was illegal, the convictions should be set aside and retrials ordered. The Privy Council ruling in *Subrahmania Ayyar* v. *Emperor* (2) is also referred to as showing that an error of this sort is not a mere curable irregularity, but is a fatal illegality.

The ruling of 1910 was by myself, and I find on again considering the matter, that I am still of the same opinion. Persons can only be jointly tried, apart from cases of offenders and their abettors, if—see section 239, Criminal Procedure Code—they are accused of the same offence or of different offences committed in the same transaction. Now here Ghulam Haidar has been charged with an offence and the others with a distinct offence; and I do not think that the keeping of a gaming house and the being present in it at time of a Police raid can be said to be part of the "same transaction." I am aware of no exact precedent, but the rulings under section 239 aforesaid afford valuable analogies, and the above is my conclusion. I, therefore, allow the revision and direct that, the convictions and sentences being set aside, the matter should be again tried, Ghulam Haidar being tried separately from the other accused persons.

Revision accepted.

(1) 5 Ind. Cas. 720; 5 P. W. R. 1910 Cr.; 11 Cr. L. J. 211.

(2) 25 M. 61; 11 M. L. J 233; 3 Bom. L. R. 540; 5 C. W. N. 866; 28 I. A. 257 (P. C.), 2 Weir 271.

CHAINSUKH *v.* EMPEROR.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION No. 1071 OF 1914.

January 28, 1915.

Present:—Mr. Justice Piggott.

CHAINSUKH AND ANOTHER—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Evidence—Statement made to Police officer, admissibility of.

A statement by a Police officer to the effect that certain persons made certain statements to him is not admissible in evidence unless it is evidence of general repute.

Application in revision against an order of the Sessions Judge of Agra,

Mr. *A. P. Dube*, for the Applicants

The *Assistant Government Advocate*, for the Crown.

JUDGMENT.—Chainsukh and Hukmi, father and son, residents of a village in the Agra District, were prosecuted before a Magistrate of the first class on the allegation that they habitually committed the offence of counterfeiting coins. The Magistrate after a full inquiry passed an order requiring them to file security for a period of two years. As the security was not furnished, the Magistrate referred the matter to the Sessions Judge. The Sessions Judge has passed an order requiring security to be furnished as directed by the Magistrate, and sentencing both men to rigorous imprisonment for a period of two years in default of furnishing the said security. The order of the Sessions Judge is challenged in revision, substantially on the ground that it is based upon inadmissible evidence. I have examined the record, and I am satisfied that the applicants have made good their plea. At the outset of the Sessions Judge's order I find the following passages: "The search of the house of Hukmi led to the finding of nothing criminating except a telegram from Chiranji's brother. Under the circumstances in which this telegram was found I consider it a strong piece of evidence in corroboration of Chiranji's statement that Hukmi was his associate and the coiner of the counterfeit coin in his possession. In another recent case Badri and Dwarka also mentioned the name of Hukmi as being their accomplice." There is no legal evidence on the record that Chiranji or Badri or Dwarka made the statements relied on by the Sessions Judge. They were not called as witnesses in the case. The statements relied on by the Sessions Judge are statements by Police officers to the effect that Chiranji, Badri or Dwarka made certain statements to them. This is not evidence of general repute, and is not admissible under any provision of the Indian Evidence Act or of the Code of Criminal Procedure. The remark about the finding of the telegram is open even to equal objection. There is no telegram on the record alleged to have been found in Hukmi's house, nor is there anything on the record to show what were the terms of the telegram which the Sub-Inspector Ashiq Ali (P. W. No. 2) says he found. If the telegram in question was an exhibit of importance in the case, it should have been proved. The Court might then have considered its terms and considered further whether it was prepared to presume, without any direct evidence, that it was actually despatched by the person from whom it purported to come, and that that person was Chiranji's brother. The passages I have quoted from the order of the learned Sessions Judge are obviously material to the conclusion arrived at by that Court. The comments which I have made on them are sufficient to show that his order cannot be affirmed as it stands. I have examined the record in some detail, in order to see whether I should merely quash the proceedings or direct any further proceedings to be taken. The record seems to me to be saturated with evidence not legally admissible, and I am quite unable to concur with the Magistrate or the Sessions Judge as to the evidential value of the statements made by five Police officers, who have been relied on as proving that Chainsukh and Hukmi are by general repute habitual counterfeiters of coin. They appear to have been prosecuted on one occasion only, when they were convicted of a technical offence for which an almost nominal sentence was considered sufficient. The fact of this conviction, however, might account for the diffusion of the rumours unfavourable to the character of the persons so convicted. It would certainly serve to account for information unfavourable to their character

reaching the Police officers. Any person caught with counterfeit coin in his possession, and desirous of concealing the real source from which it came, would find it easy to say that it proceeded from Chainsukh and Hukmi who had already been convicted in another case. I accept this application and set aside the order of the Sessions Judge. If the applicants are in custody, they must be released. If they have furnished security, their bonds and those of their sureties are hereby discharged.

Order set aside.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 837 OF 1914.

January 9, 1915.

Present:—Mr. Justice Rossignol.

RONKI—CONVICT—APPELLANT

versus

EMPEROR—PROSECUTOR—RESPONDENT.

First report—No mention of offender therein—Subsequent assertion of his having been seen not reliable—Track evidence, value of.

Where the first report makes no mention of the offender and the complainant when questioned named nobody as his assailant, and there is no assertion therein that any fugitive had been seen, the complainant's subsequent statement that he had identified the accused at the time of the attack and the evidence of his neighbours that they saw him running with the instrument of crime in his hands, cannot justly be relied upon.

The track evidence of a flimsy nature should not be believed without sufficient corroboration.

Appeal from the order of the Magistrate first Class, Hissar, exercising enhanced powers under section 30 of the Criminal Procedure Code, dated the 8th October 1914, convicting the appellant.

Mr. *Nand Lal*, for the Appellant.

JUDGMENT.—The appellant has been convicted of the attempted murder of Hari Chand and has been sentenced to seven years' rigorous imprisonment. The alleged motive is appellant's resentment in respect of a decree obtained by complainant's father against appellant's father shortly before the commission of the offence.

Hari Chand, complainant, was attacked as he lay asleep in the bazar in front of his shop. The first report was to the effect

that Hari Chand, when questioned, had mentioned nobody and there is no mention that any fugitive had been seen.

Hari Chand stated before the Magistrate that he had identified appellant at the time of the attack, but the Magistrate declined to believe this and having seen the Police proceedings, I think the Magistrate was quite correct in his conclusion.

But the lower Court has convicted on the evidence of four neighbours of complainant, who say they saw appellant running away with a hatchet in his hand.

I place no reliance on these witnesses. They live quite close to the complainant, they say they heard the alarm and cries of *wadh gaya*, still they did not go to the spot and tell what they had seen. Moreover, appellant had been arrested on suspicion before their statements were recorded.

There is some track evidence of a very flimsy nature and the so-called tracker has not been corroborated. The lower Court does not rely on it.

There is no sound evidence at all against the appellant.

Ground 7 is withdrawn.

The appeal is accepted and the appellant is acquitted.

Appeal accepted.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL TRANSFER APPLICATION No. 77 OF 1914.

July 8, 1914.

Present:—Mr. Fawcett, J. C.

NABIBUX KHAN AHMEDKHAN—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 526—Transfer—Necessity of trying Magistrate's evidence—Burden of proof.

NABIBUX KHAN AHMEDKHAN v. EMPEROR.

An application for transfer based on the ground that the evidence of the trying Magistrate is necessary for the defence, cannot be entertained unless it is clearly shown that the evidence is really essential and that there is likelihood that he can give evidence which would aid the accused in his defence. The burden of proof lies very heavily on the applicant to show that such is the case.

Application for transfer of the case from the Court of the Sub-Divisional Magistrate, Mehar, to outside Larkana District.

Mr. *F. J. de Verteuil*, for the Applicant.

Mr. *E. Raymond*, Public Prosecutor, for the Crown.

JUDGMENT.—This is an application under section 526, Criminal Procedure Code, for a transfer from the Court of the Sub-Divisional Magistrate, Mehar, of certain proceedings which had been instituted against the applicant under section 110, Criminal Procedure Code.

The first ground on which this application is based is that the District Superintendent of Police, Larkana, is taking a personal interest in the case and is pressing *zamindars* to be witnesses against him. This is an allegation which is supported by the affidavit of one person, but the Public Prosecutor for the Crown states that it is strongly denied by the District Superintendent of Police himself, and it is obviously a ground which cannot be accepted as sufficient unless there is a very strong reason to believe that the District Superintendent of Police is actually putting improper pressure on persons to give evidence or otherwise going beyond the proper limits of his duties as a Police officer. In this case it is stated that the proceedings were purposely put in the hands of the District Superintendent of Police, in order that there might be no suspicion of their institution improperly by a subordinate, and the Court must presume that an officer of the standing of District Superintendent of Police would not go beyond the proper grounds of his duty in such matters. I do not think that this allegation affords any substantial ground for the transfer applied for.

The 2nd ground on which this application is based is that the evidence of the Sub-Divisional Magistrate is absolutely essential in this case for the accused's defence. It is stated that the Sub-Divisional Magistrate, under the directions of the District Magistrate, made certain inquiries into other cases, in the course of which the applicant asserts that he expressed fears as to the results of his giving evidence and that the trying Magistrate re-assured him on the point. It is alleged that his fear was that if he did give evidence he would incur the enmity of the Sub-Inspector and that this is, therefore, material fact for the purpose of his defence *viz*, that the proceedings had been instituted against him on account of Police enmity. The Magistrate in the report which he has furnished in compliance with the order of this Court states that he made certain inquiries as alleged, but so far as he remembers the applicant did not in fact give evidence against the Sub-Inspector. He also says the applicant did not, so far as he remembers, express any fear to him nor does he remember re assuring him. It is quite clear that an application for transfer of a case pending before the Magistrate on the grounds that the Magistrate is a necessary witness for the defence, must be strictly scrutinized, as otherwise it would be open to any accused person to obtain a transfer of a case from a Magistrate, whom he did not want to try the case, merely on this particular ground; and it clearly cannot be the intention of the Legislature that this latitude should be open to the accused, unless there are sufficient grounds for his allegation. In this particular case it is clear that the fact of the Sub-Divisional Magistrate having made the inquiries referred to can be put in evidence by certified copies of proceedings. The allegation as to the accused's expression of fear before the Sub-Divisional Magistrate and his re-assuring him, is, no doubt, a matter on which the Magistrate's evidence might more properly be required; but in view of the definite statement of the Magistrate that he is not in a position to give evidence which would support this allegation, I do not think that there is any sufficient ground for saying that it is expedient in the interests of justice that this particular case should not be tried by him and should be transferred to some other Magistrate. As I have already said, a very heavy burden of proof that the evidence of the Magistrate is necessary, lies on the applicant, and I do not think that it has been properly discharged in this case. I have

been referred to the case of *Emperor* v. *Abdul Latif* (1), in which the learned Judge held that, inasmuch as the Magistrate was bound under section 257, Criminal Procedure Code, to issue a summons, unless he considered that the application was made for the purpose of vexation or delay, or for defeating the ends of justice, and it was not proper to leave the decision of such a question to the Magistrate whose evidence was required, the application for transfer ought to be granted. It is of course a matter in which there can be a difference of opinion as to whether it is or is not expedient that a Magistrate should be placed in such a position. But on the other hand, it must be borne in mind that if this view be adopted, it will, as pointed out by the learned Public Prosecutor, be open to any accused persons to obtain a transfer in this way. And for the reasons already given I do not think it expedient to order a transfer, unless it is clearly shown that the evidence of a Magistrate is really essential for the accused's defence, and that there is likelihood that he can give evidence which would aid the accused in his defence. I do not think that there is anything in this case to satisfy these conditions and the application is accordingly dismissed.

Application dismissed.

(1) 26 A. 536; A. W. N. (1904) 94; 1 Cr. L. J. 338.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION No. 1215 OF 1914.

February 6, 1915.

Present:—Justice Sir P. C. Banerjee, KT.

RAM BEHARI—APPLICANT

versus

MUNESHAR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 145—Dispute likely to cause breach of the peace not mentioned in notice—Parties aware—Magistrate—Jurisdiction—Revision.

Where there is a dispute likely to cause a breach of the peace and the parties are aware of it, the Magistrate is not ousted of his jurisdiction to act under section 145 of the Criminal Procedure Code simply because in the notice issued it is not stated that a dispute likely to cause a breach of the peace exists.

Ganga Saran Singh v. *Bhagwat Prasad*, 5 Ind. Cas. 471; 7 A. L. J. 53; 11 Cr. L. J. 141; 32 A. 132, referred to.

Criminal revision against an order of the Magistrate of Gorakhpur.

Mr. *S. C. Mukerji*, for the Appellant.

Mr. *Hamilton*, for the Opposite Party.

JUDGMENT.—This is an application for revision of an order passed under section 145 of the Code of Criminal Procedure. The main ground upon which the application is made is that the Magistrate who made the order had no jurisdiction to make it, inasmuch as the notice which he issued under the section did not strictly comply with the requirements of clause (1) of the section. The first notice issued was no doubt very defective, but in the second notice the only defect was that it was not stated that a dispute likely to cause a breach of the peace existed. The parties, it is clear, were aware of the dispute which existed between them and as has been found, there was a dispute which was likely to cause a breach of the peace. As the learned Magistrate has pointed out, the applicants themselves considered that a breach of the peace was likely to ensue. That being so, I do not think this is a case in which this Court should exercise its powers of revision and should hold that the Magistrate had no jurisdiction to take proceedings under section 145. I may refer to the latest ruling of this Court on the point *viz.*, *Ganga Saran Singh* v. *Bhagwat Prasad* (1).

There is a further plea taken in the application that the Magistrate ought not to have order the lock put on the shop in dispute to be removed. I think under the circumstances the Magistrate was fully justified in making that order, inasmuch as in proceedings under section 145 he had nothing to do with the moveable property contained in the said shop. I accordingly dismiss the application.

Application dismissed.

(1) 5 Ind. Cas. 471; 32 A. 132; 7 A. L. J. 53; 11 Cr. L. J. 141.

RAMANATHAM CHETTY v. RAGAMMAL.

MADRAS HIGH COURT.

CIVIL SUIT No. 21 OF 1913.

September 29, 1914.

Present:—Mr. Justice Kumaraswami Sastri.

S. G. RAMANATHAM CHETTY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

A. S. RAGAMMAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Probate and Administration Act (V of 1881), ss. 19, 45, 78, 89—Administration, when comes to an end—Grant of Letters of Administration to Hindu widow—Her liability under an administration bond—Administrator of executor, whether a derivative executor—Executor, whether trustee—Assent to legacy, effect of—Suit on bond conditioned with performance of several acts—Limitation Act (IX of 1908), Sch. I, Art. 68

As soon as an administrator has performed the duties imposed on him by the Probate and Administration Act, the administration must be deemed to be at an end and when the person entitled to the estate is the executor or administrator himself, subsequent possession and acts are attributable to him not as administrator but as heir.

Where a Hindu widow obtained Letters of Administration to the estate of her deceased husband and executed the usual administration bond under section 78 of the Probate and Administration Act:

Held, that her liability under the bond was confined only to such acts of waste and mismanagement as could be attributed to her as administratrix and not any such acts attributable to her as the widow in possession of her husband's estate under Hindu Law after administration was over.

The administrator of an executor is not a derivative executor. Where, therefore, an executor dies without having fully administered the estate the duty of carrying on the administration of that estate does not devolve upon the deceased executor or administrator's personal representative but on a person appointed for the purpose under sections 19 and 45 of the Probate and Administration Act.

An executor is not an express trustee merely by virtue of the office in the absence of any trusts imposed upon him by the terms of the Will.

Mere assent to a legacy does not convert an executor into a trustee unless he has separated the fund and set it apart. It does not transfer the liability from the estate of the deceased and fasten it on to that of the executor so as to make it a debt payable by his executor or administrator in the usual course of administration.

In cases where a bond contains successive covenants each breach gives a separate cause of action, but the date of the last breach is the starting point of limitation in a suit on the bond when the bond is conditioned on the performance of several acts and the obligation to pay is enforceable till the last of the conditions is fulfilled.

Where the assignees of an administration bond executed by a Hindu widow in connection with the grant to her of the Letters of Administration to the estate of her deceased husband, sued for an account of the administration:

Held, that the suit was governed by Article 68 of the first Schedule to the Limitation Act and having been brought more than three years from the period when the conditions of the bond were broken, was barred by limitation.

FACTS.—One Kuppu Chetty died leaving a Will of which he appointed Kandaswami Chetty executor. The Will provided that the executor should from the property set apart Rs. 500 for one Ramaswami Chetty and should hand over the said sum together with interest at half a rupee per hundred to him on his attaining the age of 18, and that the executor should pay another sum of Rs. 500 similarly with interest to Venkatasiva Chetty on his attaining the same age. After giving two more legacies, the testator continued: "After deducting the above mentioned four items and the expenses of my funeral ceremonies the whole of my remaining estate shall be enjoyed by my above-mentioned executor, Kandaswami Chetty." The Will was proved by Kandaswami Chetty and he died some years thereafter without paying the legacies above referred to. The 1st defendant Ragammal applied for Letters of Administration to the estate of her deceased husband the said Kandaswami Chetty. In paragraph 4 of her petition for Letters of Administration she stated as follows: "That the deceased Kuppu Chetty bequeathed by his last Will all his properties to the said Kandaswami Chetty and the latter took out Probate of the said Will and took possession of and enjoyed the estate during his life-time." Paragraph 5 of the petition ran as follows: "That the estate in the hands of Kandaswami Chetty was his own and no one save the petitioner has any interest therein." Letters of Administration were granted to her and an administration bond was taken in the name of the Registrar of the High Court, executed by the 1st defendant and as sureties for her by the 2nd, 3rd and 4th defendants and one Subbaraya Chetty, whose legal representatives were the 5th and 6th defendants in this suit.

The material portions of the administration bond are as follows:

"I, A. S. Ragammal, am bound unto A. L. Hannay, Esquire, the Registrar of the High Court, in the sum of Rs. 1,43,873-10 7,

I, M. Subbaraya Chetty, in the sum of Rs. 88,000 and we, P. Appavu Mudaliar, Aiya Mudaliar and Muthuswami Mudaliar in the sum of Rs. 2,25,000 to be paid to the said A. L. Hannay Esquire or the Registrar of the High Court for the time being for which payment to be made we bind ourselves by these presents ...." "The condition of this obligation is such that if A. S. Ragammal do make a true inventory and exhibit the same in Court within six months from the date of the grant, within a year from the grant, do make, and render a true account thereof, the said property and credits do well and truely administer according to law, and all the rest and residue of the property and credits which shall be found remaining upon the said administration account, she do deliver and pay unto such person or persons as shall be lawfully entitled thereto, then this obligation to be void or else to remain in full force."

The 1st defendant filed an account in Court and among the debts due from the estate of Kandaswami Chetty, she mentioned the legacies payable under the Will of Kuppu Chetty with the accumulations of interest upon the said legacies.

Subbaraya Chetty instituted proceedings against Ragammal for getting his surety bond vacated (Original Suit No. 19 of 1903 on the file of the High Court) and in the said proceedings both Ragammal and Subbaraya Chetty admitted that the aforesaid legacies were payable out of the estate of Kandaswami Chetty and that the said legacies were unpaid and the administration of the said estate was otherwise complete.

Original Suit No. 218 of 1908 was filed by the next reversioner of the estate of Kandaswami Chetty against Ragammal alleging several acts of waste on her part and it having been found that the 1st defendant Ragammal had been guilty of gross mismanagement, a Receiver was appointed on the 2nd May 1910 and she was directed to deliver to the Receiver possession of all the properties belonging to the estate of Kandaswami Chetty in her hands.

On the 6th October 1911 a decree was obtained against the 1st defendant by Venkatasiva Chetty one of the legatees above named in the City Civil Court, Madras, for the legacy payable under Kuppu Chetty's Will with interest thereon By order of the High Court dated 2nd April 1912, the Receiver was directed to pay the amount due under the aforesaid decree to the said Venkatasiva Chetty.

The present plaintiffs made an application to the High Court for an assignment of the administration bond and in pursuance of an order made on the 5th November 1912 the administration bond was assigned to the plaintiffs to enable them to file a suit for the recovery of the amount due thereunder for the benefit of all persons interested in the estate of the said Kandaswami Chetty. The plaintiffs were the nearest reversioners to the said estate.

The plaint alleged several acts of waste on the part of the 1st defendant, alleged that the terms of the administration bond had been broken and charged that the 1st defendant and the sureties were liable.

Among other defences it was pleaded on behalf of the sureties, that they were not liable in respect of waste committed after the completion of the administration by the 1st defendant, that the 1st defendant shed her character as administratrix as soon as she had filed the inventory and accounts, that the administration had at all events been completed several years before institution of the suit and that the suit was barred by limitation.

Mr. *C. P. Ramaswami Iyer*, for the 2nd Defendant :—There is no cause of action against the sureties. The 1st defendant ceased to be an administratrix long ago and it is only for her acts as administratrix that they can be made liable. No sooner had the 1st defendant paid debts and funeral expenses of the deceased, her functions *qua* administratrix ceased and the property vested in her as heir. See *In the goods of Nursing Chunder Bysack* (1). In *George Attenborough & Son* v. *Solomon* (2), Haldane, L. C., observes that as soon as the executor assents to the legacy the estate becomes vested in

(1) 3 C. W. N. 635.
(2) (1913) A. C. 76; 82 L. J. Ch. 178; 107 L. T. 833; 57 S. J. 76; 29 T. L. R. 79.

him as trustee. See also *Solomon* v. *Attenborough* (3). The judgment of Fletcher Moulton, L. J.: *Dobbs* v. *Brain* (4), *Nixon* v. *Smith*; *In re Timmis* (5) and *Henderson-Roe* v. *Hitchins*: *In re Smith* (6). In all these cases it was held that as soon as the functions of the executor ceased the properties vested in him as trustee. These are cases where trusts have been declared by the Will. I rely on them for showing that the sureties are liable only for acts of the administratrix as such and not for her acts in a different capacity. Administration ceases as soon as the inventory and accounts were filed in 1901 and debts must be presumed to have been paid by 1901. After a reasonable lapse of time, it must be presumed that the duties of administration have come to an end *George Attenborough & Son* v. *Solomon* (2).

This is a suit on a bond and on failure to comply with the terms of the bond in 1901 by her not filing an inventory in due time the breach occurred and the suit is barred. For delay in filing an inventory and account, only actual damage can be recovered: *Canterbury* v. *Wills* (7), also *Lachman Das* v. *Chater*(8). Payment of legacies under Kuppu Chetti's Will is not one of the duties which the 1st defendant had to perform as administratrix of Kandaswami Chetti's estate. As soon as Kandaswami Chetty died the estate of Kuppu Chetty had become unrepresented unless somebody got administration *de bonis non*. So 1st defendant could not represent the estate: *DeSousa* v. *Secretary of State* (9), Williams on Executors, 10th Edition, Volume I, page 381: In Indian law the executor of an executor is not executor of the original testator. See also *Narasimmulu* v. *Ghulam Hussain Sait*(10). If Kandaswami did not assent to the legacy there must be a suit for general administration and after his death the suit must be against the administrator *de bonis non* of the estate of original testator: *Okhoy Coomar* v. *Koylash Chunder* (11). If he had assented, still he would neither be a trustee nor a debtor. He would not be a trustee because no trusts were declared by Kuppu Chetty's Will. The executor of a deceased man is an executor until he pays the legacy. Assentin[8] does not convert him to a trustee, *Rowe, In re, Jacobs* v. *Hind* (12), *Sander* v. *Heathfield* (13); *Hardwick* v. *Sutton* (14), *In re Davis*; *Evans* v. *Moore* (15), Halsbury's Laws of England, Volume 14, page 312. It has very recently been held that he is not an express trustee. *Blow In re, St. Bartholomew's Hospital* v. *Cambden* (16). He is clearly not a debtor: Godefroi on Trusts, third Edition, page 219: *Chunilal* v. *Suraj Ram* (17), *Henderson-Roe* v. *Hitchins*, *In re Smith* (6), *Ballard* v. *Marsden*(18). Debt is a garnishable thing and legacy assented to is not granishable; *Vyse* v. *Brown* (19), *Dix* v. *Burford* (20). Article 123 of the Limitation Act only applied to assented legacies. It shows that debt is different from legacy. As I said representation should be completed before relief in respect of the original estate could be given: The liability of the 1st defendant, if any, is on account of her being in possession of assets not because she has obtained Letters of Administration to her husband's estate: See *Baroda Prasad Banerjee* v. *Ganjendra Nath Banerjee* (21). In *Penny* v. *Watts* (22), it was held that a bill to recover the payment of a legacy out of the assets in the hands of an executor, cannot be maintained without making the administrator *de bonis*

(3) (1912) 1 Ch. 451; 81 L. J. Ch. 242, 106 L. T. 87; 56 S. J. 270, 28 T. L. R. 225.
(4) (1892) 2 Q. B. 207 at p. 211; 61 L. J. Q. B. 749; 67 L. T. 371; 41 W 7; 57 J. P. 22.
(5) (1902) 1 Ch. 176; 71 L. J. Ch. 118; 85 L. T. 672; 50 W. R. 164
(6) 42 Ch. D. 302; 58 L. J. Ch. 860; 61 L. T. 363, 37 W. R. 705.
(7) 1 Salk. 315; 91 E. R. 278.
(8) 10 A. 29; A. W. N. (1887) 279.
(9) 12 B. L R. 423.
(10) 16 M. 71.
(11) 17 C. 387.
(12) 58 L. J. Ch. 703; 61 L. T. 381
(13) 44 L. J Ch. 113 at p. 116, 19 Eq. 21; 31 L. T. 400; 23 W. R. 331.
(14) 57 L. T. 14
(15) (1891) 3 Ch. 119 at pp. 124 125; 61 L. J. Ch. 85; 65 L. T. 128, 39 W. R. 627.
(16) (1914) 1 Ch. 233; 83 L. J. Ch. 185; 109 L. T. 913; 58 S. J 136; 30 T. L. R. 117.
(17) 3 Ind. Cas. 765; 33 B. 433 at p. 433; 11 Bom. L. R. 708.
(18) 4 Ch. D. 374 at p 377, 40 L. J. Ch. 614, 42 L. T. 763; 28 W. R. 914.
(19) 13 Q. B. D. 199; Cab. & E. 223; 33 W. R. 168; 48 J. P. 151.
(20) 19 Beav. 409; 52 E. R. 408; 105 R. R. 190.
(21) 1 Ind. Cas. 289; 9 C. L. J. 383 at p. 404; 13 C. W. N. 557.
(22) 2 Phillips 149; 41 E. R. 898; 16 L. J, Ch. 146; 78 R. R. 59.

non a party: See also *Tingrey* v. *Brown* (23); *In the goods of William Bridger* (24) *Doe d Bennett* v. *Turner* (25), *Ex parte Lord Guydir* (26), *Creasor* v. *Robinson* (27), *Rowsell* v. *Morris* (28), *Dowdeswell* v. *Dowdeswell* (29), *Mitchell* v. *Reynolds* (30), Halsbury's Laws of England, Volume 14, pages 195 and 196. The administration of the properties of Kandaswami does not include payment of the legacies payable under the Will of Kuppu Chetty. Administration of estate of Kandaswami Chetty has ceased and the sureties are, therefore, no longer liable. *Blake* v. *Bayne* (31).

Mr. *C. Venkatasubbaramiah*, for the 1st Defendant, referred to section 45 of the Probate and Administration Act: *Narasimmulu* v. *Ghulam Hussain Sait* (10), *Ameer Chand* v. *Mohamud Bibi* (32) and *Blake* v. *Bayne* (31).

Mr. *G. Krishnasawmi Iyer*, for the 5th Defendant: The administration bond is void and *ultra vires* as it has been taken in the name of the Registrar instead of that of the Judge as required by section 78 of the Probate and Administration Act: See *Debendra Nath Dutt* v. *Administrator-General of Bengal* (33). Where the Statute requires a particular form to be adopted the Court has no power to alter it. See *Sri Raja Sinhadri Appu Rao* v. *Prattipathi Ramayya* (34), *Raman Chetti* v. *Municipal Council of Kumbakonam* (35), *Amedabad Municipality* v. *Sulemanji* (36), Halsbury's Laws of England, Vol. 14, p. 206, *Mayne* v. *Fletcher* (37), *Bainbridge* v. *Postmaster-General* (38). The assignment is also *ultra vires*. There must be a statutory provision transmitting the right to the successors-in-office: *Tingrey* v. *Brown* (23), *Howley* v. *Knight* (39), Halsbury's Laws of England, Volume 8, paragraph 814 *Power* v. *Banks* (40). Plaintiff is not a person competent to sue as the assignment is bad. Besides the estate has been fully administered, *Blake* v. *Bayne* (31).

Mr. *Venkatasubba Row*, for the Plaintiff: This is a suit on an administration bond. There are four conditions (1) filing an inventory, (2) filing an account, (3) well and truly administering according to law (4), paying residue to the persons lawfully entitled. The suit was filed within three years from the breach of the fourth condition. The suit is, therefore, within time. Time runs from the last breach of any of the successive conditions, *Sanders* v. *Coward* (41), Halsbury's Laws of England, Volume 3, page 100.

The breach of the fourth condition occurred when the first defendant delivered possession of the estate to the Receiver in Civil Suit No. 218 of 1908. The 1st defendant was administering till then. She would be administratrix so long as any debts due by the estate remained unpaid. It is in evidence that a legacy payable under the Will of Kuppu Chetty was paid by the Receiver under directions of Court. That was an amount payable by the 1st defendant as administratrix. Administration came to a premature close by the appointment of a Receiver. The sureties will be liable for all acts of waste committed by the 1st defendant as administratrix. She having continued to be administratrix till delivery to Receiver they are liable for all acts charged in the plaint.

It is contended on the other side that the 1st defendant was liable only to pay debts. She is liable to make all payments

(23) 1 Bos. & Pull 310; 126 E. R. 921; 4 R. R. 805
(24) 4 Pro. D. 77; 47 L. J. P. 46; 30 L. T. 123.
(25) 7 M. & W. 226; 56 R. R. 692; 10 L. J. Ex. 213.
(26) 56 E. R. 717; 4 Madd. 281.
(27) 14 Beav. 589, 51 E. R. 411; 21 L. J. Ch. 64; 15 Jur. 1049; 18 L. T. (o. s.) 82; 92 R. R. 243.
(28) 17 Eq. 20 at p. 23; 43 L. J. Ch. 97; 29 L. T. 446; 22 W. R. 67.
(29) 9 Ch. D. 294; 48 L. J. Ch. 23; 33 L. T. 828; 27 W. R. 241.
(30) P. Wms. 181; 24 E. R. 547.
(31) (1908) A. C. 371; 77 L. J. P. C. 97; 99 L. T 35.
(32) 6 C. L. J. 453.
(33) 33 C. 713; 3 C. L. J. 422; 10 C. W. N. 673 (F. B.)
(34) 29 M. 29 at p. 36.
(35) 30 M. 290; 2 M. L. T. 294.
(36) 27 B. 618; 5 Bom. L. R. 592.
(37) 9 B. & C. 382; 4 M. & Ry. 311; 7 L. J. (o. s.) K. B. 209; 109 E. R. 142.
(38) (1906) 1 K. B. 178; 75 L. J. K. B. 366; 94 L. T. 120; 54 W. R. 231; 22 T. L. R. 70.
(39) 14 Q. B. 240; 19 L. J. Q. B. 3; 14 Jur. 665.
(40 (1901) 2 Ch. 487; 70 L. J. Ch. 700; 85 L. T. 376; 49 W. R. 679, 66 J. P. 2117 T. L. R. 621.
(41) 15 M. & W. 48; 3 D. & L. 281; 15 L. J. Ex. 97; 10 Jur. 186.

which the deceased was bound to make or which had to be made out of his estate. Williams on Executors, 10th Edition, Volume II, page 1346; Volume I, page 751 *et seq.*

It is argued on the other side that the intestate was not bound to pay legacies out of his estate. This is erroneous. The Will of Kuppu Chetty directed his executor, Kandaswami Chetty, to pay certain legacies and take the residue for himself. The admissions of the 1st defendant and of Subbaraya Chetty in the various affidavits and pleadings filed, show that Kandaswami Chetty took possession of the residue and treated himself as owner. The petition for Letters of Administration states that Kandaswami Chetty took the estate of Kuppu Chetty and Letters are asked in respect of the estate so taken. It was impossible to ascertain the residue unless the legacies had been provided for. Assent of executor to his own legacy is as necessary as to legacy to a third party. Until he examined the state of assets he could not take his legacy. Williams, Volume II, 1109.

Residuary legatee is to be paid after all other legatees are paid, Williams, Volume II, 1192.

The residue can only be ascertained after the legacies are set apart: *Ganoda Sundary Chaudhurani* v. *Nalini Ranjan* (42).

The admissions of the 1st defendant and Subbaraya Chetty also show that these legacies were payable out of the estate of Kandaswami Chetty. Kandaswami Chetty was either a debtor or a trustee in respect of these legacies. He may be taken to have invested them with himself. The inventory and accounts filed are intelligible only on this footing. If by investing them with himself, he committed a breach of trust he became liable and after him his estate continued to be. He may be presumed on account of lapse of time to have assented to the legacies. Williams, Vol. II, 1106.

He then becomes a debtor; at any rate his estate becomes liable. I also say that under the terms of the Will of Kuppu Chetty, Kandaswami Chetty was an express trustee for the payment of these legacies: *Nistarini Dasi* v. *Nundo Lal Bose* (43), *Ram Dhan* v. *Mani Bai* (44).

Administratrix would be bound to pay moneys which the intestate was to account for in the capacity of trustee.

Wassell v. *Leggatt* (45), *Sander* v. *Heathfield* (13), *Hardwick* v. *Sutton* (14).

An executor is a trustee in respect of legacies payable under the Will. The cases quoted on the other side only show that an executor is not an express trustee for the purpose of limitation but they do not say that he is not a trustee. In any event Kandaswami Chetty by his conduct constituted himself a trustee. I rely on Fletcher Moulton's judgment in *Solomon* v. *Attenborough* (3) and on observations of Lord Haldane in the same case in the House of Lords, *George Attenborough & Son* v. *Solomon* (2), *Phillipo* v. *Munnings* (46), *Byrchall* v. *Bradford* (47), *O'Reilly* v. *Walsh* (48), *Dix* v. *Burfod* (20), *Tyson* v. *Jackson* (49).

In this case as the legatee happened to be an infant to whom the legacy was to be paid in his eighteenth year with interest accumulated till then, Kandaswami Chetty undoubtedly was a trustee. *Henderson-Roe* v. *Hitchins, In re Smith* (6).

In the accounts filed by the 1st defendant, interest was shown to be due to the legatees. Interest could not be paid out of Kuppu Chetty's estate. It could only be paid out of Kandaswami's estate. This again assumes the moneys had been invested with himself. By reason of the investment he would be a trustee. If the investment with himself was wrongful he would be committing a breach of trust. If the accounts maintained by the Kandaswami Chetty were produced, they would conclusively prove that he treated himself as debtor. The accounts filed by the 1st defendant must be deemed to be an extract from such accounts. In any case the administratrix would be liable. The liability

(42) 1 Ind. Cas. 514; 36 C. 28 at pp. 42,43, 12 C. W. N. 1065.

(43) 30 C. 389; 7 C. W. N. 353.
(44) 25 B. 429; 3 Bom. L. R. 45.
(45) (1896) 1 Ch. 554; 65 L. J. Ch 240, 74 L. T. 99; 44 W. R. 298.
(46) 2 My. & Cr. 309, 40 E. R. 658; 45 R. R. 63.
(47) 6 Madd. 235; 23 R. R. 204; 56 E. R. 1061.
(48) Ir. R. 6 Eq. 555.
(49) 30 Beav. 384; 54 E. R. 937; 32 R. R. 320.

of administratrix is not confined to debts as stated by the other side. The liability extends to demands subsisting against the estate, whatever the nature of the demand may be. See section 89 of the Probate and Administration Act. It is also argued on the other side that the legatee had a right of action only against a person who should have constituted himself an administrator *de bonis non* of Kuppu Chetty. No doubt the legatee could have taken steps to have an administrator *de bonis non* and he could have sued him but the administrator *de bonis non* would seek to recover the legacy from the personal representative of the executor of Kuppu Chetty. It would be his duty to do so. If it was an amount which had been allowed to be mixed up with his own money by Kandaswami Chetty his personal representative would be liable. Here the legatee obtained a decree against the 1st defendant in her capacity as administratrix. It was a debt, therefore, payable by her as such. If the personal representative would be liable at the suit of an administrator *de bonis non* the former would be liable in an action by the legatee. In numerous cases it has been held that the personal representative of the administrator was a proper and necessary party: *Ritchie* v. *Rees*(50), *Gale* v. *Luttree*(51); *Holland* v. *Prior*(52), *Hall* v. *Austin* (53). Further there could not be an administrator *de bonis non* in this case as Kandaswami Chetty had fully administered the estate. As I said before the residue to which he became entitled could not have become ascertained if the administration had not been complete. But I would go further and contend that the executor would be liable for all acts of the 1st defendant until she delivered the estate to the reversioners. The 4th condition of the bond could be deemed to have been performed only on the handing of the estate to the persons lawfully entitled, that is, the reversioners. As administratrix she could not give herself possession of the estate. Her rights being those of a limited owner in her capacity of widow, she in her capacity as administratrix could not hand the estate to herself as the widow without taking safeguards for preservation of estate.

Mr. *C. P. Ramaswami Iyer* replied.

JUDGMENT.—This is a suit by the plaintiffs as assignees of the administration bond executed by defendants Nos. 1 to 4 and one M. Subbaraya Chetti in connection with the grant of Letters of Administration by this Court to the 1st defendant to the estate of her deceased husband, Kandaswami Chetty. The plaint sets out that Kandaswami Chetti died issueless on or about 18th December 1898 leaving the 1st defendant, his widow and legal representative, that the 1st defendant obtained Letters of Administration to the estate of her husband on the 24th November 1899, having executed an administration bond dated 12th and 17th October 1899, that defendants Nos. 2, 3, and 4 and one M. Subbarya Chetti joined in the execution of the necessary administration bonds as sureties, that by the terms of the administration bond the 1st defendant bound herself to pay Rs. 1,43,873-10-7, the 2nd, 3rd, and 4th defendants to pay Rs. 2,25,000, and Mallappa Subbaraya Chetti (whose legal representatives are the 5th and 6th defendants) to pay Rs. 88,000 to the Registrar of the High Court or his assigns in case the 1st defendant did not administer the estate properly, that the 1st defendant took possession as administratrix of her husband's estate of properties to the value of Rs. 1,70,000 but failed to administer it according to law, that she committed various acts of mal-administration and waste and mismanaged the properties, that in Original Suit No. 218 of 1908 the 1st defendant was found guilty of waste and mismanagement and a Receiver was appointed, that by an order of this Court dated the 5th November 1912, the administration bond executed by defendants Nos. 1 to 4 and M. Subbaraya Chetti was directed to be assigned to the plaintiffs herein, the nearest reversioners, to enable them to sue for the benefit of all persons interested in the estate and that the plaintiffs are consequently entitled to an account of the 1st defendant's administration of the estate of her husband on the footing of wilful default and to a decree against the sureties in respect of any sums that may be found to be due by reason of such default.

The 1st defendant filed a written statement denying any mal-administration or

(50) 1 Adams 144.
(51) 2 Adams 234.
(52) 1 M. & K. 237; Coop. t. Brough. 426; 39 E. R. 671, 36 R. R. 316.
(53) 2 Collyer 570; 63 E. R. 865.

waste or that any mal-administration or waste was found by the Court in Civil Suit No. 218 of 1908. She also pleads that the suit is barred by limitation, that it is *res judicata* by reason of the decision in Civil Suit No. 218 of 1908, that the present relief asked for ought to have been asked for in that suit. She states that, as administration was over when she paid all the debt due by the estate and paid the residue over to herself as the next heir lawfully entitled to get it and since everything intended to be done to administer the estate was done before 1902, the suit is barred by limitation, and that assuming any waste to have been committed it would not be in the course of administration so as to entitle the plaintiffs to any relief. Defendants Nos. 2 to 6 filed written statements denying any waste or mal-administration and containing similar allegations. The other defendants filed written statements containing similar allegations.

The following issues were settled :—

I. Was the 1st defendant guilty of the acts of waste and mal-administration alleged in paragraphs 5, 6 and 7 of the plaint ?

II. Are the sureties liable for acts of waste, if any, after the filing of the inventory and payment of the debts ?

III. Is the suit barred by limitation ?

IV. Is the suit barred by Civil Suit No. 19 of 1902 and Original Side Appeal No. 2 of 1904 ?

V. To what relief are the plaintiffs entitled ?

II issue. Kandaswami Chetti, the husband of the 1st defendant, died issueless on the 18th December 1898 and Letters of Administration were granted to his estate to the 1st defendant. The grant is marked I in this suit. A schedule is annexed giving a list of properties moveable, immoveable and outstandings. The usual administration bond was executed by the 1st defendant and defendants Nos. 2 to 4 and M. Subbaraya Chetti, uncle of defendants Nos. 5 and 6. The terms of the bond were as follows:—"The condition of this obligation is such that if the above bounden Arni Sannyasi Ragammal the administratrix of the property and credits of Arni Sannyasi Cundasawmy Chettiar late of Madras but now deceased, do make a true inventory of the said property and credits which have or shall come to the possession or knowledge of the said Arni Sanhyasi Ragammal administratrix or to the possession of any other person for her and the same so made do exhibit into the said High Court within six months from the date of the grant of administration to the said Arni Sannyasi Ragammal and within a year from the said grant of administration do make and render a true account thereof ; and further the said property and credits of the deceased do well and truly administer according to law, and all the rest and residue of the said property and credits, which shall be found remaining upon the said administration account, she, the said Arni Sannyasi Ragammal, do deliver and pay unto such person or persons as shall be lawfully entitled thereto, then this obligation to be void and of no effect, or else to remain in full force and virtue."

It is clear the liability under the administration bond is confined only to such acts of waste and mismanagement as can be attributable to the 1st defendant as administratrix and not to any such acts attributable to her as the widow in possession of her husband's estate under Hindu Law after administration was over. In the present case the 1st defendant was both administratrix and heir and the question is when she ceased to be the administratrix, and became clothed with the larger powers of heir. I am of opinon that as soon as the duties imposed on her by the Probate and Administration Act were complied with, the administation of the estate was over and any subsequent acts of waste or mismanagement would be by her as widow which though giving the reversioners certain right could not be covered by the terms of the administration bond. It is argued by Mr. Venkatasubbarao for plaintiff that a Hindu widow is bound to preserve the estate for the benefit of the reversioners and that consequently when a widow takes out Letters of Administration the estate is handed over within the meaning of the administration bond "to such person or persons as shall be lawfully entitled thereto," only when it comes into the possession of the next full male owner. I do not think there is any authority for this proposition. A widow

is as much the heir of an intestate as any male successor and she represents the estate just as fully as any other person. The fact that her powers of disposal are curtailed will nonetheless make her the person to whom the adiministrator, if he were a third party, would be bound to deliver the estate as directed both by law and the administration bond.

Under the terms of the administration bond the 1st defendant as administratrix had to do the following :—

(1) to file an account and inventory showing assets and liabilities;

(2) file an account showing the assets which came into her hands and the manner in w ich they have been applied and disposed of;

(3) to administer the estate properly, and

(4) to pay the residue to the person entitled.

The duties of an administrator are set out in Chapter VII of the Probate and Administration Act and the condition in the bond to administer the estate properly must be taken to mean that the duties imposed on an administrator by the Act should be performed. As soon as the administrator has performed these duties the administration must be deemed to be at an end and when the person entitled to the estate is the executor or administrator himself subsequent possession and acts are attributable to him not as administrator but as heir. It is no doubt true that an executor or administrator cannot divest himself of liability in respect of any claim or duty arising out of the duties imposed upon him by law as such executor or administrator by handing over the estate to the heir but this does not affect the question as to the period when the executor or administrator must be deemed to have duly administered the estate, and if he is the heir, to have clothed himself with the larger powers of heir. As pointed out by Fletcher Moulton, L. J., in *Solomon* v. *Attenborough* (3), while no one can put a time limit to the office of executor or to say that he has ceased to be executor because he has passed his accounts and though some claim might turn up which would find and not recreate him executor that has nothing to do with the rights and liabilities created by the handing over of the estate to the rightful heir after the inventory and accounts have been filed and the statutory obligations as to collection of outstanding and payment of debts have been discharged. The position of a Hindu widow who takes out Letters of Administration was considered, *In the goods of Nursing Chunder Byack* (1), and it was held that when there are no debts and legacies to be paid and the administration is at an end the widow who obtained Letters of Administration is in possession of the estate not as administratrix but as the widow and heiress. I am of opinion that as soon as the 1st defendant did the acts required to be done by law as administratrix, such as the filing of an inventory and account, payment of debts payable by the estate of the deceased, etc., the liability of the 1st defendant and the sureties under the administration bond ceased and that any subsequent acts should be attributed to her as heir and not as administratrix but as a widow in possession as heir.

III *Issue*. It is not disputed that a suit to enforce a bond subject to a condition should be instituted within three years from the period when the condition is broken. The present case falls under Article 68 of the second Schedule to the Limitation Act. In cases where the bond contains successive covenants each breach gives a separate cause of action but the date of the last breach is the starting point of limitation in a suit on the bond when the bond is conditioned on the performance of several acts and the obligation to pay is enforceable till the last of the conditions is fulfilled.

In the present case Kandaswami Chetty the person to whose estate Letters of Administration were granted to the 1st defendant, died on the 18th December 1898, Letters of Administration were granted on the 24th November 1899, the administration bond was signed by the 1st defendant on the 12th October 1899 and by the other sureties on the 17th October 1899. Inventory and accounts were filed on the 11th February 1901. In November 1901 Subbaraya Chetti one of the sureties applied to be discharged but his application was rejected. He filed Original Suit No. 19 of 1903 praying to be dis-

charged. In his plaint, Exhibit B 6, he alleged that administration of the estate was complete with the exception that five individuals referred to in paragraph 21 of the plaint had not been paid. The 1st defendant filed a written statement (Exhibit B 7) alleging that the surety had caused loss to the estate by mismanaging the same and that all the debts due by the estate had been paid except certain legacies due under the Will of one Kuppu Chetti to whose Will Kandaswami Chetti, her husband, had taken out probate. This suit was dismissed. So far as the breaches complained of in the plaint are concerned it is admitted that no breach can be established which is within three years prior to suit except non-payment of the legacies due to the legatees under Kuppu Chetty's Will, one of whom Venkatasiva Chetty *alias* Murugesa Chetty filed Original Suit No. 345 of 1911 on the file of the City Civil Court and got a decree for the legacy due to him under Kuppu Chetty's Will. It is conceded that unless the payment of the legacies payable under the Will of Kuppu Chetty can be treated as part of the administration of the estate of Kandaswami Chetty there would be no breach within three years before suit. All the breaches of duty now complained of were alleged in Original Suit No 218 of 1908 by the present plaintiffs who then sued as reversioners and it follows that the terms of the bond were broken and the bond became payable three years before suit.

It was argued by the plaintiff's Vakil that payment of the legacies payable under the Will of Kuppu Chetti was part of the duties of the 1st defendant as administratrix of Kandaswami Chetty's estate and that as they were not paid till within three years before the present suit, it must be taken that administration continued till then and that there was a continuing breach of duty till the legacies were paid.

Kuppu Chetty died leaving a Will (probate of which has been marked as Exhibit A) bequeathing the residue of his estate to Kandaswami Chetty (1st defendant's husband) who obtained probate. The Will gave a few small legacies. These were of Rs. 500 each to his brother's sons with a direction to pay them with interest at 6 per cent. when they attained 18 years. Another was a sum of Rs. 500 to be paid to Kanniammall at any time after she demands "After she begets a child." The Will provides that Kandaswami Chetty "shall from the whole of his property take out and set apart the legacies" and left the whole of the residue to Kandaswami Chetty.

There is no evidence as to what Kandasami Chetty did but it is conceded that he died without paying the legacies. The case is now where an executor dies without having fully administered the estate. It is clear that under the law as it stands in India the administrator of an executor is not a derivative executor and that on the death of an executor or administrator without having fully administered the estate the duty of carrying on the administration of that estate will not devolve upon the deceased executor or administrator's personal representative but on a person appointed for the purpose under sections 19 and 45 of the Probate and Administration Act (corresponding to section 196 of the Succession Act). I need only refer to *De Sousa* v. *Secretary of State* (9) and the observations of Mookerjee J. (at page 403) in *Baroda Prasad Banerjee* v. *Gajendra Nath Banerjee* (21). In *Narasimmulu* v. *Gulam Hussain Sait* (10), it was held that the word, 'may' in section 54 of the Probate and Administration Act means 'shall' and that unless Letters of Administration *de bonis non* are taken out the estate of a testator is not represented on the death of the executor with probate.

If Ragammal, the 1st defendant, did not represent the estate of Kuppu Chetty it was not any part of her duty to pay the legacies payable under Kuppu Chetty's Will and so payment of legacies which Kandasami Chetty was bound to pay as executor would not come within the scope of administration of his private and personal estate.

It is argued that Kandaswami Chetty's estate became liable to pay the legacies as he was an express trustee under the Will of Kuppu Chetti. There is nothing in the Will constituting him a trustee for the legatees, and unless the Will creates a trust the executor will not be an express trustee but will simply be an executor. In *Royal General Theatrical Fund Association* v. *Kydd, In re Lacy*; (54), it was held that executors were not express trustees merely by virtue of the office in

(54) (1899) 2 Ch. 140; 68 L. J. Ch. 488; 80 L. T. 706 47 W. R. 664.

the absence of any trusts imposed upon him by terms of the Will. *Dacre* v. *Patrickson* (55). *In re Davis*; *Evans* v. *Moore* (15), *Rowe, In re*, *Jacobs* v. *Hind* (12), lay down the same rule. Several cases have been cited by the plaintiffs' Vakil but they are also cases where the executor was constituted trustee by the terms of the Will and where he became one by express declaration on his part or by his acts from which the law implied the creation of a trust which did not exist before.

It is also argued that Kandaswami Chetti who was the residuary legatee must be presumed to have assented to the legacies payable by the Will of Kuppu Chetti and that consequently he became personally liable and that the assent made him a trustee or at least a debtor so as to make the payment part of the duty of his administratrix. Mere assent to a legacy does not convert an executor into a trustee unless he has separated the fund and set it apart, *In re Barker*, *Buxton* v. *Compbell* (56). It does not transfer the liability from the estate of the deceased and fasten it on to that of the executor so as to make it a debt payable by his executor or administratrix in the usual course of administration. The following observations of Justice Kekewich in *Rowe, In re, Jacobs* v. *Hind* (12), are in point: "I am not disposed to think, without direct authority, that an executor, by assenting to a legacy, makes himself a trustee of that legacy. What he does do is this: he makes himself liable to pay out of his own moneys; that is quite possible, but that does not make him a trustee or even a debtor."

Even assuming that Kandaswami Chetti assented to the legacies payable under Kuppu Chetty's Will the only consequence would be that in a suit for the legacy he could not plead want of assets and if he has reserved no assets he might be compelled to pay out of his pocket. I do not think that a mere contingent liability to pay as executor or administrator of another estate can be treated as a demand on his private estate so as to postpone the completion of the administration to his estate in case he dies without paying the legacies. No doubt section 89 of the Probate and Administration Act makes demands and rights of suit of or against the deceased survive to and against an executor or administrator but this does not necessarily prolong the period of administration beyond the payment of funeral and testamentary expenses and the debts and legacies payable by the deceased. The test is whether the executor or administrator can resist a suit by the heirs or beneficiaries for delivery to them of his estate on the ground that the deceased was himself an administrator or executor of another estate and his estate might be called upon at some future date to meet some possible demand. When Kandaswami Chetti died he was executor of Kuppu Chetty's estate and there is no evidence that he did anything to constitute himself a trustee or to make himself personally liable to pay the legacies as a debt. The legacy still remained a legacy and the rights of the legatees were to proceed against the estate of Kuppu Chetty though they had the right to proceed against Kandaswami Chetty's estate if there was any and the assets of Kuppu Chetti were thereby made insufficient to pay the legacies. Under these circumstances I do not think the payment of the legacies due under Kuppu Chetty's Will was any part of the duties of the administratrix of Kandaswami Chetty's estate.

It is, no doubt, true that both the 1st defendant and Subbaraya Chetty, one of deceased sureties, thought that the administratrix of Kandaswami Chetti was bound to pay the legacies under Kuppu Chetty's Will but an idea of liability based on the erroneous view of law that an administratrix of an executor represents the original estate will not affect the rights and liabilities of the sureties under an administration bond or extend the period of limitation.

As it was conceded during the argument that subsequent to 1908 there were no debts of Kandaswami Chetti to be paid or assets to be realised if the legacies payable under Kuppu Chetty's Will are excluded I am of opinion that the 1st defendant as administratrix became *functus officio* and that at least from 1908 she should be treated as being in possession as heir. This view is strengthened by the fact that the present plaintiffs filed Original Suit No. 218 of 1908 as reversioners

(55) 1 Dr. & Sm. 182; 29 L. J. Ch. 846; 6 Jur. (N. S.) 863; 8 W. R. 597 at p. 647, 62 E. R. 348, 2 L. T. (N. S.) 764; 127 R. R. 69.

(56) (1892) 2 Ch. 491 at p. 495; 62 L. J. Ch. 76; 66 L. T. 848.

against 1st defendant as a widow in possession as heir under Hindu Law and got a Receiver appointed. The cause of action on the administration bond arose at least prior to 1909 and the suit is, in my opinion, barred by limitation.

IV *Issue.* The present suit is brought by the plaintiffs as assignees of an administration bond while they were suing as reversioners under Hindu Law in the previous proceedings. It is difficult to see how the decision in those proceedings can be *res judicata.* This issue was not argued or pressed.

V *Issue.* Though not raised by the issues Mr. G. Krishnasamy Aiyar who appeared for the 5th defendant contended that the administration bond was void as it was executed in favour of the Registrar of the High Court and not in favour of the Judges of the High Court as required by section 78 of the Probate and Administration Act. His argument is that as the section requires the bond to be given to the Judge, the High Court had no power to make rules contrary to the express provisions of the Probate and Administration Act. Reference was made to *Debendra Nath Dutt* v. *Administrator-General of Bengal* (33), where it is stated in the judgment of the Chief Justice that administration bond was at one time in the name of the Registrar and subsequently taken in the name of the Chief Justice as it was thought that the Registrar was not the proper person. It is unnecessary to consider this point as it is clear that it is not open to the sureties, on the faith of whose bond the estate was ordered to be administered by the 1st defendant, to dispute the validity of the bond. It was open to the High Court apart from the provisions of the Probate and Administration Act to make an order conditional on security being given and in the present case it is not disputed that the grant would not have been made if the sureties did not sign the bond sued on. It does not lie in the mouth of the sureties to say that the High Court had no power to take the bond in the form in which it was taken.

As I have found issues II and III in favour of the defendants it is unnecessary to decide the first issue.

The suit fails and is dismissed. The bond was assigned to the plaintiff by an order of the High Court and in Civil Suit No. 218 of 1908 a Receiver was appointed permanently on the ground that 1st defendant was mismanaging the estate as widow in possession of her husband's estate. I think this is a case where the costs of the plaintiff and the sureties defendants Nos. 2 to 6 should be paid out of the estate. The Receiver will pay their taxed costs.

Suit dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 146 OF 1913.

January 24, 1914.

Present:—Mr. Prideaux, Offg., A. J. C.

DALCHAND—DEFENDANT—APPELLANT

versus

CHAND KHAN—PLAINTIFF—RESPONDENT.

Minor—Mortgage by guardian—Legal necessity—Alienee of minor's rights in property entitled to challenge the mortgage.

An alienee who has acquired the rights of a minor in property is entitled to challenge a mortgage granted by the guardian of the said minor, and make the mortgagee establish legal necessity for the loan, or to show the same was for the minor's benefit.

Appeal against the decree of the Divisional Judge, Jubbulpore Division, dated the 30th November 1912, reversing that of the Subordinate Judge, Jubbulpore, dated the 27th June 1912.

Mr. *F. W. Dillon*, for the Appellant.

Mr. *M. Chuckerbutty*, for the Respondent.

JUDGMENT.—*Musammat* Kuare, now dead, executed on the 5th March 1895 the mortgage-bond in suit on account of herself and her sons, defendants Nos. 2, 3 and 4, and her grandsons, defendants Nos. 1 and 5.

Plaintiffs sue to recover Rs. 1,340 thereon.

The payment of considerations and execution of the document have been held proved.

Defendant No. 6 on a prior mortgage has foreclosed certain shares of the property in suit, and he and defendant No. 7 are in possession under certain sale-deeds. They are the real contesting parties to the suit. They contested the legality of the plaintiffs' mortgage. The lower Appellate Court has held that the first five defendants

were minors at the time of the mortgage, the first four being properly represented by *Musammat* Kuare, but that defendant No. 5 at the time had his mother and guardian alive, and for this reason the mortgage could not bind him or his takers. It, however, found the last point not very material as *Musammat* Mulla, the boy's mother, had on his account mortgaged the same properties to defendant No. 6 before the date of plaintiffs' mortgage.

Dealing with the question of legal necessity the question arose whether defendants Nos. 6 and 7 could raise this plea at all. The original Court had held they could. The Divisional Judge finds that infancy is a purely personal privilege of which no one but the infant himself can take advantage, and finding that the plea was not for the benefit of the defendants Nos. 1 to 5 who have no interest left in the property, held on the authority of *Vithoba* v. *Sakharam* (1), that it was unnecessary to prove legal necessity as the minors' interests are not concerned.

The claim was decreed.

In this second appeal preferred by the sixth defendant the sole question pleaded is whether an alienee who has acquired the rights of a minor in property is entitled to challenge a mortgage granted by the guardian of the said minor, and make the mortgagee establish legal necessity for the loan, or to show the same was for the minors' benefit. That is, can they plead what the minors themselves could have pleaded if they still were the owners of the property covered by the mortgage? The question is not free from difficulty and no express authority for the proposition advanced has been quoted; but there seems to me no reason why the ordinary rule should not be applied, namely, where it is sought to enforce a mortgage by a guardian the mortgagee must prove the transaction was entered into in good faith, that is, he advanced a sum reasonable with reference to the value of the property and that the money was raised for the relief of a recognised necessity: that proper enquiries were made, and that these satisfied him of the existence of such necessity. The burden is always upon the alienee to show the money was for the minor's purposes or the minor has benefited thereby. In certain matters minority is a personal privilege and cannot be taken advantage of by the minor's assignee either before or after his death, such as the benefits of section 7 of the Limitation Act. Yet it has been held that a purchaser can avoid the acts of the guardian of the vendor, *Dattaji Sakharam Rajadhiksh* v. *Kalba Yese Parabhu* (2).

The powers of a guardian *de facto* or *de jure* to alienate the property of his ward are the same as those of a manager of a joint family acting for a minor co-parcener. In *Muhammad Musamil-ullah Khan* v. *Mithu Lal* (3), the question referred to a Full Bench was "whether a transferee from the head of a Hindu family who had previously mortgaged joint family property without legal necessity, stands in a better position than his transferor, and can set up the case that a prior mortgage of the property transferred to him was made without legal necessity." It was there "held that in view of the fact that the purchaser had acquired a title to the property by adverse possession as against all the members of the family, it was open to him, notwithstanding that his title was originally acquired from the mortgagor alone, to set up as a defence the invalidity of the mortgage." This principle can, I think, be extended. In the present case appellant has acquired as against the original owners a title to part of the property mortgaged. The mortgage here was not void but voidable at the instance of the minors if they could prove want of legal necessity, and the trial of the validity of the mortgage seems necessary for appellant's protection against the claim made against him on the mortgage. Under these circumstances it seems to me that he can raise the plea disallowed by the lower Appellate Court, and I hold accordingly. It has been found by both Courts that the mortgage was not justifiable, and that no legal necessity for the same existed, and that it was not for minors' benefit. Plaintiffs' suit then fails. Defendant No. 7 has not appealed, nor have the other defendants and the case proceeded *ex parte* against Nos. 1, 2, 4 and 5, but the appeal by one defendant where there is a

(1) 4 O. P. L. R. 128.

(2) 21 B. 749.

(3) 11 Ind. Cas. 220; 33 A. 783; 8 A. L. J. 901

common ground as here is virtually an appeal by all, and proceeding under Order XLI, rule 4, I reverse the decree of the lower Appellate Court in favour of all the defendants. The appeal succeeds and plaintiffs' case stands dismissed with costs.

Appeal accepted.

MADRAS HIGH COURT.

CIVIL APPEAL No. 192 OF 1910.

December 9, 1914.

Present:—Sir John Edward Power Wallis, KT., Chief Justice, and Mr. Justice Seshagiri Aiyar.

ACHANTA VENKATASURYANARAYANA AND ANOTHER—DEFENDANTS—APPELLANTS

versus

YELLAPRAGADU SHIVA SANKARA NARAYANA—PLAINTIFF—RESPONDENT.

Appeal—Finding adverse to defendant—Defendant whether entitled to appeal—Res judicata.

There is no right of appeal against a mere finding.

Where, therefore, in a suit to declare an adoption invalid, the invalidity of the adoption is found but the suit itself is dismissed as time-barred, the defendant has no right of appeal against that finding as there is no decree against him.

The fact that that finding may operate as *res judicata* in subsequent proceedings will not give him a right of appeal.

Run Bahadur Singh v. *Lucho Koer*, 11 C. 301 (P. C.); 12 A. 23; 4 Sar. P. C. J. 602; 9 Ind. Jur. 202; *Parbati Debi* v. *Mathura Nath Banerjee*, 15 Ind. Cas. 453; 40 C. 29; 16 C.W.N. 877; 16 C. L. J. 9, followed.

Ranganatham Chetty v *Lakshmi Ammal*, 21 Ind. Cas 15, 14 M. L. T. 189, (1913) M. W. N. 690; 25 M. L. J. 279, distinguished.

Appeal against the decree of the District Court of Godaveri, in Original Suit No. 10 of 1908.

Mr. *A. Narasimhachari* for Mr. *V. V. Srinivasa Iyengar*, for the Respondent, raised a preliminary objection that no appeal lay against an adverse finding, as the result of the appeal was favourable to the Appellant.

Mr. *P. Somasundaram*, for Mr. *P. Narayana Murti*, for the Appellant, contended that as the finding may operate as *res judicata* unless set aside he was entitled to appeal.

JUDGMENT.—The plaintiff sued for a declaration that the adoption was invalid. The District Judge found that the adoption was proved but was made without authority, but that the suit to declare its invalidity was barred as the adoption had come to the knowledge of the plaintiff more than six years before the date of suit. Although the suit was dismissed an appeal has been preferred on behalf of the 2nd defendant, the adopted boy, against the finding that the adoption was invalid for want of authority in the widow. The suit having been dismissed, the 2nd defendant had no right of appeal against the finding. It is suggested in his behalf that it may operate as *res judicata* against him unless it is set aside. There is, in our opinion, no foundation for this contention. See the observations of their Lordships of the Judicial Committee in *Run Bahadur Singh* v. *Lucho Koer* (1) and also in *Parbati Debi* v. *Mathura Nath Banerjee* (2) The question dealt with in *Ranganatham Chetty* v. *Lakshmi Ammal* (3) does not arise here and it is unnecessary to consider that decision. The appeal is dismissed with costs.

Appeal dismissed.

(1) 11 C. 301 (P. C.); 12 I. A. 23; 4 Sar. P. C. 602; 9 Ind. Jur 202.

2) 15 Ind. Cas. 453; 40 C. 29; 16 C. W. N. 877; 16 C. L. J. 9.

(3) 21 Ind. Cas 15; 14 M. L. T. 189; (1913) M. W. N. 690: 25 M. L. J. 279.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 274B OF 1913.

August 22, 1914.

Present:—Mr. Stanyon, A. J. C.

BHIORAJ—PLAINTIFF—APPELLANT

versus

NARAYAN—DEFENDANT—RESPONDENT

Registration, object and effect of—Execution—Admission by legal representative—Who is legal representative—Validity of registration.

Registration is intended to be a contemporaneous publication of a transaction as a guard against subsequent fraud and alteration. It is not in the least necessary for the purposes of registration that the legal representative should be the heir of the deceased executant. It is sufficient if he has authority, express or implied, to admit execution of the deed.

Registration of a deed is something different from the validity thereof, and from the value of the title of the executant to the property affected by the deed.

Documents are not registered against any person in the same way as a decree may be given against one person and not against another.

BHIORAJ *v.* NARAYAN.

T, the executant of a deed, left two children a boy and a girl, both under the guardianship of her husband. *T* having died before registration, her husband as guardian of the boy, erroneously believed to be the heir, admitted execution at the time of registration. The legal heir of *T* was the girl.

Held, that the deed was duly presented by a person authorized to present it and the registration was valid.

Appeal against the decree of the District Judge, Akola, dated the 4th April 1913, confirming that of the Munsif, Khamgaon, dated the 5th November 1912.

Mr. *F. W. Dillon*, for the Appellant.

Mr. *V. T. Deshmukh*, for the Respondent.

JUDGMENT.—In this case technicality has defeated justice in the Courts below because the law has been applied in a way opposed to common sense. The suit was brought to enforce a deed of mortgage, dated the 17th March 1907, for Rs. 161 by one *Musammat* Tulsi, the wife of Yado Teli, in favour of the plaintiff. Certain fields were mortgaged by this deed. The debt was payable with interest at 24 per cent. per annum on the 9th December 1907. The deed was presented for registration by the plaintiff on the 16th July 1907. Before this date the executant *Musammat* Tulsi died, and, in response to a summons issued by the registering officer, her husband, Yado Teli, as guardian of his minor son Narayan, described as the heir of the deceased, appeared as her representative. He admitted execution of the deed and the receipt of the full consideration stated in the deed. The registering officer also satisfied himself that Narain was a minor and the recognized heir of the deceased. Thereupon the document was registered and was accepted by every one concerned as duly registered.

On the 25th March 1912 the present suit was filed, and Rs. 322 were claimed as due on the bond. The defendant originally impleaded was the minor Narayan. His father and natural guardian is said to have disappeared, and his mother's sister Gopi was put forward as his guardian, Sitaram, the husband of Gopi, professing to be on bad terms with her and, therefore, living apart from her. The absence of Yado opened the way for a denial of execution of and consideration for the bond. But before this it was urged that *Musammat* Tulsi had, left a daughter Mathuri who was her heir, and Mathuri was added as a defendant. She is a minor, and Gopi appeared as her guardian also. Thus was Yado relieved of the necessity of facing his admissions and statements before the registering officer. The plea was now taken that Tulsi having inherited the fields in dispute from her father, they became her absolute estate under the Bombay School of Hindu Law, and would descend as he *stridhan*. Therefore, Mathuri and not Narayan was her heir, and their had been no valid registration of the mortgage-deed. This preposterous quibble has actually succeeded in the Courts below, who have dismissed the suit on the ground that the bond, being in law unregistered, is inadmissible in evidence for the purpose of relief against the mortgaged property. The plaintiff has appealed and, of course, the appeal must succeed.

The lower Appellate Court describes the bond as an instrument that "has not been registered as against Muthuri." The expression seems to involve some misapprehension. Documents are not registered *against* any person in the same way as a decree may be given against one person and not against another. Registration is intended to be a contemporaneous publication of a transaction as a guard against subsequent fraud and alteration. Where an executant cannot, or does not, appear, at the registration, it is necessary that some one should appear for him. Such person is called the legal representative. It is not in the least necessary for the purposes of registration that such legal representative should be the heir of the deceased executant. It is sufficient if he has authority, express or implied, to admit execution of the deed. That alone is sufficient to justify registration though an admission in respect of the consideration is usually added. Registration will be effected, even if consideration is denied, upon execution being admitted. When Tulsi died she left two little children, a boy Narayan and a girl Mathuri, both under the guardianship of her husband, Yado. This husband had full authority to admit, *for the purposes of registration* that Tulsi had executed the deed. He did so but at that time he and all others concerned were under the misapprehension that Narayan was the heir of Tulsi: so Yado acted as the guardian of Narayan. In fact

and in law he was also at that time the guardian of Mathuri. The conjecture of the District Judge that Yado admitted everything on behalf of Narayan because he considered the payment of his own debts, included in the bond, a pious obligation on his son, and that he would have said something else as the guardian of Mathuri, is a purely gratuitous assumption, crediting Yado with a knowledge of Hindu Law for which there is no justification. The question whether Tulsi had executed the deed was a question of fact as to which Yado had to tell the truth, and there is no reason to suppose that, having admitted execution for Narayan he would have denied it for Mathuri. It would indeed undermine the operation of the law of registration, and upset titles for the benefit of dishonest persons, if deeds, registered on admissions of execution made by the accepted heirs and legal representatives of deceased executants, for the time being were to fall into the category of unregistered documents upon some other persons establishing better claims to the estates of such executants. Suppose *Musammat* Tulsi had herself appeared and made the admissions that Yado did. Would the *registration* of the deed have been any the less valid if some person evicted her from the mortgaged property thereafter by proving a better title? It is clear that the registration of a deed is something different from the validity thereof, and from the value of the title of the executant to the property affected by the deed. I hold that the admission of execution made by Yado was all sufficient for the purposes of registration, and the validity thereof is not affected by his error that his minor son rather than his minor daughter, had inherited the mortgaged estate. Assuming that the registering officer erred in taking Yado's admission of execution, *quoad* guardian of Narayan, instead of *quoad* guardian of Mathuri, that was only an error of procedure which would not invalidate the registration. I am fortified in the view I take by the decisions in *Sah Mukhun Lal* v. *Sah Koondun Lall* (1), *Muhammad Ewaz* v. *Birj Lal* (2); and *Pakran* v. *Kunhammed* (3). The case of *Mujib-un-nissa* v. *Abdur Rahim* (4) is not an authority the other way The document in that case was presented for registration by a person whose authority to present it as an agent of the executant, had ceased to exist by the death of his principal. Their Lordships of the Privy Council held that the power and jurisdiction of the registering officer only arises when he is invoked by a person in direct relation to the document, and that requirement had not been complied with in the case before them. The registration was, therefore, not merely irregular and valid, but illegal and a nullity. The Board expressly distinguished this case from their previous decision above quoted and in no way overruled the latter. In the present case the deed was duly presented by a person authorized to present it, and the registering officer, having satisfied himself of its execution, registered it, as indeed he was bound to do.

The appeal is affirmed. The decree of the lower Appellate Court is reversed, and the case is remanded for a decision on the merits. The appellant will be given the usual refund certificate. Other costs here and hitherto will follow the result.

Appeal accepted; Case remanded.

(1) 2 I. A. 210; 24 W. R. 75; 15 B. L. R. 228.

(2) 1 A. 465 at p. 473, 3 Suth. P. C. J. 438; 4 I. A. 166; 3 Saraswati's P. C. J. 738.

(3) 23 M. 580

(4) 23 A. 233; 11 M. L. J. 58; 3 Bom. L. R. 154; 28 I. A. 15 (P. C.), 5 C. W. N. 177.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 26 OF 1914.

December 7, 1914.

Present:—Mr. Justice Spencer and Mr. Justice Napier.

THIKKILLATH TARAWAD KARANAVAN AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

VADAKKA CHATHIBIKATH MANCHU NAIR AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Malabar Law—Kudima *tenure—Ejectment, right of, when arises—Failure to perform services—Forfeiture—Denial of landlord's title, whether sufficient.*

The mere denial of the landlord's title will not work a forfeiture of that tenancy.

A landlord's power to recover the land and to oust the tenant in *kudima janmam* demises, is limited to cases in which the tenant omits to perform the services for the performance of which the grant was made.

Musammat AMBA *v.* SHEORAM.

Second appeal against the decree of the Court of the Subordinate Judge of South Malabar at Palghat, in Appeal Suit No. 462 of 1913, preferred against that of the Court of the District Munsif of Alathur, in Original Suit No. 141 of 1912.

Mr. *A. S. Venku Aiyar* for Messrs. *T. R. Ramachandra Iyer* and *T. R. Krishnaswami Iyer*, for the Appellant.—The assertion by the defendants of a *jenmam* right is quite inconsistent with the existence of the relationship of landlord and tenant. It, therefore, worked a forfeiture and the landlord is entitled to eject. Exhibit V on which the defendants base their *kudima jenmam* demise is not genuine.

Messrs. *C. V. Anantakrishna Iyer* and *T. K. Govinda Aiyer*, for the Respondents. The *kudima jenmam* tenure is forfeitable only for failure to perform the services. Second Appeal No. 987 of 1904. The genuineness of Exhibit V was not disputed in the Court of first instance.

JUDGMENT.—The plaintiff sought to eject the defendants on the ground that their assertion of *jenmam* right in two deeds one of partition and one of mortgage worked a forfeiture. In Second Appeal No. 987 of 1904 Benson and Wallis, JJ., agreeing with the District Judge of North Malabar held that a landlord's power to recover the land and to oust the tenant in *kudima jenmam*, demises is limited to cases in which the tenant omits to perform the services for the performance of which the grant was made. This view is in accordance with the description given of this form of tenure in Chapter XIII of Moore's Malabar Law. We think that the plaintiff has failed to make out that he had a right to eject the defendants by virtue of their denial, if any. A further point has been taken that Exhibit V on which the defendants rely for proving that their tenure was of the species called *adima jenmam* or *kudima jenmam* was not genuine, but its genuineness was evidently not disputed in the District Munsif's Court.

The appeal fails and is dismissed with costs of the 5th and 6th defendants.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 425 OF 1913.

July 29, 1914.

Present:—Mr. Batten, OFFG. J. C.

Musammat AMBA—PLAINTIFF—APPELLANT

versus

SHEORAM—DEFENDANT—RESPONDENT.

Central Provinces Tenancy Act (IX of 1883), s. 94—Ejectment, meaning of—Wrongful but peaceful possession with intention of excluding the rightful holder.

Ejectment in section 94 of the Central Provinces Tenancy Act means a dispossession, that is to say, a loss of possession through some act of the defendant which was a taking of possession with the intention of excluding the plaintiff. Force includes in cases of this sort the moral equivalent of force.

Thus, a person who takes wrongful but peaceful possession, and when asked to give up possession by the rightful holder, refuses to do so, must be held to eject the rightful holder, provided his declared intention is to retain possession permanently.

Ganpat v. Trimbak, 3 Ind. Cas. 51; 5 N. L. R. 97, referred to.

Appeal against the decree of the Divisional Judge, Nagpur Division, dated the 11th April 1913, confirming that of the District Judge, Chanda, dated the 9th August 1912.

Mr. *M. V. Abhyankar*, for the Appellants.

Messrs. *J. Mitra* and *Waman Rao Gharpure*, for the Respondent.

JUDGMENT.—The findings of facts are that the plaintiffs, or rather their mother, their predecessor, sub-leased their occupancy fields, by a lease which expired on the 14th February 1908. Prior to the expiry of the sub-lease the defendants, the landlords evicted the sub-tenant, and when the plaintiffs demanded possession they refused to give them possession. The last date of refusal is given in the plaint as the 10th April 1909. The suit for possession was instituted on the 8th July 1911. The lower Courts have dismissed the suit as time barred, with reference to section 94 (1) of the Central Provinces Tenancy Act. In appeal it is urged that the plaintiffs, in the circumstances stated above, were not ejected within the meaning of sub-section (1) of section 94; the plaintiffs, it is argued, were not in physical as opposed to legal possession, and so were not dispossessed and not ejected. The learned Divisional Judge has referred to the

judgment of Skinner, A. J. C., in *Ganpat* v. *Trimbak* (1), as defining ejectment. In that case the landlord took possession with the tenant's consent, and it was held that the tenant was not ejected within the meaning of section 94. The meanings of the words 'eject' and 'evict' were discussed, and it was remarked that in section 92 "the words 'ejectment' and 'ejected' * * * seem to be used to denote wrongful and forcible dispossession." The meaning in section 94 (1) is clearly the same as in section 92.

On the findings of fact the appeal, in my opinion, must fail, and the reasoning of the learned Divisional Judge appears to me to be correct. It is to the effect that a person who takes wrongful but peaceful possession, and when asked to give up possession by the rightful holder, refuses to do so, must be held to eject the rightful holder, provided his declared intention is to retain possession permanently. It appears to me that ejectment in section 94 means a dispossession, that is to say, a loss of possession through some act of the defendant which was a taking of possession with the intention of excluding the plaintiff. This is what happened here. Force includes in cases of this sort the moral equivalent of force, and what happened was that the defendants were in wrongful possession on the expiry of the sub-lease, and, when asked to give up possession, by their conduct evinced the intention of remaining in forcible possession. The retaining of possession certainly amounted to ejection as soon as there was a refusal to restore possession, even if it did not previously do so.

For these reasons I dismiss the appeal with costs.

Appeal dismissed.

(1) 3 Ind. Cas. 51; 5 N. L. R. 97.

ALLAHABAD HIGH COURT.

EXECUTION SECOND CIVIL APPEAL No. 1150 OF 1914.

January 13, 1915.

Present:—MR. Justice Chamier.

CHATAR PALMAN AND ANOTHER—JUDGMENT-DEBTORS—APPELLANTS

versus

PREM NATH TEWARI AND ANOTHER—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 48—Minor—Extension of period of limitation—Limitation Act (IX of 1908), s. 6, applicability of.

Section 6 of the Limitation Act, 1908, serves only to extend, for the benefit of minors, periods of limitation provided by the Act itself, it does not extend the period of limitation provided by section 48 of the Code of Civil Procedure 1908.

Jhandu v. *Mohan Lal*, 128 P. R. 1894, *Ramana Reddi* v. *Babu Reddi*, 18 Ind. Cas 586; 37 M. 188; 13 M. L. T. 79; 1913) M. W. N. 114; 24 M. L. J. 96, approved of

Moro Sadashiv v. *Visaji Raghunath*, 16 B 536, not approved of.

Execution second appeal from the decision of the Subordinate Judge of Gorakhpur, dated the 30th April 1904, reversing that of the Munsif of Bansi.

Mr. *G. L. Agarwala*, for the Appellants.

Mr. *Iswar Saran*, for the Respondents.

JUDGMENT.—This appeal arises out of proceedings taken to execute a decree obtained on May 22nd 1901 by the respondents, who were at the time and still are minors. Their guardian made several applications for execution of the decree which were granted, the last of them being made on February 6th 1912, and ultimately dismissed on December 3rd 1912. The present application was presented on May 27th 1913, *i. e.*, a few days after the expiration of 12 years from the date of the decree. One of the grounds on which the application was contested' and the only ground with which we are concerned now was that further execution of the decree is barred by section 48 of the Code of Civil Procedure. The Munsif decided this question in favour of the judgment-debtors-appellants but the Additional Subordinate Judge decided it against them, following the decision of the Bombay High Court in *Moro Sadashiv* v. *Visaji Raghunath* (1). In the case cited the Bombay High Court pointed out that section 7 of the Limitation Act of 1877 served only to extend, for the benefit of minors, periods of limitation provided by that Act, but they

(1) 16 B. 536.

held that section 230 of the Code of Civil Procedure must give way to the general principle that time does not run against a minor. In *Jhanda* v. *Mohan Lal* (2), the Punjab Chief Court declined to follow the decision of the Bombay High Court and quite recently in *Ramana Reddi* v. *Balu Reddi* (3), in a case arising under section 6 of the Limitation Act of 1908 and section 48 of the Code of Civil Procedure of 1908, the Madras High Court followed the Punjab decision and declined to follow that of the Bombay High Court. I prefer the view taken by the Punjab and Madras Courts. Section 6 of the present Limitation Act, like section 7 of the Limitation Act of 1877, serves only to extend, for the benefit of minors, periods of limitation provided by the Act itself, indeed strictly speaking it refers only to periods of limitation prescribed by the first Schedule to the Act. Section 48 of the present Code of Civil Procedure, like section 230 of the Code of 1882, recognizes certain exceptions to the general rule which it lays down, but it makes no exception in favour of minors. I know of no general law, apart from section 6 of the Limitation Act, which lays down that minority is a ground of exemption from the operation of the Law of Limitation. As Sir Meredyth Plowden said in the Punjab case, the present question may be a *casus omissus*, but if so, it is the business of the Legislature, not of the Courts, to provide for it. Apart from the actual wording of section 6 of the Limitation Act there are great difficulties in engrafting on section 48 of the Code of Civil Procedure the rule laid down in the Limitation Act. If any extension of the period of 12 years is to be allowed, how much is to be allowed and from what date is the extension to be calculated? An extension of three years only will not meet all cases and yet the Limitation Act does not allow an extension of more than three years after the minor attains his majority. It appears to me that it would be pure legislation to hold that section 48 of the Code of Civil Procedure does not apply to this case or to hold that minors, situated as the present respondents are, can claim an extension of the period prescribed by it sufficient to enable them to take out execution after they attain their majority.

(2) 128 P. R. 1894.

(3) 18 Ind. Cas. 586; 37 M. 186; 13 M. L. T. 79; (1913) M. W. N. 114; 24 M. L. J. 96.

For the reasons given by the lower Appellate Court it is impossible to hold that the present application for execution is one to restore or revive the last previous application. Indeed the respondents put forward no such contention before me.

In my opinion the respondents' present application for execution should have been dismissed. I allow this appeal, reverse the decision of the lower Appellate Court and restore the order of the first Court dismissing the application. The respondents will pay the appellants' costs in all three Courts.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 304 OF 1913.

July 15, 1914.

Present:—Mr. Hallifax, A. J. C.

HARIA—DEFENDANT—APPELLANT

versus

MANAKCHAND—PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872), s. 32 (2)—Statement by deceased scribe of a bond as to marks (nishani) of executant, admissibility of.

The bond in suit purported to be executed by three persons who were all dead. The signature of each of them was represented by an irregular scribble such as might be made by an illiterate person, and against each of these marks there was the statement that it was the mark (*nishani*) of one of the executants, the name being given in each case. The scribe and the attesting witnesses were also dead. The whole of the bond including the statement as to the marks was proved to be in the handwriting of the deceased scribe by the evidence of his father, a bond-writer.

Held, that direct evidence was to be found on the bond itself in the written statement made by the deceased scribe that the signatures were those of the persons whose names were written against them, and that that statement was relevant under section 32 (2) of the Evidence Act, having been made by the deceased scribe in the ordinary course of his business as bond-writer.

Appeal against the decree of the District Judge, Narsinghpur, dated the 20th February 1913, reversing that of the Subordinate Judge, Narsinghpur, dated the 25th October 1912.

Mr. *G. P. Dick*, for the Appellant.

The Hon'ble Sir *Bipin Krishna Bose*, for the Respondent.

JUDGMENT.—The plaintiff, who is respondent in this Court, sued on a mortgage-bond, dated the 29th of September 1892, purporting to be executed by three persons

who are all now dead. The signature of each of them is represented by an irregular scribble such as might be made by an illiterate person, and against each of these marks there is the statement that it is the mark (*nishani*) of one of the executants, the name being given in each case. These three statements are in the same hand-writing as that of the rest of the bond. That is proved by the statement of Bhagwandas, Brahmin (P. W. No. 1), who describes himself as a bond-writer, to be the hand-writing of his deceased son, Ramdayal. He stated in the first Court that the bond, that is, presumably all of it that was not obviously in a different hand-writing, was in that of his son, and this might well be held to include the statement that he was again called in the lower Appellate Court to make, that the names of the executants were also written by his son. Both attesting witnesses also are dead, and the signature of each of them has been satisfactorily proved to be in his hand-writing.

The mortgage secured a debt of Rs. 900, and it was stipulated that this sum was to be repaid on the 3rd of May 1901 and till it was repaid, the mortgagee was to remain in possession of the property and appropriate all the profits in lieu of interest. The mortgagee has actually been in possession under this agreement ever since. Of the six defendants one only appeared to defend the suit He is the son of one of the executants and the grandson and nephew of the other two, and he said: "I know nothing about the execution of the bond in suit by my father. Harbans was my grandfather and Mulli was my uncle. They died, but when, I cannot say. Plaintiff is in possession of the land claimed. I have got no means to redeem the mortgage even if proved."

Apart then from the formalities required by sections 68 and 69 of the Evidence Act, it seems clear that the genuine nature and the validity of the document have been fully proved, having regard to the definition of proof in section 4 and the rule of common sense enunciated in section 114 of that Act. Compliance with those formalities is, however, necessary. In the first Court it was held that the last of those prescribed by section 69, proof that the signatures of the ostensible executants were the signatures of the persons named, had not been carried out, because there had been no attempt to prove who wrote the names, which appear against the marks which are the signatures of the executants. As has already been pointed out, there was some evidence on this point. The deficiency, such as it was, was, however, made good in the lower Appellate Court, and it was there held that sufficient proof of the execution of the bond had been given to satisfy the requirements of section 69. Against this finding the defendants have appealed.

On the line of reasoning adopted in *Abdulla Paru* v. *Gannibai* (1), I am satisfied that there is evidence on the record directly tending to show that the signature marks on the document were made by the alleged executants, and that, therefore, the finding of the lower Appellate Court that that fact is proved cannot now be assailed. That direct evidence is to be found on the bond itself in the written statement made by the deceased scribe that the signatures are those of the persons whose names are written against them. That statement is proved by the evidence of Bhagwandas (P. W. No. 1.), and it is relevant under section 32 (2) of the Evidence Act because it was made by the deceased Ramdayal in the ordinary course of his business of a bond-writer. For the appellants it is objected that there is nothing to show that Ramdayal was a bond-writer. The evidence on the point is certainly not strong, because the point was never raised, but I consider it to be sufficient. He was the son of a bond-writer, who appears to regard the writing of this bond by him as quite in the ordinary course of affairs, and the writing and the manner and the terms of the bond are all evidence of its having been written by a professional bond-writer. In the absence of even a suggestion to the contrary, I hold, therefore, on this evidence that the bond was written by Ramdayal in the ordinary course of his business. This finding, given under section 103 of the Civil Procedure Code, makes the written statement of Ramdayal in regard to the persons by whom the signatures on the bond were made relevant under section 32 (2) of the Evidence Act. There are many strong reasons for believing that statement to be true, and absolutely none for believing it to be false, and it has been

(1) 11 B. 690.

accepted as true by the Judge of the lower Appellate Court. The finding that due execution of the mortgage-bond has been proved must, therefore, stand.

The defendants have also appealed against the decision of the lower Appellate Court that the plaintiff is entitled to a decree for sale on the mortgage, contending that it is an usufructuary mortgage and the plaintiff is entitled only to remain in possession until they choose to redeem, which they can do at any time on payment of Rs. 900. The question is an open one, but the plaintiff is willing to concede the point for the purposes of this case, provided that the question of his right to sue for sale hereafter, if he should desire to do so, is not thereby made *res judicata* and that this right to retain possession till redemption, which the defendants admit, is clearly stated. He has in fact realised that his suit was ill-advised, as the right to possession of the land is worth now a great deal more than Rs. 900, and the property is not transferable except under his mortgage, being an occupancy-holding. To force a sale and obtain re-payment of his debt would be entirely against his own interest, but having once launched the suit he was of course bound to appeal against the finding of the first Court that the mortgage-bond was never duly executed. It appears that on that finding the defendants were foolish enough to take forcible possession of the holding, and that the plaintiff has now recovered possession by a suit under the Specific Relief Act and has also recovered Rs. 140 as mesne profits. On the announcement of the decision that the mortgage-bond was duly proved, the parties have agreed that the decree of the lower Appellate Court shall be set aside and that in lieu thereof a decree shall issue declaring that the mortgage-bond in suit was duly executed and that the plaintiff is entitled to hold possession of the mortgaged property till redemption, and ordering that each party shall pay its own costs throughout. A decree will issue accordingly.

Decree accordingly.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 352 OF 1914.

February 15, 1915.

Present:—Mr. Justice Parlett.

MA NGWE AND OTHERS—APPELLANTS

versus

MA THA HLAY—RESPONDENT.

Mortgage-deed—Provision extinguishing right of redemption if right not exercised within two years, effect of.

A mortgage-deed provided that if the mortgagor failed to redeem within two years, the mortgagees had a right to treat the transaction as a sale, and further that if they did not wish so to treat it, they could call upon the mortgagor to redeem at once and that the mortgagor was bound to do so, but if he were unable to do so, the right of redemption would be extended indefinitely:

Held, that as soon as the two years had elapsed without the mortgagor exercising her right of redemption, that which was a mortgage in its inception became an absolute sale from the beginning, finally closing the transaction between the parties as in the case of an ordinary mortgage by conditional sale.

Thumbusamy Moodelly v. *Hossain Rowther*, 1 M. 1; 2 I. A. 241; 3 Suth. P. C. J. 198; 3 Sar. P. C. J. 531, referred to and followed.

Mr. *Palit*, for the Appellants.

JUDGMENT.—Respondent sued to redeem 15.59 acres of land mortgaged to the appellants for Rs. 800 on 14th May 1904. The mortgage-deed stipulated that the land should be redeemed within two years, but the plaintiff set up a subsequent agreement whereby her right of redemption was kept alive. This she failed to prove, and both Courts decided the case upon a consideration of the meaning and effect of the terms of the mortgage-deed, but whereas the Sub-Divisional Court interpreted them as putting an end to the mortgage, the Divisional Court held the contrary. The passage in its judgment runs :—

"It (the deed) does contain a simple clause that failure of redemption after two years automatically passes the title to the land. On the contrary, it provides for a series of alternatives which the parties may adopt, and it seems to me to have been the intention of the parties that there should have been some formal declaration of the course of conduct they desired to adopt. The mortgagee could either call on the mortgagor to redeem at once, and if he could not do so might take over the land or if he did not wish to take over the land and the mortgagor could not redeem, then the right to redeem became prolonged

indefinitely. In a case where there is any doubt about the effect of penal clauses in the mortgage-deed, the deed should be construed in favour of the mortgagor so as to keep alive the right of redemption. In the present case neither party appears to have taken any action at the expiry of the term of the mortgage. Matters were allowed to drift until the suit was filed and the land to continue to appear in the assessment rolls as subject to mortgage and to be assessed in the name of the mortgagor. The conclusion to which I come, is that it was never intended that the clauses relating to the right of redemption in the mortgage-deed should operate to extinguish that right without some further act of the parties."

This is by no means clear that the Divisional Court should, under Order XLI, rule 27, have admitted in evidence the certified copy of an assessment roll from which it drew the conclusion that the land continued to be assessed in the name of the mortgagor. At any rate the extremest inference which could possibly be drawn from this assessment roll for the year 1907-08 was that at the time it was prepared, the land mortgaged had been reported to the Revenue Authorities as having become the absolute property of the original mortgagees. As this was only the second year after they allege it had become her property, the delay was not very unusual. It is, however, very significant that the plaintiff made no attempt to show that the records of any of the six subsequent years contained similar entries.

The document, after referring to the mortgage as one for two years, proceeds "when the term expires I will redeem: should I not do so, let the mortgagees, if they so desire, take the land outright for the aforesaid sum of Rs. 800; if they desire me to redeem at once, I will do so; or if they do not desire to take the land outright and I cannot redeem and we say 'let us wait,' then 'let the land be redeemable upon payment of the money after whatever lapse of time." These terms do not appear to me to provide a number of alternative courses which could be followed at the choice of the parties, but rather a series of consequences which would ensue in a fixed order. To begin with, for the first two years the mortgagor had an indefeasible right to redeem. After that period, if she had not exercised her right, the mortgagees had a right to treat the transaction as a sale. If they did not wish so to treat it however, they could call upon the mortgagor to redeem at once and she was bound to do so; but if under these circumstances she was unable to redeem, the time for redemption would be extended indefinitely. That extension could only come about if the mortgagees declined to exercise their right of foreclosure: that right was theirs as soon as two years had elapsed without the mortgagor exercising her right of redemption. "Thereupon," to quote the words of the Privy Council in *Thumbusamy Moodelly* v. *Hossain Rowthen* (1), "that which was a mortgage in its inception was to become an absolute sale as from the beginning, finally closing the transaction between the parties, as in the case of an ordinary mortgage by conditional sale." I consider that no further act of the parties was required to extinguish the right of redemption, nor was any formal declaration of the course they desired to adopt, and that the decision of the Sub-Divisional Court was correct. It is restored and that of the Divisional Court reversed. Respondent will pay appellants' costs of this appeal.

Appeal allowed.

(1) 1 M. 1; 2 I. A. 241 at p. 249; 3 Suth. P. C. J. 198; 3 Sar. P. C. J. 531.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 409, 1064, 1937 TO 1951, 1953 TO 1999 AND 2001 TO 2003 OF 1912.

December 9, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

Sowcar Lold GOVIND DOSS KRISHNA DOSS VARU—DEFENDANT—APPELLANT

versus

GURRAM CHINNAPPA NAIDU AND OTHERS—PLAINTIFFS—RESPONDENTS.

Madras Estates Land Act (I of 1908), s. 13, cl. 3, if retrospective—Enhanced rent, contract to pay, if presumable from 40 years' payment—Wells dug at tenant's expense—Site of wells given free of rent by landlord—Consideration—Enhanced rent, if claimable.

GOVIND DOSS v. GUBRAM CHINNAPPA NAIDU.

Section 13, clause (3), of the Madras Estates Land Act I of 1908, has no retrospective operation.

A valid contract to pay rent at enhanced rate can be presumed from payments at that rate for 40 years.

Where a landlord set apart a considerable area of land for the digging of wells for irrigating the lands in respect of which enhanced rates are claimed and charged no rent for the area so set apart, he must be deemed to have contributed to the cost of the wells dug by tenants on that area, though at their expense, and such contribution is sufficient consideration for a contract to pay rent at enhanced rate.

Arumugam Chetti v. *Raja Jagaveera Rama Venkateswara Ettappa*, 28 M. 444; 15 M.L. J 292; 9 M L T. 76 and *Raja Kumara Venkata Perumal* v. *Ramudu*, 27 Ind. Cas. 688; 28 M. L. J. 81; (1915) M. W. N. 132; 17 M. L. T. 129, followed.

Arumugam Chetti v. *Raja Jagaveera Rama Venkateswara Ettappa*, 8 Ind. Cas. 330, 9 M. L. T. 76; 35 M. 134, distinguished.

Second appeals against the decrees of the District Court of North Arcot in Appeal Suits Nos. 100, 177, 104, 108, 109, 111 to 122, 124 to 133, 135 to 138, 140 to 142, 144 to 167, 169, 171, 176, 178 to 180, and 182 to 184 of 1911, preferred against those of the Court of the Revenue Divisional Officer, Chandragiri, in Summary Suits Nos. 702, 779, 706, 710, 711, 713 to 724, 726 to 735, 737 to 740, 742 to 744, 746 to 769, 771, 773, 778, 780 to 782 and 814 to 816 of 1910.

FACTS.—These suits were filed by the *ryots* of Kammapalli in the Narayanavanam *taluk* against the defendant, the mortgagee with possession of the said *taluk*, under section 55 of the Madras Estates Land Act, I of 1908, to compel him to grant a proper *patta*. The tenants alleged *inter alia* that the defendant had no right to recover enhanced rates for wet crops raised on *manavari* land with the aid of wells dug at their expense. The defendant mainly contended that the sites of the wells, which were *poramboke*, were given by him free of rent for the digging of the wells, that as such he had contributed to the cost of such wells, that enhanced rates were, therefore, legally claimable by him, and that the tenants had been paying the said enhanced rent for the last 40 years and so could not go behind the said payments. The Court of first instance held that the landlord was not entitled to levy enhanced rates as the wells had been dug at the sole expense of the tenants. On appeal the District Judge concurred with the Head Assistant Collector. The defendant thereupon appealed to the High Court.

Mr. *V. C. Seshachariar*, with Messrs. *B. Sadagopachariar*, *K. Bhashyam Aiyangar* and *C. Narasimhachariar*, for the Appellant:—The District Judge erred in construing section 13 of the Madras Estates Land Act. That section is not retrospective. *Raja Kumara Venkata Perumal* v. *Ramudu*(1). The tenants having paid rents at the rate claimed for the last 40 years, a contract to pay at that rate ought to be presumed. The landlord having given the site of the wells free of charge, he must be deemed to have contributed towards the construction of the wells and so it is quite competent to him to claim an enhanced rate of rent.

Mr. *P. Nagabhushanam*, for the Respondents:—The wells had been dug at the tenants' sole expense. The landlord is, therefore, not entitled to claim any enhanced rent for the improvements. Consequently there is no consideration for the promise to pay enhanced rate presumable from 40 years' payment. The sites of the wells are so insignificant in value that their free grant, even if true, cannot be adequate as consideration.

JUDGMENT.

S. A. No. 409 of 1912.

NAPIER, J.—The question that arises in this appeal is whether in the circumstances of this case the *zemindar* is entitled to charge enhanced rates for crops grown with the aid of well water. The District Judge has considered the matter solely with reference to section 13, clause 3, of the Madras Act I of 1908 and has assumed that that section applies to improvements made prior to the Act. It had been decided in *Raja Kumara Venkata Perumal* v. *Ramudu* (1) that that clause has no retrospective operation. The further point decided in that case was that a valid contract to pay enhanced rate could be presumed where the rate had been paid for a period of 60 years or so. The reasoning of the District Judge cannot, therefore, be accepted and it has only to be considered whether there was a valid contract in this case, that is to say, whether, although the *ryots* did in fact dig the wells utilised for irrigating the crops, the landlord did or did not contribute something towards the construction of the wells which would in law amount to a consideration for

(1) 27 Ind. Cas. 688, 28 M. L. J. 81; (1915) M. W. N. 132; 17 M. L. T. 129.

a contract to pay enhanced rates. It is admitted that the sites occupied by the wells have never been charged with rent and that they are entered in the estate accounts as *poramboke*. The District Judge takes the view that as there is a term in the *patta* under which the *zemindar* is entitled to charge rent for that land, he cannot set up that the abstention to charge rent was the consideration. We cannot accept this view. Undoubtedly a considerable area though made up of small plots has been rendered uncultivable by the construction of a number of wells within it and admittedly if that area had not been set apart for wells, the *zemindar* would have been entitled to receive rent from any cultivating tenant in respect of it. By handing over that area to the *ryots* for the construction of wells he has in our opinion contributed to the cost of the wells and such contribution is good consideration for the contract set up by him. It is admitted by the *ryots* that they have been paying these increased rates for about 40 years; and on the principle enunciated in the case above quoted and based on the judgment of Subrahmania Aiyar, J., in *Arumugam Chetti* v. *Raja Jagaveera Rama Venkateswara Ettappa* (2), it would be open to us to presume consideration for the contract. This case is, however, a stronger one, for there is definite evidence of that consideration. We, therefore, hold that the proposed *patta* is not invalid on that ground. In this view it is not necessary to decide the other point raised, namely, that there is in fact no enhancement, though we may observe that the decision in *Arumugam Chetti* v. *Raja Jagaveera Rama Venkateswara Ettappa* (3), relied on, does not seem to us to be applicable to the present case. We, therefore, reverse the decision of the District Judge and hold that the *patta* tendered is a proper *patta*. The plaintiffs will pay the costs throughout.

The decision in this case governs Second Appeal No. 1064 of 1912 and the other cases posted with it.

SADASIVA AIYAR, J.—I concur.

Appeals allowed.

(2) 28 M. 444; 15 M. L. J. 202.
(3) 8 Ind. Cas 330; 35 M. 134; 9 M. L. T. 76.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 176 OF 1914.

January 12, 1915.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

POTHI RAM AND OTHERS—DEFENDANTS—APPELLANTS

versus

Musammat ISLAM FATEMA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872), s. 27—Restraint of trade—Landlord allowing cattle market to be held on his land in return of toll, whether trading—Agreement not to hold market to sell cattle on particular days, whether void.

A landholder who, in return for market tolls or fees, allows a cattle market to be conducted on his land, is not thereby exercising the trade or business of selling cattle.

Therefore, an agreement between the owners of two neighbouring lands to the effect that a market for sale of cattle shall not be held on the same day on the lands of both of them, is not void under section 27 of the Contract Act.

First appeal from an order of the Additional Subordinate Judge, Bareilly, dated the 1st of September 1914.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Appellants.

JUDGMENT.—The question raised by this appeal is the applicability of the principle laid down in section 27 of the Indian Contract Act (IX of 1872) to the circumstances of this particular case. It is alleged that the defendants, who are land-holders, had entered into a contract with certain neighbouring land-holders as to the holding of markets on their respective lands. The plaintiffs sued for enforcement of this contract and for damages. The first Court threw out the case on the finding that the agreement was void, in that it was an agreement restraining the defendants from exercising a lawful profession, trade or business, and that consequently it was not necessary to go into any of the other questions raised by the pleadings. The lower Appellate Court has reversed this decision and remanded the case for trial on the merits. The question is whether the owner of land entering into an agreement with the owner of neighbouring land, to the effect that a market for sale of cattle shall not be held on the same day on the lands of both of them, is entering into an agreement which is void under section 27 aforesaid. It seems to us that a land-

lord who in return for market tolls or fees, allows a cattle market to be conducted on his land is not thereby exercising the trade or business of selling cattle. If he is exercising any business at all, he is exercising the business of a land-holder, and the agreement on his part not to allow his land to be used for some particular purpose on some particular day is not an agreement restraining him from exercising a lawful profession, trade or business. These considerations are sufficient to dispose of this appeal. It is accordingly dismissed.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL 1297 OF 1913.

December 22, 1914.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Seshagiri Aiyar.

UDAYAL—PLAINTIFF—APPELLANT

versus

A. L. A. R. R. M ARUNACHALA CHETTIAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Madras Estates Land Act (I of 1908), ss. 4, 12—Custom not to pay rent for land remaining fallow—Term in patta that no rent is chargeable on lands allowed to lie fallow, whether improper—Tax on palmyras, when payable.

A tenant is bound to pay rent upon every portion of his holding, whether he cultivates it or not, but is subject to any custom which may be proved to exist in particular localities.

Where, therefore, a custom not to charge any rent for the lands which are allowed to lie fallow by the tenants exists, a term in a *patta* to that effect is not improper.

Nagu Chetti v. *Bhaskara Sethupathi*, 9 Ind. Cas. 41; 9 M. L. T. 191; (1911) 1 M. W. N. 6; *Kadir Mohideen* v. *Alagappa Chettiar*, 12 Ind Cas. 566; (1911) 2 M. W. N. 394, distinguished.

Arunachellam Chettiar v. *Muthayanai Thevan*, 25 Ind. Cas. 675; 26 M. L. J. 575, followed.

Prima facie, a tenant who pays rent for a land should not be taxed twice over for trees standing on the land unless he derives special benefit from them.

Therefore, a separate tree tax on palmyras should be levied only when they are tapped for toddy, and not when they merely put forth spathes.

Second appeal against the decree of the District Court of Ramnad at Madura, in Appeal Suit No. 897 of 1911, preferred against that of the Court of the Sub-Collector of Ramnad, in Summary Suit No. 879 of 1911.

FACTS.—The suit was by a tenant for the grant of a proper *patta* by the landlord. The points in dispute were whether the landlord was entitled to levy rent on lands allowed to remain fallow for a season, and whether a tenant was liable to pay tax for palmyra trees standing on land for which rent is being paid and if so, from what period of time, whether from the time they are tapped for toddy or at any previous stage. The Sub-Collector of Ramnad held that a custom existed in the Ramnad *zemindari* to which the suit lands appertained for tenants occasionally to allow a portion of their holding to remain fallow and for the landlord not to charge rents for such portions and that the landlord was entitled to levy tree tax only from the time the trees were tapped and that till then he was entitled to rent for the land alone. On appeal the District Judge held that though the custom set up was true it was unreasonable, that the tenant was liable if he negligently allowed the land to remain waste and that the tenant was liable to pay tree tax from the time the trees put forth spathes. The tenant appealed to the High Court and the landlord also filed a memorandum of cross-objections.

Mr. *A. Sundaram*, for the Appellant:—The cases relied upon by the District Judge have no application to the facts of the present case. There is nothing unreasonable in occasionally allowing a portion of a holding to remain fallow. *Arunachellam Chettiar* v. *Muthayanai Thevan* (1). The tenant will be bound to pay tax for trees only if he derives any benefit therefrom.

Mr. *S. Sundararaja Iyengar*, for the Respondents:—Under section 4 of the Madras Estates Land Act the tenant is bound to pay rent on every portion of his holding, whether he cultivates it or not: *Nagu Chetti* v. *Bhaskara Sethupathi* (2), *Kadir Mohideen* v. *Alagappa Chettiar* (3) and Second Appeal No. 445 of 1912. The tree tax was payable from the time the trees became fit for tapping by putting forth spathes.

JUDGMENT.—The plaintiff who is a tenant sued for the grant of a proper *patta* to him by the landlord. He took various objections to the one tendered by the defendant (Exhibit VI). The Sub-Collector modified

(1) 25 Ind. Cas. 675; 26 M. L. J. 575.

(2) 9 Ind. Cas. 41; 9 M. L. T. 191; (1911) 1 M. W. N. 6.

(3) 12 Ind. Cas. 566; (1911) 2 M. W. N. 394.

UDAYAL v. ARUNACHALA CHETTIAR.

its terms in some respects. On appeal, the District Judge reversed that decision with reference to two of the disputed terms. This second appeal and the memorandum of objections relate to them.

The first point for decision is whether waste dry lands included in a tenant's holding are not chargeable with rent. The Sub-Collector, after discussing the evidence in the case, came to the conclusion that it is the custom in the *zemindari* of Ramnad not to charge any rent for lands which are allowed to lie fallow by the tenant. The District Judge on appeal accepts this finding and says: "The evidence shows that waste has not been charged before:" However, he considered it to be unreasonable that the tenant should be at liberty to allow lands to remain uncultivated and directed the *patta* to be amended "so as to make it clear that waste should be charged only if due to the *ryot's* neglect." We are unable to agree with this conclusion. There is nothing unreasonable in a tenant occasionally leaving a certain portion of his holding uncultivated. *Prima facie* the tenant would be very anxious to cultivate every field included in his *patta*. It is more to his interest than to that of the landlord to do so. If any portion of his holding remains waste, it must be due to circumstances beyond his control. The defendant's Vakil has not asked us to provide against allowing lands to remain waste for a number of years continuously. That by itself would be evidence of wilful default for which provision, if claimed by the landlord, may have to be made. Such a question does not arise for decision before us. The suggested amendment by the District Judge would lead to a great deal of abuse. It is not possible to predicate accurately what would amount to wilful default or neglect on the part of the *ryot*; this clause would lead to unnecessary litigation and to the embitterment of feelings between the landlord and the *ryot*. As regards decided cases, in the case of *Nagu Chetti* v. *Bhaskara Sethupathi* (2), relied upon by the District Judge, the question as to whether by the custom of the *zemindari* the tenant can allow a portion of his holding to remain occasionally uncultivated was not considered. No such custom was apparently set up or found in that case. The other decision relied upon by the District Judge is that of *Kadir Mohideen* v. *Alagappa Chettiar* (3). In that case all that was decided was that a clause imposing liability on the tenant to pay rent on waste land if cultivated by him was reasonable. Apparently the waste land was not included in the holding and the provision to the effect that if the tenant encroaches upon neighbouring waste lands of the landlord and cultivates them he should pay *tirva*, is a very proper provision. On the other hand in *Arunachellam Chettiar* v. *Muthayanai Thevan* 1), which related to the Ramnad *zemindari*, the learned Judges came to the conclusion that there was nothing unreasonable in the custom which gave liberty to the tenant to allow a certain portion of his holding to remain occasionally uncultivated. In Second Appeal No. 445 of 1912, although the decision was with reference to lands in the same *zemindari*, the learned Judges did not consider any question of usage.

In the argument before us section 4 of the Estates Land Act was relied upon as indicating that the tenant is bound to pay the rent upon every portion of his holding, whether he cultivates it or not. This general provision is subject to any custom that may be proved to exist in particular localities. On the whole our conclusion is that the decision of the Sub-Collector is right and that the District Judge's suggestion to amend the *patta* should not be upheld.

The second point argued relates to tree tax, *i.e.*, tax on palmyras. In the plaint it was admitted by the tenant that it was usual to pay the tax for the palmyra trees which are tapped for toddy. Having regard to this admission the Sub-Collector came to the conclusion that until a tree is tapped the landlord is only entitled to the rent upon the land on which the tree grows and that he is not entitled to any tree tax. The District Judge on the other hand has come to the conclusion that the moment that a palmyra tree puts forth spathes, it should be taxed. We think this is not correct. *Prima facie* the tenant who pays rent for the land should not be taxed twice over unless he derives any special benefit from the trees standing on the land. This is the correct view having regard to the provisions of section 12 of

the Estates Land Act, which reserves considerable rights to the tenant in the trees growing on his holding.

We must, therefore, reverse the decision of the District Judge on the two points mentioned above and restore that of the Sub-Collector. This disposes of the memorandum of objections as well. Appellant will have his costs in this and in the lower Appellate Court.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 65 OF 1914.

January 22, 1915.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerjee, KT.

WILAYAT ALI KHAN AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

GHANI KHAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Appeal—Suit filed in Subordinate Judge's Court but heard and decided by Munsif—Jurisdiction of Subordinate Judge to hear appeal.

A suit was filed in the Court of the Subordinate Judge, but was subsequently transferred to the Court of the Munsif who heard and decided it. On appeal the District Judge transferred the case to the Subordinate Judge to hear the appeal:

Held, that the Subordinate Judge had jurisdiction to hear the appeal.

Second appeal from the decision of the Subordinate Judge of Farrukhabad, dated the 25th of July 1913.

Dr. *S. N. Sen*, for the Appellants.

Mr. *Gulzari Lal*, for the Respondents.

JUDGMENT.—The first contention raised in this appeal is that the learned Subordinate Judge who heard the appeal was not competent to do so. The basis of this contention is that the suit when originally filed was filed in the Court of the Subordinate Judge having regard to its valuation. Subsequently the jurisdiction of the Munsif to hear suits of that value was extended and the suit was accordingly transferred to the file of the Munsif. It is admitted that the case

was never tried by the Subordinate Judge. An appeal from the decision of the Munsif was presented in the Court of the District Judge who transferred it to the Subordinate Judge, and the learned Subordinate Judge heard the appeal. There can be no doubt that the appeal from the Munsif's decree lay to the Court of the District Judge and that the District Judge was competent to transfer it to the Subordinate Judge. Upon such transfer being made the learned Subordinate Judge had full jurisdiction to hear the appeal. There was nothing to preclude the Subordinate Judge from hearing the appeal and the mere fact that at one time the plaint had been presented in his Court does not take away his jurisdiction to hear the appeal.

The next point urged raises a question of fact which is concluded by the finding of the Court below.

The appeal, therefore, fails and is dismissed with costs, including in this Court fees on the higher scale

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 889 OF 1914.

January 6, 1915.

Present:—Mr. Justice Spencer and Mr. Justice Seshagiri Aiyar.

SIVAGNANA DESIKA GNANA-SAMBANDA PANDARASANNADHY—PETITIONER

versus

THE HONOURABLE THE ADVOCATE-GENERAL OF MADRAS—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 92—Scheme, suit for framing and for appointment of a committee of supervision, after removal of trustee—Death of trustee—Cause of action, if survives against successor-in-office.

Where, during the pendency of a suit instituted by the Advocate-General against the trustee of certain *devastanams* for his removal on the ground of 'mismanagement and breach of trust and for the settlement of a scheme and the appointment of a committee of supervision, the defendant died:

Held, that the cause of action survived against the successor-in-office of the deceased defendant and that he was rightly brought on record, inasmuch as

the plaint contained averments to the effect that there had been systematic mismanagement of the funds of the trust, that there was no means of checking what was depositedin the *hundials*, that the servants of the temple were making fortunes out of it, that there was a large surplus income every year which had to be properly employed and that the new defendant, the present trustee, had also contributed to the previous mismanagement in his character of agent of the deceased trustee—facts which would by themselves be sufficient to found a suit for the framing of a scheme.

Per *Sesha giri Aiyar, J.*—In considering whether the prayer for the settlement of a scheme is only ancillary to the prayer for the removal of the trustee or is the principal relief claimed in the suit, the fact that the person who is said to have contributed to the prior mismanagement has succeeded to the trusteeship is a factor to be taken into account.

When the income of a temple is in excess of its expenditure, the Advocate-General will be well-advised in seeking the aid of the Court for the framing of a scheme for the proper application of the surplus.

In re Campden Charities, 18 Ch. D 310, 50 L. J. Ch. 646; 45 L. T. 152, 30 W. R 496, followed.

The relief by way of settlement of a scheme need not depend upon charges against the trustee-in-office. It is sufficient if mismanagement is averred and it is alleged that a proper scheme is necessary to render the recurrence of the state of affairs impracticable.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Subordinate Judge of Mayavaram, in Interlocutory Appeal No. 304 of 1914, in Original Suit No. 10 of 1911.

FACTS.—This civil revision petition arose out of a suit instituted by the Advocate-General of Madras in the Court of the Subordinate Judge of Mayavaram for the removal of the Pandarasannathi of the *Dharmapuram Adhinam* from the trusteeship of the *devastanams* attached to the said *adhinam* on the ground of mismanagement, for the framing of a scheme for the efficient managment of the said *devastanams* and for the appointment of a committee of supervision. During the pendency of this suit, the defendant died and his successor in office, the petitioner, was brought on record by the Subordinate Judge in the room of the deceased. Against the order so bringing him on record the petitioner preferred this civil revision petition to the High Court.

Messrs. *T. Rangachariar* and *Nallasivan Pillai*, for the Petitioner:—The cause of action did not survive against the present pettioner. The acts of the petitioner as agent could not be charged against him as trustee. The relief regarding the framing of a scheme must depend on charges against the trustee in office and as there are no such charges against the present trustee and as the last incumbent is dead, there is no cause of action as against the present trustee.

Messrs. *M. O. Parthasarathi Iyengar* and *S. Muthi Mudaliar*, for the Respondent:—Presence of a large surplus income is by itself sufficient cause of action for a suit to frame a scheme. Here, however, various charges of mismanagement are brought forward and necessity is shown for a scheme: *In re Campden Charities* (1). Upon the allegations in the plaint the cause of action did survive against the petitioner and he was properly brought on record.

JUDGMENT.

SPENCER, J.—The suit was brought by the Advocate-General under section 92 of the Code of Civil Procedure against the petitioner's predecessor-in-office and one of the reliefs asked for was the settlement of a scheme for the efficient management of the *devastanams* and the appointment of a commitee of supervision as a check upon the trustee.

I am satisfied that in making the petitioner a party to the suit the lower Court committed no illegality or material irregularity and that there was no defective exercise of jurisdiction in its order so as to call for our interference in revision. It is further clear from paragaph 3 of the plaintiff's statement of 20th August 1911 and from paragraphs 8, 9, 13 (*g*), 15, 20 and 22 of the plaint that this suit was not brought solely on account of the personal mismanagement of the petitioner's predecessor.

The petition is dismissed with costs.

SESHAGIRI AIYAR, J.—I agree. Before dealing with the question raised by Mr. T. Rangachariar that the cause of action against the deceased trustee does not survive against his successor-in-office, it has to be noted that certain specific allegations of misfeasance and breach of trust are made in the plaint against the petitioner, while he was acting as agent of the deceased trustee in respect of the suit temple. It may be, as contended for by the learned Vakil, that the petitioner's conduct as agent should not be charged against him as

(1) 18 Ch. D. 310; 50 L. J. Ch. 646; 45 L. T. 152; 30 W. R. 496.

trustee." At the same time, in considering whether the prayer for the settlement of a scheme is only ancillary to the one for the removal of the original defendant or was the principal relief claimed in the suit, the fact that the person who is said to have contributed to the prior mismanagement of the *devastanam* has now become the trustee, is a factor to be taken into account. Apart from this, I am satisfied that the cause of action as stated in the plaint does survive against the petitioner. In the earlier portion of the plaint there is a general allegation that the funds of the temple have been misappropriated. In paragraph 9, it is stated that since the assumption of trusteeship by the original defendant "the affairs of the *devastanam* have been drifting rapidly from bad to worse." This statement is intended to show that a general scheme is necessary to stop further malversation of the temple funds. Paragraph 12 says that the temple has a surplus of Rs. 26,000 annually. If the Advocate-General came to Court with this one allegation and asked for the settlement of a scheme for the utilisation of the surplus income, he will be within his rights under section 92 of the Code of Civil Procedure. In *In re Campden Charities* (1), the Court of Appeal pointed out that the fact that the surplus income was being applied in a particular manner was not a reason for not framing a proper scheme regarding its appropriation. The same rule must hold good in this country. When the income of a temple is in excess of its expenditure, the Advocate-General will be well advised in seeking the aid of the Court for a scheme for its proper employment. Consequently in so far as the allegation in paragraph 12 of the plaint is concerned, the relief for the settling of a scheme will survive against the successors of the original defendant. The statement in paragraph 13 (*g*) was supplemented by the plaintiff on the 20th August 1911. This is undoubtedly a part of the plaint. In the subsequent statement, there is a distinct allegation that the specific instance is only "an illustration of the systematic mismanagement which calls for the settlement of the scheme." On this averment, it is impossible to argue that the cause of action does not survive against the petitioner. Paragraph 15 of the plaint is even stronger. It complains of the want of means "for checking what is deposited in the *hundials*." That can only be done in a properly framed scheme. In another place, the plaint charges that other servants of the temple "are also making fortunes out of the *devastanam*." This allegation is made with a view to the framing of a scheme. I have, therefore, no hesitation in holding that the cause of action at least in regard to the relief claimed in paragraph 25 (*e*) survives against the petitioner. The prayer for the removal of the original defendant must be struck out. I cannot accede to the contention of Mr. Rangachariar that the relief by way of setting a scheme must depend upon charges against the trustee-in-office. If the Advocate-General alleged that the affairs of the temple were mismanaged by a deceased trustee and that in order to render the recurrence of such a state of affairs impracticable it is necessary to have a proper scheme, he is entitled under the Code of Civil Procedure to seek the aid of the Court. That I take, in substance, is what he asks the Court to do by bringing the petitioner on record in place of the deceased trustee.

I am, therefore, of opinion that the order of the Subordinate Judge is right. The petition must be dismissed with costs.

Petition dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 420 OF 1913.

May 27, 1914.

Present:—Justice Sir George Knox, KT.

RAM NARAIN—DEFENDANT—APPELLANT

versus

BEHARI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Provincial Insolvency Act (III of 1907), s. 20, cl. (d) —Insolvent, whether can sue to set aside decrees against him.

An insolvent is not prevented by reason of section 20, clause (*d*), of Act III of 1907, from instituting, defending or continuing any suit or other legal proceeding relating to a decree against him.

Second appeal from a decree of the Additional Subordinate Judge of Cawnpore, confirming that of the Munsif of that place.

FACTS.—Ram Narain, appellant, obtained an *ex parte* decree against the respondent, Behari, on the basis of a promissory note on the 16th of August 1910. In

execution of the decree, Ram Narain arrested Behari, who, in order to obtain his release, made an application to the District Judge to be declared insolvent. He was declared insolvent on the 19th of November 1910. Subsequently he instituted the present suit to have it declared that the *ex parte* decree obtained against him was fraudulent and the promissory note on which it had been obtained was a forgery. The defendant pleaded that the promissory note was a genuine transaction and the decree was not tainted with fraud. He, further, pleaded that the plaintiffs having been declared insolvents were not entitled to maintain the suit. The Munsif decided both the points against the defendant and decreed the suit. On appeal the Subordinate Judge confirmed the decision of the Court of first instance and dismissed the appeal. The defendant thereupon appealed to the High Court.

Mr. *W. Wallach* (with him Messrs. *Howard* and *G. L. Agarwala*), for the Appellant.

Mr. *R. Malcomson*, for the Respondents.

JUDGMEMT.—The plea which has been argued before me is plea No 1. And it is to the effect that the plaintiff having been adjudged an insolvent has no right to maintain the present suit against the appellant. In support of this argument I am referred to section 20, clause (*d*), of Act III of 1907. I hold that that clause does in no way apply to the matter in dispute in the present case. The matter in dispute is a decree, the property of Ram Narain, and in no way the property of Behari and Dhokal. There is, therefore, nothing to prevent Behari and Dhokal from instituting, defending or continuing any suit, or other legal proceeding, relating to this decree. The plea fails. No other plea was argued before me. The appeal is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

ORIGINAL CIVIL SUIT No. 203 OF 1914.

January 25, 1915.

Present:—Mr. Justice Kumaraswami Sastri.

G. CUNNIAH CHETTI—PLAINTIFF

versus

C. ELAMANDA CHETTI AND OTHERS—DEFENDANTS.

Ejectment, suit in—Possession under oral lease for fixed term, if valid as defence.

It is not open to a purchaser of immoveable property to eject a tenant who is in possession under an oral agreement to lease for a fixed term which he can specifically enforce, if the purchaser had notice of the terms of the tenancy and he or his predecessor-in-title had accepted rent from the tenant on such a footing.

Ittappan v. *Parangodan Nayar*, 21 M. 291; 8 M. L. J. 137, *Bibi Jawahir Kumari* v. *Chatterput Singh*, 2 C. L. J 343 and *Singheeram Poddar* v. *Bhagbat Chandar Nundi*, 6 Ind. Cas. 632, 11 C. L. J. 543, followed.

Sonat Chandra Ghose v *Sham Chand Singh Roy*, 14 Ind Cas. 701, 39 C. 663; 16 C. L. J. 71, referred to.

Kurri Veerareddi v. *Kurri Rapireddi*, 20 M. 336; 1 M L. T. 153 (F. B); 16 M. L. J. 395, explained.

FACTS.—First defendant was the owner of the suit property, portions of which were held by the defendants Nos. 2 to 4 under oral leases from him. The plaintiff, having purchased the property and having been put into possession of only a portion of the same, sued the vendor and the tenants for recovery of possession of the remaining portion thereof and for mesne profits. The 1st defendant contended that he never agreed to hand over actual physical or vacant possession to the plaintiff, that the latter was entitled to collect the rents from the tenants in occupation and to eject them, they being only tenants-at-will, and that he had no cause of action as against him. Second defendant contended *inter alia* that in February 1914 the plaintiff's vendor agreed orally to lease the property in question to him for a term of five years, that he was in possession pursuant to the said agreement and that the plaintiff, having had notice of his title under the said arrangement, was not entitled to eject him. Kumaraswami Sastri, J., before whom the case came on the 25th September 1914, raised a preliminary issue whether the plea of the 2nd defendant disclosed any defence. Arguments were heard on this preliminary issue.

Mr. *K. Ramachandran*, for the Plaintiff:—An oral agreement to sell conveys no interest in the property agreed to be sold. *Kurri*

Veerareddi v. *Kurri Bapireddi* (1). By analogy an oral agreement to lease also conveys no interest in the property agreed to be demised. The suit in ejectment is maintainable and there is no valid defence thereto.

Mr. *V. Raghunatha Sastriar*, for the 2nd Defendant, relied on *Singheeram Poddar* v. *Bhagbat Chunder Nundi* (2), *Ittappan* v. *Parangodan Nayar* (3), *Bibi Jawahir Kumari* v. *Chatterput Singh* (4) and *Sarat Chundro Ghose* v. *Sham Chand Singh Roy* (5), and distinguished the case of *Kurri Veerareddi* v. *Kurri Bapireddi* (1).

JUDGMENT.—The point raised by the preliminary issue is whether a person who is in possession of a certain property under an oral agreement to lease for a specific term can be ejected at the instance of the purchaser with notice of the oral agreement. I am of opinion that it is not open to such a purchaser to eject a person who is in possession under an agreement to lease which he can specifically enforce. The authorities seem to be clearly in support of this view. Although an agreement to lease, if reduced to writing, requires registration, the law does not prevent an oral agreement to lease properties. It has been held that a valid agreement to lease may be made by a verbal agreement which, though void as a lease, is capable of enforcement as an agreement for a lease. See *Singheeram Poddar* v. *Bhagbat Chunder Nundi* (2). It is also clear that a person in possession under an oral contract of lease which may be specifically enforced cannot be ejected by a party to the contract. *Ittappan* v. *Parangodan Nayar* (3), *Bibi Jawahir Kumari* v. *Chatterput Singh* (4) and *Sarat Chandra Ghose* v. *Shayam Chand Singh Roy* (5) are the authorities directly in point.

It is argued for the plaintiff that an agreement to lease does not convey any interest in immoveable property and that consequently on the analogy of *Kurri Veerareddi* v. *Kurri Bapireddi* (1), it can afford no defence to a suit in ejectment by one having a legal title. But *Kurri Veerareddi* v *Kurri Bapireddi* (1) proceeds on section 54 of the Transfer of Property Act, which contains an express provision that a contract to sell does not convey any interest in immoveable property. There is no such clause in the section relating to leases and having regard to section 91 of the Trusts Act which enacts that "Where a person acquires property with notice that another person has entered into an existing contract affecting that property, of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract", I do not think I can hold that, where there is no specific enactment providing that such an agreement does not convey any interest in the property as is provided in section 54 of the Transfer of Property Act, the same principle should be applied to such cases. I do not think it necessary to extend the scope of the decision in *Kurri Veerareddi* v. *Kurri Bapireddi* (1) beyond the cases covered by section 54 of the Transfer of Property Act. To do so would be to enable the plaintiff to take advantage of his own wrong and breach of contract, and it is unnecessary to extend those provisions unless there is some specific legal enactment.

Following *Ittappan* v. *Parangodan Nayar* (3), *Bibi Jawahir Kumari* v. *Chatterput Singh* (4) and *Singheeram Poddar* v. *Bhagbat Chunder Nundi* (2), I am of opinion that it is open to the defendant to resist a suit in ejectment if he can prove that there was an oral contract to lease for a fixed term, that he was in possession in pursuance of that contract and that the plaintiff or his predecessor-in-title accepted rent from him on such footing. I find the preliminary issue against the plaintiff and frame the following additional issues:—

* * *

The suit again came on for final hearing before Kumaraswami Sastri, J., on the 25th January 1915 and was decreed with costs, the Judge holding that the contract set up by the 2nd defendant was not proved.

Suit decreed.

(1) 29 M. 336, 1 M. L. T. 153 (F. B.); 16 M. L. J. 395.
(2) 6 Ind Cas. 632; 11 C. L. J. 543.
(3) 21 M. 291, 8 M. L. J. 187.
(4) 2 C. L. J. 343.
(5) 14 Ind. Cas. 701, 39 C. 663; 16 C. L. J. 71.

EBRAHIM AHMED MEHTER v. S. ABDUL HUQ.

LOWER BURMA CHIEF COURT.
FIRST CIVIL APPEAL No. 12 OF 1913.
February 8, 1915.

Present:—Sir Charles Fox, KT., Chief Judge, and Mr. Justice Hartnoll.

EBRAHIM AHMED MEHTER—
DEFENDANT—APPELLANT
versus
S. ABDUL HUQ—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch I, Art. 85—"Mutual, open and current account," meaning of—Settled account, opening of.

For an account to be mutual, it is necessary not only that one of the parties has received money and paid on account of the other, but that each of the two parties has received and paid on the other's account: each party should be able to say to the other "I have an account against you."

Phillips v. *Phillips*, (1852) 9 Hare 471; 68 E. R. 596; *Padwick* v. *Hurst*, (1854) 18 Beav. 575; 52 E. R. 225; 23 L. J. Ch. 667; 18 Jur. 763; 104 R. R. 536; *Hajee Syad Mahomed* v. *Musammat Ashufoonissa*, 5 C. 759; 6 C. L. R. 112; *Ram. Pershad* v. *Harbans Singh*, 6 C. L. J. 158, referred to and followed.

Where an account has been settled up to a certain date, it lies on the party desiring to re-open that account to aver some specific error in the account and to prove it.

Parkinson v. *Hanbury*, (1867) 2 H. L. 1 at pp. 11, 19; 36 L. J. Ch. 292; 16 L. T. 243; 15 W. R. 642, referred to.

Mr. *J. R. Das*, for the Appellant.

Mr. *N. N. Burjorji*, for the Respondent.

JUDGMENT.

Fox, C. J.—The suit from the decree in which this appeal is made was instituted by Mohamed Salay Naikwara on the 21st August 1909 against the appellant, Ebrahim Ahmed Mehter, son and executor of Ahmed Kassim Ariff, who died on the 2nd June 1907. The respondent is the assignee of the decree in the suit. The plaintiff claimed Rs. 74,914-6-10 as being due on an agency account between him and Ariff, in the alternative he prayed for the account to be taken and for a decree for the amount found owing thereon. The plaint stated that the cause of action arose on the 1st July 1907 when the agency ceased. This date is admittedly wrong because the agency ceased on the 2nd June 1907 when Ariff died. Sums were advanced to the defendant executor for funeral expenses of the deceased after his death, and the plaintiff collected some rents of houses which had belonged to him. These should have gone into a separate account against the executor, and were not properly included in the account of Ariff.

In any case all sums received and paid after the death of Ariff should have been the subject of a separate suit and could not be allowed for in the present suit.

Further, the date of the death of Ariff affords no starting point for a limitation period under any article in the first Schedule to the Indian Limitation Act, 1908.

If Article 85 of the first Schedule does no apply, it has not been contended that the plaintiff can recover amounts in respect of matters except such as occurred between the 21st August 1906 and the 21st August 1909 *i.e.* the period of three years before the suit was filed. No detailed statement is before us of the amounts of receipts and payments of the plaintiff between the 21st August 1906 and the 2nd June 1907, after which interest on the amount then due could be the only charge, but it may be taken that the amounts do not exceed the sum of Rs. 16,941-2-6, which the defendant admitted in his written statement to be due and for which a decree was given on the 1st August 1910. This decree was made by consent, and by it it was also ordered that an account be taken of the plaintiff's agency. The Rs. 16,941-2-6 was paid in September 1910. The taking of the account extended over a very long time, notwithstanding the fact that the Commissioner knew the language in which the accounts are written and translation of them was not necessary, he submitted his report on the 1st May 1912. The proceedings might possibly have been very much shortened and large expense might have been saved if before the taking of the account had commenced, allegations in the plaint which amounted to statements that the account between the plaintiff and Ariff had been settled between them year by year had been gone into and decided. No account signed by Ariff could be produced; consequently Article 64 could not be relied on. The plaintiff, however, was in a position to show that Ariff had from time to time examined his accounts and had acknowledged them to be correct. If the Court had held that the account had been settled up to the end of 1904, it would have laid on the defendant to aver some specific error in the account upto that time to entitle him to have the account before that time opened up [see

Parkinson v. *Hanbury* (1). On the taking of the account the defendant insisted on every item being proved strictly, and contended, and still contends in appeal that no items should be allowed as proved which were not supported by vouchers. On the plaintiff's evidence before the Commissioner I am of opinion that his accounts even up to the end of 1906 were agreed to as being correct, and the defendant was not entitled to have it before that time vouched for, and consequently that this objection on appeal is of no force except as regards items between the 1st January and the 2nd June 1907. It does not seem necessary to enter into whether such last mentioned items have been proved or not.

The substantial ground of appeal was that the claim was barred by limitation. The plaint was not framed on the basis of the suit being one "for the balance due on a mutual, open and current account where there have been reciprocal demands between the parties," nor, until the further hearing of this appeal, was there anything before the Court to show which was the last item in the account which was admitted or proved. In going through the case after the first argument of the appeal, I found that the account in English which had been referred to in the argument was on the face of it merely a synopsis, and that it could not be a current account or a translation of anything entered in the plaintiff's books. The Advocate for the respondent was consequently asked to have sufficient of the plaintiff's books, which had been before the Commissioner, translated to show what he relied on as proving that there was a mutual, open and current account, and the item he relied on as the last item admitted or proved. This has been done, and I am satisfied that the plaintiff kept regular books of account in the Guzerati language; and that he all along kept a current account of all transactions with or done on behalf of Ariff, and that such account was still open when Ariff died. An item of Rs. 32 entered in his cash book on the 22nd May 1907 as a debit against Ariff for sundry small repairs to his houses or an item of Rs. 504 credited to him on the 1st June 1907 is the last item previous to his death entered in the cash book and carried to his ledger account. Even if the item of Rs. 32 was not strictly proved, the item of Rs. 504 is not disputed, and consequenity may be held to be admitted.

The question, however, is whether the account was a "mutual account where there have been reciprocal demands between the parties" within the meaning of the Article relied on.

The meaning of the Article and of Articles in previous Indian Limitation Acts dealing with mutual accounts has been the subject of much discussion in the Indian High Courts, and we have been referred to all the reported decisions. The views expressed are not unanimous; the application of the Article to a particular case must be often a matter of difficulty. In regard to the words "where there have been reciprocal demands between the parties," Sir Charles Sargent in *Narrandas Hemraj* v. *Vissandas Hemraj* (2) said that literally construed, they would confine the clause to those cases only in which both parties have, in the course of their dealings, made actual demands on one another, but he thought that it could not have been intended to restrict it to such cases. The words "mutual account," however, have given rise to the greatest difficulty.

It appears to me that light upon the meaning of the Article is to be sought from the provisions of previous Indian Acts dealing with the subject. The first was Act XIV of 1859, section VIII of which enacted that "in suits for balances of accounts current between merchants and traders who have had mutual dealings, the cause of action shall be deemed to have arisen at, and the period of limitation shall be computed from, the close of the year in the accounts of which there is the last item admitted or proved indicating the continuance of mutual dealings; such year to be reckoned in the accounts." It will be observed that this provision dealt with accounts current between merchants and traders only. In *Hirada Basappa* v. *Gadigi Muddapa* (3), Holloway, C. J., commented upon a provision having been adopted in India when a similar provision in an old English Statute

(1) (1867) 2 H. L. 1 at pp. 11, 19; 36 L. J. Ch. 292; 16 L. T. 243; 15 W. R. 642.

(2) 6 B. 134.

(3) 6 M. H. C. R. 142.

which had been found mischievous had been repealed, by the 9th section of the Merchantile Law Amendment Act 1856, a few years previous to the Indian Act. Act IX of 1871 repealed in India the old English Statute of 21 James the First, Chapter 16, but Article 87 of the second Schedule again made provision for one kind of open and current account in the following words: "37: For the balance due on a mutual open and current account where there have been reciprocal demands between the parties," the period of limitation was made three years from the time of the last item admitted or proved in the account.

The provision in the Act of 1859 seems to clearly point to cases in which two merchants or traders, who are all supposed to keep accounts, had accounts against one another. The Act of 1871 refers to one account only which must be that of the plaintiff who sues, but this does not necessarily exclude the view that the Article applied only to cases in which each party has kept an account against the other. This Act extended a provision, which had previously applied to accounts between merchants and traders, to accounts between every description of persons, but the phraseology which has given rise to so much discussion was adopted. The source of the phraseology must, I think, have been the English Law; the words "mutual" and "reciprocal demands" are those used by Mr. Justice Denison in a case referred to in Sergeant Williams' Notes, to the old case of *Webber* v. *Tivill* (4). * * * *

The fact that there were mutual accounts between the parties was one of the grounds on which Chancery Courts exercised their equitable jurisdiction in regard to decrees for accounts to be taken, and in connection with the exercise of this jurisdiction it had to be decided what mutual accounts were. In *Phillips* v. *Phillips* (5), Vice-Chancellor Sir G. J. Turner said: "I understand a mutual account to mean, not merely where one of two parties has received money and paid it on account of the other, but where each of two parties has received and paid on the other's account."

In *Padwick* v. *Hurst* (6), a case not unlike the present case, the Master of the Rolls, Sir John Romilly, said: "Mutual accounts appear to me to be accurately defined by Sir George Turner in *Phillips* v. *Phillips* (5). They are not constituted by a person receiving moneys for and paying and lending moneys to his principal, or where the accounts simply consist in receipts and payments by the agent on behalf of and to the principal. If the principal were also on his side, paying moneys on behalf of the agent, so that there would be accounts to be taken on both sides, then there would be cross-demands or a case of mutual accounts, but the fact relied on, that money was lent by the plaintiff to the defendant (in addition to the plaintiff having done various business for him) does not constitute any case of mutual accounts. There is no allegation in this bill (in equity) that the defendant principal transacted any business for the plaintiff (agent) or paid any sums of money on his account. If the case alleged had been that besides money being paid to the defendant, the defendant had paid various sums of money on behalf of the plaintiff, for which the latter was accountable to the defendant, then the case of cross-payments and of mutual accounts would have arisen, but this is not alleged on the face of this bill."

These decisions show very clearly what sort of accounts were considered to be "mutual accounts" in English Law: I cannot find that the correctness of the decisions has ever been questioned in the English Courts. The remarks of Pontifex, J., in *Hajee Syud Mahomed* v. *Musammat Ashrufoonissa* (7), "unless each party could have said to the other 'I have an account against you,' I do not see how these could be 'mutual accounts,'" appear to me to be in accord with these decisions, and to have been intended to express what they express. Sir Ashutosh Mookerjee's judgment in *Ram Pershad* v. *Harbans Singh* (8) is founded on them.

I would hold that for an account to be "mutual" it must come within the definition given by Vice-Chancellor Turner in

(4) (1863) 2 Wms. Saund 124; 85 E. R. 843 at p. 846.

(5) (1852) 9 Hare 471 at p. 473; 68 E. R. 596.

(6) (1854) 18 Beav. 575; 52 E. R. 225; 23 L. J. Ch. 857, 18 Jur. 763; 104 R. R. 536.

(7) 5 C. 759, 6 C. L. R. 112.

(8) 6 C. L. J. 168.

Phillips v. *Phillips* (5). In the present case I cannot find that there was any mutual account, or that the plaintiff's was a mutual account. He was an agent who collected the rents of his principal's houses, attended to and paid the expenses in connection with them, advanced him money, looked after business in which he was interested, and in fact he appears to have done all business matters for Ariff, but I cannot find that Ariff ever did anything for the plaintiff; it is not alleged that he transacted any business for him or that he paid any sums on his account. Ariff was not then in a position to say to the plaintiff "I have an account against you to be set off against your account against me."

For these reasons I am of opinion that Article 85 of the first division of the first Schedule to the Limitation Act does not apply to the account on which the plaintiff sued, and consequently that the appeal must be allowed on the 1st ground of appeal.

In his written statement the defendant executor admits that he is executor of his father, or in other words that his father's estate was liable for Rs. 16,941-2-6, consequently the part of the decree dated the 15th July 1910 which ordered him to pay the plaintiff that amount should stand, but the rest of that decree and the decree of the 30th August 1912 should, in my opinion, be set aside.

The appellant asks for his costs of the suit. I do not think he should be allowed them; he did not pay the Rs. 16,941-2-6 which he admitted that his father's estate owed the plaintiff, and the latter was forced to bring a suit. The large expense incurred in the suit was chiefly due to the line he took in requiring every item in the plaintiff's account to be strictly proved. I would make no order as to the costs of the suit.

The appellant is, I think, entitled to receive from the respondent his costs of the appeal to be calculated on the difference between Rs. 16,941-2-6 and Rs. 67,912-14-2.

HARTNOLL, J.—I concur.

Decree modified.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 413 OF 1913.

August 28, 1914.

Present:—Mr. Justice Seshagiri Aiyar.

MAJETI NAGARATNAM—DEFENDANT—PETITIONER

versus

PACHIGOLLA RAMAYYA AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. IX, r. 13 and O. XVII, r. 3, scope of—Court's direction to be present—Defendant's default and Pleader's representation of "no instructions," effect of—Affidavit uncontradicted, reliability of.

A decree passed on defendant's default of appearance inspite of the Court's direction to appear and after his Pleader's representation that he had no instructions, amounts to an *ex parte* decree within the meaning of Order IX, rule 13, of the Civil Procedure Code.

Chandramathi Ammal v. *Narayanaswami Iyer*, 5 Ind. Cas. 23; 9 M. L. J. 700; 7 M. L. T. 369; 33 M. 241, followed.

Order XVII, rule 3, Civil Procedure Code, applies only to cases of a party's failure to do an act for which time had been granted on his application.

An affidavit uncontradicted is *prima facie* reliable.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the order of the Court of the Subordinate Judge of Kistna at Ellore, in Miscellaneous Petition No. 3662 of 1912 in Small Cause Suit No. 2073 of 1911.

FACTS.—The lower Court directed the defendant to be present on a particular date, to which the case was adjourned for final hearing. On that date the defendant was not present, but his Pleader prayed for an adjournment and on the Court refusing the same represented he had no instructions. The Court then examined a witness for the plaintiff and passed a decree. Thereupon the defendant moved the Court by petition to set aside the decree and filed an affidavit stating that on adjournment being refused his Vakil had represented to the Court that he had no instructions. The lower Court passed an order refusing to set aside the deree, holding that there was a decision on the merits and that the case was governed by Order XVII, rule 3, of the Civil Procedure Code. The defendant then filed this civil revision petition against the said order.

Mr. *M. Purushotham Naidu*, for the Petitioner:—The defendant must be held to have been *ex parte* as he was not present and his Pleader said he had no instructions. See

Chandramathi Ammal v. *Narayanasami Iyer* (1).

Mr. *P. Nagabhushanam*, for the Respondents :—The Court directed the defendant to be present for being examined on the adjourned date. The defendant failed to do so. Order XVII, rule 3, applied to the case.

JUDGMENT.—In this case the final hearing was adjourned to the 30th September 1912 and the Subordinate Judge directed that the defendant should be present to be examined on that date. When the case came on to be heard his Pleader, according to the Subordinate Judge, represented that he wanted an adjournment and that he was not prepared to go on with the examination of witnesses.

The affidavit filed in the lower Court by the party contains this averment, namely, "As your Court did not grant an adjournment, my Vakil said that he had no instructions to proceed with the case."

This was uncontradicted and I must take it that it correctly states the facts. The Subordinate Judge, thereupon, proceeded to dispose of the suit by examining one of the witnesses for the plaintiff. The defendant applied to set aside that decree on the ground that he must be deemed to have been *ex parte* at the adjourned hearing and that Order IX, rule 13, Civil Procedure Code, applied to this case.

The Subordinate Judge is of opinion that as he disposed of the case on the merits, the proper rule applicable is rule 3, Order XVII. I cannot agree with this conclusion. Order XVII, rule 3, only applies where, on the application of one of the parties, the Judge directs a particular act to be done on the adjourned hearing and the party is unable to perform that act. In this case, as I have already mentioned, the Judge directed the defendant to appear for examination before he gave judgment in the case, Rule 2, Order XVII, applies to this case.

The question for consideration under that rule is whether the defendant can be regarded as having been *ex parte* because his Pleader intimated to the Court that he had no instructions to go on with the hearing. Having regard to the recent judgment of their Lordships Justice Wallis and Justice Krishnaswamy Iyer in *Chandramathi Ammal* v. *Narayanasami Iyer* (1), I must hold that the defendant must be deemed to have been *ex parte* on the adjourned date and that the Subordinate Judge was bound to proceed to dispose of the application under Order IX. The intimation by the Pleader that he had no instructions, coupled with the affidavit filed by his client, must be read as meaning that he had only instructions to apply for adjournment and that he was not prepared to conduct the case. Under these circumstances it must be taken that neither the Pleader nor the party *appeared*.

The Subordinate Judge has not considered the question whether on the affidavit a proper explanation has been given for non-appearance on the adjourned date. He will do this now. I reverse his order and direct him to take the application on his file and dispose of it according to law. Costs to abide.

Petition allowed.

(1) 5 Ind. Cas. 23; 33 M. 241; 19 M. L. J. 760. 7 M. L. T. 309.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 727 TO 733 OF 1912.

January 28, 1915.

Present:—Mr. Justice N. Chatterjea and Mr. Justice Greaves.

PRAN KRISHNA SAHA AND ANOTHER—DEFENDANTS—APPELLANTS

versus

TRAILAKHYA NATH CHOWDHURY AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 106, suit under—Question of title, whether determined in suit under s. 106—Civil Court, jurisdiction of.

A person who is not in possession of land which is claimed as rent-free at the date of the Record of Rights, cannot have the mere question of his title to hold the land rent-free tried in a suit under section 106 of the Bengal Tenancy Act (VIII of 1885), nor can he obtain possession of the land in a suit under that section.

Nilmoni Kumar v. *Kedar Nath Ghosh*, 20 Ind. Cas. 151; 17 C. W. N. 750, referred to.

Where, however, the plaintiff has a title and his claim is not barred by limitation he is entitled to possession, but he cannot get all the reliefs in a suit under section 106, whereas he can get a complete remedy by a suit in the Civil Court.

PRAN KRISHNA SAHA *v.* TRAILAKHYANATH CHOWDHURY.

Second civil appeals from the decisions of the District Judge, Pabna, dated the 14th September 1911, confirming that of the Assistant Settlement Officer, Pabna, dated the 31st March 1911.

In No. 727

Babus *Jogesh Chandra Roy* and *Upendra Lal Roy*, for the Appellants.

Dr. *Dwarka Nath Mitra* and Babu *Purno Chandra Roy*, for the Respondents.

In No. 728

Babu *Jogendra Chandra Dutta*, for the Appellants.

Dr. *Dwarka Nath Mitra* and Babu *Purno Chandra Roy*, for the Respondents.

In No. 729 to 731.

Babu *Jogendra Chandra Dutta*, for the Appellants.

Dr. *Dwarka Nath Mitra*, for the Respondents.

In Nos. 732 and 733.

Babu *Jogendra Chandra Dutta*, for the Appellants.

Babu *Jnanendra Nath Sarkar*, for the Respondents.

JUDGMENT.

In No. 727 of 1912.

This appeal arises out of a suit instituted under section 106 of the Bengal Tenancy Act. It appears that in the Record of Rights prepared under Chapter X of the Bengal Tenancy Act, the land in suit was entered as the *mal* land of the *patnidar* defendants and as constituting the holding of the other defendants under the former. The plaintiffs thereupon instituted this suit under section 106 of the Bengal Tenancy Act for a declaration that the land formed the rent-free (*brohmatter*) tenure of the plaintiff No. 1, under whom the other plaintiffs held as tenants, and for correction of the entry in the Record of Rights accordingly. The Courts below have found in favour of the plaintiffs and the defendants have appealed to this Court.

It is contended on behalf of the appellants that the Revenue Officer in deciding disputes in suits under section 106 of the Bengal Tenancy Act is confined to a consideration of the question of possession alone, and cannot try any question of title, and that the plaintiffs having been found to have been out of possession at the date of the final publication of the Record of Rights, and also at the date of the suit, the suit ought to have been dismissed. The appellants rely on the cases of *Padmalav* v. *Lukmi Rani* (1), *Kali Sundari Debya* v. *Girija Sankar Sanyal* (2) and *Ram Chandra* v. *Nanda Nandananandi Deb* (3) in support of their contention.

It is contended on behalf of the respondents, that these cases were between rival *proprietors*, and are, therefore, distinguishable. The reason why in a case between rival proprietors, the Court is confined to a consideration of the question of possession, as was pointed out by Coxe, J., in *Mohunt Padmalav* v. *Lukmi Rani* (1), is that the *khewat* recording proprietary interests is drawn up with reference to the registers kept by the Collector under the Land Registration Act, which are prepared according to possession and possession alone, and have no concern with title unaccompanied by possession, and in that very case it was observed by the learned Judge that in a suit between tenant and tenant, or between a landlord and tenant, questions other than that of possession may legitimately arise.

The present case is not between rival *proprietors*. The defendants (or some of them) are *patnidars* and *durpatnidars* of the *mouza* in which the lands are situated, and the plaintiff No. 1 claims to hold the lands in the *mouza* in rent-free right derived from the *zemindars* under whom the defendants hold the *mouza* in *patni* and *durpatni*. The cases, therefore, relating to rival proprietors may be distinguished from the present case.

The learned Pleader for the respondents contends that the case comes under clause (*j*) of section 102 of the Bengal Tenancy Act, under which the Revenue Officer may, if the land is claimed to be held rent-free, record "whether or not rent is actually paid, and if not paid, whether or not the occupant is entitled to hold the land without payment of rent, and if so, entitled under what authority," and that under section 106 the Revenue Officer may decide a dispute

(1) 12 C. W. N. 8.
(2) 11 Ind. Cas. 184; 15 C. W. N. 974.
(3) 20 Ind. Cas. 298; 18 C. W. N. 988; 19 C. L. J. 197.

regarding any entry which a Revenue Officer has made in, or any omission which the said officer has made from, the record when such dispute is (among other matters) as to whether land held rent-free is properly so held or "as to any other matter."

The words "entitled to hold" in section 102, clause (*j*), indicate that the question of title may be gone into, but then the words in section 06 "as to whether land held rent-free is properly so held" and those in section 102, clause (*j*), "if the land is claimed to be held rent-free," taken with the other words, in that section *viz.*, whether or not the *occupant* is entitled to hold the land without payment of rent, go to show that the land must be in the occupation of the person who claims to hold it rent-free at the time the Record of Rights is made and published. It is found that the plaintiffs were dispossessed before the Settlement proceedings were commenced. That being so, the plaintiffs were not the *occupant* of the land. The words "or as to any other matter" in section 106 are no doubt very comprehensive, but it seems to us that they must have reference to the matters indicated in section 102, and that section 106, in so far as it relates to the decision of disputes with respect to land claimed to be held rent-free, contemplates a suit by a person who is in possession of land, which he claims to hold rent-fee, to have an entry or omission in the record with respect to it corrected.

We are of opinion that a person who is not in possession of land which is claimed as rent-free at the date of the Record of Rights, cannot have the mere question of his title to hold the land rent-free tried in a suit under section 106 of the Bengal Tenancy Act. Moreover, the plaintiffs were admittedly out of possession at the date of the suit under section 106. They cannot obtain possession of lands in a suit under section 106 [See *Nilmoni Kumar* v. *Kedar Nath Ghosh*, (4)] and they do not claim possession in the suit, though a declaration has been made that they are entitled to get possession. It is conceded that that portion of the order cannot stand, but it is contended that they are entitled to have the entry as to *mal* land corrected in this suit, and that they may obtain possession by a suit in the Civil Court. If, however, the plaintiffs have a title and their claim is not barred by limitation, as found by the Courts below, they are entitled to possession. But they cannot get all the reliefs in a suit under section 106, whereas they can get a complete remedy by a suit in the Civil Court.

The appeal is, therefore, allowed, but having regard to the fact that the ground upon which the appeal succeeds was not specifically taken in the Courts below, we direct that each party will bear his own costs in all the Court.

This judgment will govern Appeals Nos 728, 729 to 731, 732 and 733 of 1912.

Appeals allowed.

(4) 20 Ind. Cas. 151; 17 C. W. N. 750.

LOWER BURMA CHIEF COURT.

CIVIL REVISION PETITION NO. 9 OF 1914.

February 12, 1915.

Present:—Mr. Justice Twomey.

MAUNG THA—PLAINTIFF—APPLICANT

versus

SHWE ZAN—DEFENDANT—RESPONDENT.

Revision—Material irregularity in assessing damages—Contract Act (IX of 1872), s. 74, disregarding provisions of.

To disregard the provisions of section 74 of the Indian Contract Act in assessing the damages is a material irregularity within the meaning of section 115, Civil Procedure Code.

Mr. *Hancock*, for the Applicant.

Mr. *Lambert* (Senior), for the Respondent.

JUDGMENT.—In this case the plaintiff claimed Rs. 400 as compensation for the damage suffered by his sailing boat which the defendant hired. The Township Court found against the plaintiff, but the District Court on appeal decided that there was an agreement by the defendant to pay Rs. 400 if the boat was "wrecked," that owing to the carelessness and cowardice of the defendant the boat was driven on to the rocks and suffered serious damage, and that the defendant was liable to pay Rs. 400, the sum agreed upon.

No second appeal lies, but the plaintiff's appeal was admitted as an application for

revision. His Counsel abandons the grounds set out in paragraphs 1, 2 and 3 (which are, 1*st*, that there was no contract, 2*nd*, that there was no bailment and 3*rd*, that the accident was not due to the plaintiff's negligence). It is quite clear that these grounds are unsustainable. There remains the 4th paragraph, in which it is urged that the damages awarded are excessive.

The finding of the District Court as to the terms of the bailment cannot be disputed and I see no reason to dissent from it. A sum of Rs. 400 was agreed upon as damages in case the boat was "destroyed," (*Pyet Si*). But the boat was not destroyed. She was badly holed by the rocks, but was patched up and was brought into port. She is capable of repair. In these circumstances the plaintiff is clearly not entitled to the amount stipulated, namely, Rs. 400, the full value of the boat. He can only get reasonable compensation under section 74, Contract Act. Even if the agreement was that, however slight the damage, the hirer should pay Rs. 400, such a stipulation would be by way of penalty and would be construed by the Court only as fixing a maximum amount, and the Court would have to decide what would be reasonable compensation in the circumstances. There is evidence that the boat was valued at Rs. 400 when hired, and that in her damaged condition she was worth only Rs. 100. Looking to the statements of the witnesses on both sides as to the serious extent of the injuries suffered by the boat, I think the estimate of Rs. 100 as her value at the end of the trip is probably correct.

It must be held that the learned Judge of the District Court acted with material irregularity in disregarding the provisions of section 74, Contract Act. The decree is altered, so as to allow a sum of Rs. 300 only as damages with costs on that amount in all Courts.

Decree modified.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 864 OF 1913.

November 24, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Hannay.

AMRITHESWARA PANDITHAR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MURUGAPPA CHETTIAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu temple—Muraikar *or turn* archaka *and* miras archaka, *rights of, to perform new* pujas—Navavarana puja, *what is—Trustee, right of, to have new* pujas *and* archanas *performed by* miras archaka.

Trustees of Hindu temples will be acting contrary to their duty if they refuse to accept voluntary contributions offered by devotees for the performance of new *pujas* and festivals, provided they are not inconsistent with the object of the institution and the necessary funds are forthcoming from the devotees.

Elayalvar Reddiar v. *Namberumal Chettiar*, 23 M. 296; 10 M. L. J. 86, followed.

Non-*muraikar* (non-turn-holder) *archakas* are entitled to perform for their clients special acts of worship, such as *navavarana puja*, without prejudice to the *mamool* worship being performed during the usual hours by the *muraikars* or the turn-holders.

Per *Sadasiva Aiyar, J.*—*Archana* is not distinct from *puja* and is a portion of it; the latter is a general term meaning ceremonial worship, the former term being applied to the placing of pure leaves or flowers on the idol during the course of recitation of the names of the god or goddess, as the case may be. *Archanam* is connected more with vocal respect and praise and *pujanam* with mental attitude.

Navavarana puja is one in which the *saktis* of the five ordinary aspects of the god (*Brahma, Vishnu, Rudra, Iswara* and *Sadasiva*) and the four higher aspects (*Bindu, Nadda, Sakti* and *Sira*) are worshipped.

Second appeal against the decree of the Distict Court of Trichinopoly, in Appeal Suit No. 123 of 1912, preferred against that of the Court of the District Munsif of Srirangam in Original Suit No. 452 of 1910.

FACTS.—Plaintiffs and defendants Nos. 3 and 4 are the *miras archakas* of the Akhilandeswari temple at Tiruvanaikaval, near Trichinopoly, of which the 1st and 2nd defendants are the trustees. The plaintiffs, alleging that during the *navarathri* festival, when it was their turn to perform all the *pujas* in the temple and enjoy the emoluments thereof, 1st and 2nd defendants had, at the instance of the 5th defendant, a devotee, and contrary to *mamool*, introduced a new *puja*, called *navavarana puja*, and had the same performed by defendants No. 3 and 4, that the said *puja* was opposed to the Shastras and

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to the exercise of the plaintiffs' rights and that it was provocative of disturbance, sued for a permanent injunction restraining the defendants from interfering with the plaintiffs' right to perform the *puja* and from introducing the new *puja* or in the alternative restraining the defendants Nos. 1, 2 and 5 from having the said *puja* performed by defendants Nos. 3 and 4. The District Judge held that defendants Nos. 3 and 4 might be employed by the 5th defendant to perform *navavarana archana*, but not *navavarana puja*, and restrained the defendants from interfering with the performance of the *mamool puja* by the plaintiffs during the *navarathri* festival from *uchikala puja* to *ardhajama puja* and from holding possession of the keys of the *sannidhi* doors and from performing the *navavarana puja* as distinct from *navavarana archana*. The plaintiffs appealed to the High Court against so much of the decree as refused them the further reliefs sought.

Mr. *V. Visvanatha Sastri*, for the Appellants:- The plaintiffs as turn-holders are entitled to perfrom every kind of *puja* and *archana* during the nine days of the *navarathri* festival and to receive the emoluments thereof. The trustees are not entitled to depute defendants Nos. 3 and 4 to perform any *puja* during that period so as to interfere with the exercise of the plaintiffs' rights. Further, the *navavarana puja* is unauthorised by the Shastras and is an innovation which ought not to be permitted as it is likely to desecrate the deity and create a disturbance.

Messrs. *T. Rangaramanujachariar* and *N. Rajagopalchariar*, for the Respondents:—It is quite competent to the trustees to have non-*mamool puja* and *archanas* performed by any *miras archaka*, the right of the turn-holders being only confined to the performance of the *mamool pujas*. *Navavarana puja* is quite Shastraic and a trustee cannot with impunity refuse to accept voluntary contributions for perfomance of *pujas*, provided such *pujas* are not repugnant to the usages of the institution.

JUDGMENT.

SADASIVA AIYAR, J.—The plaintiffs are the appellants. They are some of the *archakas* in the famous Siva Temple in Tiruvanaikaval near Trichinopoly. They brought this suit against the trustees of the temple (defendants Nos. 1 and 2) and against two other *archakas* who had been employed to perform a special *puja*, called *navavarana puja*, during the nine days of the *navarathri* festival by a rich devotee, the 5th defendant. The plaintiffs' contentions are: (1) during those nine days it is the plaintiffs' turn to perform all the *pujas* in the temple; and (2) this new *navavarana puja* has not been in existence from time immemorial, is opposed to the Shastras, is provocative of disturbance and is directly opposed to the plaintiffs' right (See paragraph 7 of the plaint).

On these allegations, they sued for a permanent injunction to issue to the defendants restraining them from interfering with the *pujas* which the plaintiffs should perform, restraining the defendants from performing the new *puja* and in case the Court should hold that the preformance of the *navavarana puja* is not illegal, restraining the defendants from preventing the plaintiffs' performing the *puja* and from receiving the incomes and honours from the defendants Nos. 1, 2 and 5, who should be further prevented from getting the *puja* done through the defendants Nos. 3 and 4.

The learned District Judge in his judgment divided the *navavarana puja* into two parts, *puja* and *archana*. Then he held that the defendants Nos. 3 and 4 might be employed by the 5th defendant to perform the *archana*, but cannot be allowed to perform the *puja*. He then gave a decree to the plaintiffs for the following reliefs:—

(1) An injunction restraining the defendants from interfering with the performance by the plaintiffs, during the *navarathri*, of the *mamool pujas* in Akhilandeswari temple from *uchikala puja* to *ardhajama puja* and the retention by them of the keys of the *sannidhi* doors;

(2) an injunction restraining the defendants from performing the *navavarana puja* during the *navarathri* festival as described in the Agama Book, Exhibit III, but the defendants to be entitled to perform what is described as the *navavarana archana* in the last sentence of Exhibit III, namely, the mere recitation of the names of goddess, offering of food, perfumes, lights, *neeranjana* (*mangalaharathi*) and ringing of bell.

The plaintiffs are not satisfied with the injunction granted in the above terms and

they want that even as regards what is called the *navavarana archanai*, the defendants Nos. 3 and 4 should not be employed by the 5th defendant to perform this *archanai* and that it is only the plaintiffs who could be deputed by the 5th defendant to perform the *archanai*.

There are 16 grounds mentioned in the memorandum of second appeal, but the arguments were confined to two grounds, those grounds being the 3rd and 5th which are as follows:—

"(3) Because it being admitted that this *navavarana puja* or *archanai*, whatever view be taken of its nature, is not an old and *mamool*-conducted form of worship, but is a new introduction into the suit temple, the Courts below ought to have granted the injunction sought for."

"(4) * * * *

"(5) Because in any case the admission of the Vakil, contrary to the evidence and without instructions from the plaintiffs, on a point of ritualistic law in a particular institution is not binding upon the plaintiffs and the admission, even so far as it goes, will not authorise the introduction of all new *pujas* and *archanas* into the temple."

I must unhesitatingly reject the contention put forward in the 3rd ground. Sir S. Subrahmania Aiyar, J., said in the case of *Elayalvar Reddiar* v. *Namberumal Chettiar* (1) that voluntary contributions are usually offered for performing new *pujas* or new festivals by rich devotees to famous temples and that provided the festivals and worships are not inconsistent with the object of the institution, the trustees *would act in contravention of their duty* if they refused to celebrate these new festivals or to *have these new pujas performed*, provided the requisite funds were forthcoming from the devotees. It is in fact part of the trustees' functions to make the institutions richer and to promote the interests of public worship by accepting such offers of wealthy devotees. It is idle to contend that the institution of a sacred *puja* like the *navavarana puja*, in which not only *sakthis* of the five ordinary aspects of God, (*Brahma*, *Vishnu*, *Rudra*, *Eswara* and *Sadasiva*) are worshipped, but even the four higher aspects (*Bindu*, *Nada*, *Sakti* and *Siva*), is a worship which will cause *pujalopam* or loss of spiritual benefit in the temple, as previously stated by the plaintiffs in their plaint. As regards the 5th contention in the memorandum of appeal, apart from any admission of the Vakil, the evidence is clear that non-*muraikars* are entitled to perform for their clients special acts of worship without prejudice to the *mamool* worship being performed during the usual hours by the *muraikars*. There is, therefore, nothing in the 5th ground.

(1) 23 M. 298; 10 M. L. J. 86.

Speaking for myself, I wish to guard myself from being understood as agreeing with the learned District Judge that the *archanai* is distinct from the *puja*. *Puja* is a general terms meaning ceremonial worship, while *archanai*, as ordinarily understood, is the placing of pure leaves or flowers on the idol during the course of the recitation of the god's (or goddess's) names in the ceremonial worship. *Archanai* is, in fact, a part of the *puja*. I do not see any reason why the trustees should not encourage devotees to have as elaborate ceremonial *puja* as they like performed to the sacred idols, without prejudice to the performance of the *mamool pujas*, or why only the *archanai* portion of the *puja* could be allowed to be so performed. In Exhibit III, a very illogical dual classification is made of the *puja*, the *pujanam* being stated to consist of *abhishakam*, *sandal*, throwing of flowers, cloth, etc., while *archanam* is said to consist of the mentioning of god's names and the dedication of food, incense, light, bell sound, camphor light and *mathuparkam*. I might be permitted to state, with great respect to the cadjan leaf, Exhibit III, that the mention of *archanam* as quite apart from the *pujanam* and the omission of offering flowers, etc., from the actions coming under *archanam* and the inclusion of it under the head of *pujanam*, as distinct from *archanam*, are not compatible with either the etymological or colloquial use of those terms. As Apte says in his dictionary, *punjanam* means worshipping, honouring, adoring, treating with respect, entertaining, hospitality; and *archanam* means worshipping, reverence or respect paid to superiors. There is really no difference in the root meaning of the two terms except probably that *archanam* is connected more with vocal respect and praise and *pujanam* with the mental attitude. In colloquial usage, *archanam* is used to signify the throwing of flowers or sacred leaves on

the idol, with the recitation of one of the names of God represented by the idol at each act of throwing. As this is considered the most important part of the whole *puja* or worship, those who do not wish to worship with elaborate ceremonial content themselves with this principal portion, namely, *archanam* accompanied usually by the showing of camphor light and the dedication of *naivedyam*. It does not follow from this that the trustees and devotees are entitled to develop the importance and sanctity of the temple by introducing only *archanais* and ought not to introduce any of the other ceremonies included in the complete *puja*. As, however, the trustees (the defendants Nos. 1 and 2), the devotee-client (the 5th defendant) and the non-*murai archakas* (defendants Nos. 3 and 4), of whom the defendant No. 5 is the client, have not put in any cross-appeals or memorandum of objections, it is unnecessary to elaborate this matter further.

In the result, the second appeal is dismissed with costs, two sets (one set to the trustees-respondents and the other set to the other respondents).

HANNAY, J.—I agree with my learned brother that, for the reasons given by him, the contentions raised by the 3rd and 5th grounds in the memorandum of second appeal must be rejected and that consequently this second appeal must be dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 190 OF 1914.

January 4, 1915.

Present:—Mr. Justice Ayling.

VATAKKA CHATHILINGATH TAVAZHI—DEFENDANT—PETITIONER

versus

RAMASWAMI PATTER AND OTHERS—PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 55 (2)—Implied covenant for title—Vendee's knowledge of defect in vendor's title—Difference between cases of conveyances of full title and conveyances of qualified title—Karamkari *tenure*

The rule that in spite of his knowledge of a defect in the title of the vendor, a vendee is in case of dispossession entitled to sue his vendor on the implied covenant for title under section 55 (2) of the Transfer of Property Act, applies only to cases of conveyances of absolute or full title. If, however, what is conveyed is not an absolute title, as in the case of a conveyance of lands held on *Karamkari* tenure (which, by their very nature, are inalienable) and the vendee is evicted by the superior landlord, the vendor is not liable to the vendee on any implied covenant for title.

Subbaraya Reddiar v. *Rajagopala Reddiar*, 23 Ind. Cas. 570; (1914) M. W. N. 376; 15 M. L. T. 240 and *Arunachala Aiyar* v. *Ramasami Aiyar*, 25 Ind. Cas. 618, 27 M. L. J. 517; 1 L. W. 849; 16 M. L. T. 397, distinguished

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge of Palghat, in Small Cause Suit No. 963 of 1913.

FACTS.—Certain lands held on *karamkari* tenure were alienated by the plaintiffs to the defendant. The superior landlord thereupon filed a suit and ejected the defendant The plaintiffs, who had not been paid the sale consideration, subsequently sued the defendant for the same and the latter contended that he was not liable to pay it, as there was failure of consideration owing to the breach of the implied covenant for title. The Subordinate Judge gave the plaintiffs a decree. The defendant then preferred this civil revision petition.

Mr. *C. Madhavan Nair*, for the Petitioner :—The mere knowledge of a defect in the title of the vendor does not affect the right of the vendee to sue the vendor on the implied convenant for title. *Subbaraya Reddiar* v. *Rajagopala Reddiar* (1) and *Arunachala Aiyar* v. *Ramasami Aiyar* (2). The vendor must be taken to have assured the vendee a *karamkari* holder's right to the land, which meant that so long as he paid the rent reserved he could not be evicted. By the eviction there has been a breach of this convenant and consequently there has been a failure of consideration.

Mr. *P. S. Narayanaswami Iyer*, for Mr. *C. V. Ananthakrishna Iyer*, for the Respondents :—The cases quoted by the other side are distinguishable as being cases of conveyance of full title. If from the very

(1) 23 Ind. Cas. 570; (1914) M. W. N 376; 15 M. L. T. 240.

(2) 25 Ind Cas. 618; 27 M. L. J. 517; 1 L. W. 849; 16 M. L. T. 397.

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nature of the lands conveyed they are inalienable (as *karamkari* tenure lands are), the vendee is not entitled to any remedy. What he bargained for was *karamkari* lands and he got them. So there has been no failure of consideration.

JUDGMENT.—The only question is whether the Subordinate Judge was right in holding that there was no implied guarantee of title under Exhibit I. Mr. Madhavan Nair for the petitioner relies on the recent decisions in *Subbaraya Reddiar* v. *Rajagopala Reddiar* (1) and *Arunachala Aiyar* v. *Ramasami Iyer* (2), as authority for holding that section 55 (2) of the Transfer of Property Act will apply even where the vendee has knowledge that the vendor's title is defective, so long as there is no contract to the contrary. But in both these cases, so far as I can see, the title purported to be conveyed was on the face of the document of conveyance a full title. In the present case Exhibit I clearly recites that the plaintiffs only held the land on *karamkari* right, the incidents of which are as defined in *Achutha Menon* v. *Sankaran Nair* (3): and I do not think section 55 would warrant a Court in implying a guarantee of any larger title. The rulings above quoted seem, therefore, to have no application to the present case: and there appears to be no ground for interfering with the decree of the *Small Cause Court*.

The petition is dismissed with costs.

Petition dismissed.

(3) 12 Ind. Cas. 1007; 36 M. 380, (1911) 2 M. W. N. 529, 22 M. L. J. 118; 10 M. L. T. 521.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 3015 OF 1909.

January 5, 1915.

Present:—Mr. Justice Sharfuddin and Mr. Justice Coxe.

Musammat BIBI SALIMAN—DEFENDANT—APPELLANT

versus

UDHORAN SAHI—PLAINTIFF AND ANOTHER—DEFENDANTS—RESPONDENTS.

Rent-decree, setting aside of—Fraud, allegation of—Rent, exaggeration of—Burden of proof—Entry in Record of Rights, mistake due to, effect of

A rent-decree cannot be set aside on the ground of an act of fraud which is not clearly and precisely alleged in the plaint at all.

Ganga Narain Gupta v. *Tilakram Chowdhry*, 15 C. 583; 15 I. A. 119, 12 Ind. Jur. 254, 5 Sar. P. C. J. 168, referred to.

In a suit to set aside a rent-decree on the ground that the rent claimed was greatly exaggerated, it is for the plaintiff to prove affirmatively that the rent sued for was more than the rent due and he must also prove that the exaggerated rent was claimed in order to defraud him.

A mistake on the part of the claimant arising out of an entry in the Record of Rights will not be fraud.

Appeal against the decree of the Second Sub-Judge, Mozaffarpore, dated the 7th of July 1909, reversing that of the Additional Munsif, Mozaffarpore, dated the 18th of January 1909.

Mr. *Muhammad Mustafa Khan*, for the Appellant.

Babu *Baidyanath Narain Singh*, for the Respondents.

JUDGMENT.

COXE, J.—This appeal arises out of a suit for a declaration that a rent-decree obtained by the defendant No. 1 against the defendant No. 2 was fraudulent. The suit, which is said to have been fraudulent, was instituted on the 16th December 1907. About a month before that, the plaintiff had applied for execution of a mortgage decree, which he held against the defendant No. 2 with respect to some lands included in the defendant No. 2's holding. This land he subsequently purchased in execution of his mortgage decree. The date of his purchase is not known to us, but it is hardly possible that it can have taken place before the institution of the rent suit.

I find it extremely difficut to appreciate what precise fraud is alleged in this case. But as I understand from the learned Pleader for the respondents, two acts of fraud are pleaded. The first is that the defendant No. 1 sued the defendant No. 2 for the rent of the holding, although the defendant No. 1 himself was in possession of it and the defendant No. 2 was not the tenant at the time of the suit. I cannot find, however, that this fraud is alleged in the plaint at all. In paragraph 2 it is stated that the defendants, in a former suit, alleged that the defendant No. 1 was in possession of the land and that the defendant No. 2 had no connection therewith, but the paragraph concludes by

asserting that these statements of the defendants were found to be false and it is nowhere suggested in the plaint that that finding was wrong.

It is quite clear that the former decree cannot be set aside on the grounds of an act of fraud which is not clearly and precisely alleged, and in this connection I may refer to the well-known case of *Ginga Narain Gupta* v. *Tiluckram Chowdhry* (1). In my opinion, therefore, the plaintiff cannot rely on the first allegation of fraud mentioned above.

The second allegation is that the rent claimed in the suit was greatly exaggerated, that the rent of the holding is Rs. 5 odd whereas the suit was brought for rent at the rate of Rs. 5 odd in cash and 4½ maunds of produce. It is clear, therefore, that to succeed in this suit the plaintiff is bound to prove that the rent was not Rs. 5 odd and 4½ maunds in produce and that the defendant No. 1 alleged that the rent was so much, in order to defraud the plaintiff. But these facts have not been found. The learned Subordinate Judge appears to have imagined, as indeed is not unusual, that when fraud was alleged by the plaintiff, it was incumbent on the defendant to prove the whole of the former case over again. He says: "The onus lay heavily on the defendant No. 1 to prove not only that the disputed lands are *mankhassa* but that the arrears decreed were justly due by the defendant No. 2." This, in my opinion, is an entire misapprehension. It is for the plaintiff to prove affirmatively that the rent sued for was more than the rent due, and even that is not sufficient. He must prove also that the exaggerated rent was claimed in order to defraud him.

It appears from the Record of Rights that the amount of 4½ maunds of produce is entered in some way against this holding. The learned Subordinate Judge regards this as not amounting to proof that that amount of rent was due from the holding, as of course he is perfectly entitled to do; but he has not considered the possibility that this entry in the Record of Rights may have misled the defendant No. 1 into claiming rent which may perhaps not have been due. A mistake of this kind, if it were a mistake, would not be fraud.

(1) 15 C. 533; 15 I. A. 119; 12 Ind. Jur. 244; 5 Sar. P. C. J. 168.

In my opinion, therefore, the case must go back to the learned Subordinate Judge for re-hearing of the appeal. He must come to affirmative findings on these two questions, *firstly*, whether the plaintiff has succeeded in proving that the defendant No. 1 sued the defendant No. 2 for more rent than was due from the holding, and *secondly*, if the defendant No. 1 did so, whether he did so with the intention of defrauding the plaintiff. If he finds these issues in the affirmative, his decision will stand; but if otherwise, it will be his duty to dismiss the appeal.

Costs will abide the result.

SHARFUDDIN, J.—I agree.

Case remanded.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 22 OF 1914.

October 29, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Tyabji.

KUPPUSAWMY AIYAR—PETITIONER—APPELLANT

versus

MUTHUSAMY AIYAR AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIII, rr. 2, 5 (a)—Application for permission to sue as pauper, how framed—Omission of one item in schedule—Dismissal of application—Revision.

The word "framed" in Order XXXIII, rule 5 *(a)*, is of special importance. It is appropriate to secure the inclusion in the petition of pauperism the various requisites specified in rule (2), and not the correctness of the particular statements of fact involved in them.

The provision for dismissal of defective petitions is not intended to be punitive.

The mere fact that the schedule to the petition does not include one item of the property is not enough ground for dismissal and the High Court can interfere in revision.

Appeal, under section 15 of the Letters Patent, against the judgment of the Hon'ble Mr. Justice Ayling in Civil Revision Petition No. 827 of 1911, preferred against that of the Court of the Subordinate Judge of Trichinopoly, in Original Petition No. 443 of 1911.

Mr. *R. Kuppusawmy Aiyar*, for the Appellant.

Messrs. *L. A. Govindaraghava Aiyar* and *L. S. Veeraraghava Aiyar*, for the Respondents.

JUDGMENT.—We deal first with the point on which the learned District Judge dismissed the civil revision petition, that the petition was dismissed rightly by the Subordinate Judge because it offended against Order XXXIII, rule 5 (*a*), of the Code of Civil Procedure. Schedule to the petition was, it is not disputed, defective, because it did not include one item of property and the petition was dismissed on account of this defect. In interpreting rules 5 and 7 we attach importance, *firstly*, to the use of the word "framed" in rule 5 (*a*), regarding it as appropriate to secure the inclusion in the petition of the various requisites specified in rule 2 and not the correctness of the particular statements of fact involved in them. And *next*, the construction adopted by the learned Judge would, in our opinion, work oppression in a manner which has not been justified by the suggestion for the respondents, that the purpose of the provision for dismissal of defective petitions is punitive. For this alleged punitive character is not supported by anything in the Order or by authority, and it cannot be contended that the total failure of the petition would be a proper or necessary penalty for the omission (it might be inadvertent) of an item, which would not necessarily have affected the decision. We, therefore, hold that the Subordinate Judge failed to deal with the question of the appellant's pauperism owing to a fundamental mistake of law and that the learned Judge's decision is, therefore, unsustainable.

Taking this view, we consider next the other ground on which the Subordinate Judge's decision is based and which the learned Judge of this Court, of course, did not find it necessary to consider, that the petition was liable to rejection with reference to rule 5 (*d*). The suit was one for accounts and for money due in connection with an arrangement between the parties for the joint enjoyment of certain property and the appropriation of its profits. The Subordinate Judge held that the appellant had no cause of action, because after reference to the documents embodying that arrangement, he found that they reserved no right to any money to the appellant. In this he was clearly wrong, *vide* Exhibit III(2). He, moreover, overlooked the claim to accounts provided for in Exhibit III (5) These provisions in Exhibit III are, as they stand, unambiguous, and no attempt has been made for the respondents to explain them otherwise. In the circumstances, we cannot hold that the Subordinate Judge ever applied his mind to them judicially. The failure to do so, when (as here) it has involved substantial prejudice to the appellant, justified our interference in revision apart from the other reason urged by the appellant, with which we need not deal, that the Subordinate Judge was not entitled to refer to Exhibits II and III at all.

The two grounds stated by the Subordinate Judge as justifying his order failing, it must be set aside, the Letters Patent Appeal being allowed. The case must be remanded for re-admission and disposal according to law with reference to the other prohibitions contained in Order XXXIII, rule 5. The Subordinate Judge will also be at liberty to consider the points raised by the respondents' affidavits as to the appellant's present position, which have been filed in this Court. Costs will be costs in the case.

Appeal allowed; Case remanded.

PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT.

October 23, 1914.

Present:—Lord Dunedin, Lord Shaw, Sir John Edge and Mr. Ameer Ali.

JHANDU—PLAINTIFF—APPELLANT

versus

TARIF AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Widow—Alienation by widow—Suit by remote reversioner for declaration that it was not binding on reversioners—Extent of reversionary heir's right to bring such suit—Reversionary heir's failure in one suit does not preclude him from suing again in respect of subsequent alienation.

The right to bring a suit for a declaration that a conveyance by a Hindu widow is only good for her life but is not good as an absolute conveyance of the property thereby dealt with against the reversioners of her deceased husband, is limited, and, as a general rule, belongs to the presumptive reversionary heir. But if the nearest reversionary heir has precluded himself in some way by his own act or conduct from suing—as by collusive

action with the widow—a reversioner in a more remote degree may be allowed to prosecute such a suit.

Rani Anund Kunwar v. *The Court of Wards*, 8 I. A. 14; 6 C. 764, 8 C. L. R. 381 (P. C.); 4 Shome L. R. 78; 4 Sar. P. C. J. 195; 5 Ind. Jur. 161, Rafique and Jackson's P. C. No 63, followed.

The presumptive reversionary heir of a deceased Hindu, who has failed in his action against the alleged widow of the deceased for possession of the property left by him, has not thereby precluded himself from again suing the widow for a declaration that a conveyance made by her after the former suit was only binding for the period of her life, and, consequently, a reversioner in a more remote degree has no right to bring such a declaratory suit

Appeal from a judgment and decree of the High Court at Allahabad, dated the 8th June 1911, reversing those of the Court of the Additional Subordinate Judge of Meerut, dated the 16th February 1910.

FACTS.—One Sukh Ram was the owner of the property in suit. He died childless early in 1903, and in the month of November of that year the name of *Musammat* Imirti, who alleged that she was his widow, was entered in the revenue papers in place of that of the deceased in respect of the property left by him.

On or about the 1st August 1904, four persons, namely, Nihal, Mir Singh, Kallu and Kehari brought a suit in the Court of the Subordinate Judge at Saharanpur against *Musammat* Imirti. They alleged that she was not lawfully married to Sukh Ram and set up a pedigree, and on the basis of that pedigree they contended that they were next reversioners of Sukh Ram and consequently his heirs. They, therefore, claimed that they were entitled to the property in suit. The Subordinate Judge decreed the suit, but on appeal the District Judge of Saharanpur held that the pedigree set up was not proved and made a decree on the 17th August 1905 dismissing the suit with costs. Thereafter by two deeds (registered), dated the 2nd March 1909, *Musammat* Imirti conveyed the property in suit to the respondents.

The suit giving rise to this appeal was instituted on the 8th October 1909 in the Court of the Subordinate Judge of Meerut by the appellant, as plaintiff, against *Musammat* Imirti (defendant) No. 1 and her vendees, the respondents (defendants Nos. 2 to 10) for the recovery of possession from the respondents of the said property which belonged to Sukh Ram and was detailed in the plaint. He alleged that *Musammat* Imirti was not the lawful wife of Sukh Ram, and that, therefore, the respondents acquired no title in the suit property which was conveyed to them by her. He set up a pedigree to show that he was the next reversioner of Sukh Ram and consequently claimed that he was the heir of Sukh Ram and as such entitled to succeed to the property left by him.

He asked for the following reliefs:—

"(*a*) The defendants may be dispossessed and the plaintiff may be put in possession of the property specified below, situate in *Mauza* Alipur Kalan, *Pargna* Baghra, District Muzaffarnagar.

"(*b*) If the Court finds that *Musammat* Imirti, defendant No. 1, was married to Sukh Ram in the *karao* form of marriage and that the said *karao* is legally valid, then a decree may be passed in favour of the plaintiff declaring that the transfer of the property, specified below, made under the sale-deed, dated the 2nd and registered on the 17th March 1909, is void and ineffectual as against the plaintiff who is the rightful person."

The respondents by their written statements pleaded that *Musammat* Imirti was the lawful wife of Sukh Ram and denied that the appellant was the next reversioner of Sukh Ram.

The Additional Subordinate Judge found that *Musammat* Imirti was not the lawful wife of Sukh Ram, that the pedigree set up was not correct, and that Nihal, Kehari and Mir Singh were "one degree higher than the plaintiff." He was, however, of opinion that because those persons, who were "the nearer reversioners, had already brought a similar suit and failed, and thus have precluded themselves from bringing another suit," the appellant was "entitled to maintain the suit" and succeed to the property in suit as the heir of Sukh Ram. His reasons were as follows:—

"It is contended that the plaintiff, being a remote reversioner, cannot maintain this suit in the life-time of the nearer reversioners, namely, Mir Singh, Nihal, Kehari and Kallu.

"I do not think that this contention is

sound when the nearer reversioners had already brought a similar suit and failed and thus have precluded themselves from bringing another suit. I allude to the Original Suit No. 160 of 1904, instituted in the Court of the Subordinate Judge at Saharanpur, which, though decreed by the Court of the first instance, was dismissed by the Appellate Court. Under these circumstances plaintiff is entitled to maintain this suit [*See Gurulingaswami* v. *Ramalakshmamma* (1), *Champa Kuar* v. *Mina Mal* (2), *Sheomurat Singh* v. *Ram Autar* (3)]."

He accordingly made a decree for possession in favour of the appellant.

On appeal the High Court set aside the decree of the Court below and dismissed the suit with costs for the following reasons:

"It appears that after the death of Sukh Ram a suit was brought for the possession of the property by four persons, Kehari, Kallu, Nihal and Mir Singh. That suit was dismissed as the plaintiffs failed to prove the pedigree propounded by them. Mir Singh, who is the uncle of the respondent, is one degree nearer to Sukh Ram than the respondent is. So also are Kehari, Kallu and Nihal. Further, in the presence of Mir Singh, the respondent can have no right to the property of Sukh Ram. The only descendant of Prem Sukh, who could possibly take a share in the property, is Mir Singh, who is admittedly alive. But at the death of Sukh Ram, Mir Singh brought his suit and failed. It is quite clear that the respondent cannot take the place of Mir Singh. The decision of the Court below cannot possibly be supported. We allow the appeal, set aside the decree of the Court below and dismiss the suit with costs in both Courts."

The appellant thereupon appealed to His Majesty in Council.

Mr. *Dube*, for the Appellant, contended that a remote reversioner could bring a suit in the life-time of the nearer reversioner, when the latter had already brought a similar suit and failed and thus precluded himself from bringing another suit. The remote reversioner derived his title from the last full owner and, therefore, a decree against other reversioners could not operate as *res judicata* against him. Although the suit could not really be maintained for possession, it could be properly sustained for a declaration that the sale by the widow was only of her life-interest.

[MR. AMEER ALI.—That is a matter of pure discretion. The suit was originally for possession.]

[SIR JOHN EDGE.—Your first claim is to get possession and the 2nd claim to have the transfer set aside.]

[LORD SHAW.—We assume you are in the second generation. You cannot sue unless you show that the preceding generation is in collusion with the widow.]

[MR. AMEER ALI.—You want to make out nearer than you are.]

LORD DUNEDIN.—Your claim is for possession.]

Reference was made to *Gurulingaswami* v. *Ramalakshmamma* (1) and Specific Relief Act, section 42.

Mr. *Parekh*, appeared for the Respondents but was not called upon.

JUDGMENT.

LORD DUNEDIN.—One Sukh Ram was an owner of property and died. He left behind him a lady named *Musammat* Imirti, who was supposed to be his legal widow, having been married in the *karao* form of marriage. If she was his legal widow, she was entitled to the life enjoyment of the property which Sukh Ram left.

In 1904 four persons called Kehri, Kallu, Nihal, and Mir Singh raised an action against this lady, alleging that they were the representatives of Sukh Ram. They further alleged that she was not a legal widow at all, and that accordingly they were entitled to possession of Sukh Ram's property. They were cast in that action, because they failed to produce a proper pedigree which showed that they were in the degree of relationship which would entitle them to succeed even if their allegations against the lady were true. The present plaintiff is a person of the name of Jhandu who, admittedly, in the pedigree is one degree further off from Sukh Ram than Mir Singh, who is still alive. He raised the present action on precisely the same averments as Mir Singh and the others raised their action in 1904, that is to say, he

(1) 18 M. 53; 4 M. L. J. 287.
(2) A. W. N. (1887) 1.
(3) A. W. N. (1888) 178.

averred that *Musammat* Imirti was not a real widow, but was, as he described it, a Bhatni widow with whom Sukh Ram had illicit connection and who lived with him as a kept woman. He, therefore, asked for possession of the property. It seems that after 1904, but before the institution of the present suit, *Musammat* Imirti made a conveyance of part of the lands to certain third parties. The Subordinate Judge gave judgment in the plaintiff's favour, disregarding the fact that in no supposition could the plaintiff ever be entitled to immediate possession for which he asked, owing to the fact that Mir Singh was still alive and was a degree nearer than the plaintiff.

The High Court set aside that judgment and dismissed the suit holding that it was impossible for the plaintiff to get what he asked, because in any event Mir Singh, under the present circumstances, would out him out.

An appeal has been taken to their Lordships' Board and the learned Counsel for the appellant really gave up at once any idea of insisting on the relief which the plaintiff asked for and which he got from the Subordinate Judge, because he admitted that the widow being alive he could not possibly get possession. That of course is tantamount to an admission that she is a real widow and not, as put in the plaint, a kept woman. But he has pressed their Lordships to turn the pleadings round and to give him a declaration that this conveyance by the widow to these third persons was bad as an absolute conveyance, and was only given as for the period of her own life.

Now it is the fact that a reversioner in India may have a declaration from a Court to the effect that a conveyance by the person presently in possession is only good for the life of that person and is not good as an absolute conveyance of the property against the reversioners. But it is perfectly well settled that that declaration will only be given to persons who stand in a certain relationship. It was laid down by this Board in the case which has been quoted of, *Rani Anund Kunwar* v. *The Court of Wards* (4), "that the right to bring such a suit is limited, and, as a general rule, belongs to the presumptive reversionary heir." It is quite true that the Board indicated that, in certain cases, the nearest reversionary heir might have precluded himself in some way by his own act or conduct from suing—as by collusive action with the widow—and in that case a reversioner in a more remote degree might be allowed to prosecute the suit. The argument that was addressed to the Board was that this was such a case, because Mir Singh having brought the suit in 1904 and failed through producing a false pedigree, he never could sue again.

There are two reasons either of which is sufficient to prevent that argument prevailing. The first has already been indicated, namely, that the relief asked for here was possession of the property, and that the declaration now sought for can scarcely be spelt out of the pleadings at all. But there is another objection which is equally fatal and it is this. In 1904, when Mir Singh brought his suit, this deed of conveyance by the widow was not in existence and, therefore, it is impossible to say that Mir Singh has, by his conduct in raising an action in 1904, precluded himself from challenging by way of declaration the deed which at that time was not in existence.

Their Lordships will, therefore, humbly advise His Majesty to dismiss the appeal with costs.

Appeal dismissed.

Solicitors for the Appellants: Messrs. *Barfeild & Barfeild.*

Solicitors for the Respondents: Mr. *E. Dalgado.*

(4) 8 I. A. 14, 6 C. 764; 8 C. L. R. 381 (P. C.); 4 Shome L. R. 78; 4 Sar. P. C. J. 195, 5 Ind. Jur. 161; Rafique and Jackson's P. C. No. 68.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 918 OF 1914.

January 23, 1915.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

RAGHUNANDAN PRASAD—DEFENDANT—APPELLANT

versus

CHEM RAM AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu law- Son's liability to pay money due under indemnity bond of his father—Debt not tainted with immorality—Liability of ancestral property in hands of son.

MAUNG THA *v.* N. C. CHATTERJEE.

It is the pious duty of a Hindu son to pay the money due under an indemnity clause provided in a sale-deed, not tainted with immorality, executed by his father. The ancestral property in the hands of the son is liable to discharge the debt.

Second appeal from the decision of the District Judge of Budaun, dated the 30th of March 1914

Mr. *B. E. O'Conor*, for the Appellant.

Mr. *Sital Prasad Ghose*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit in which the plaintiffs sought to recover money payable to them under an indemnity given to their predecessor-in-title by the father of the appellant. It appears that Murli Manohar and two others executed a sale-deed in favour of the father of the plaintiffs. That sale-deed contained a provision to the effect that in the event of any claim being asserted and proved, and in the event of any defect being found in the title of the vendors, the purchaser shall have a right to realise the consideration money from the vendors or their heirs and legal representatives together with damages. In subsequent litigation it was held that two of the vendors were not competent to sell the property beyond the term of their lives and in consequence of this the purchaser was deprived of a part of the property. The plaintiffs thereupon brought the present suit.

The only question is whether the defendant-appellant, the son of Murli Manohur, is liable to discharge the liability created by his father by the indemnity clause, and whether that debt can be realised from the ancestral property in the hands of the appellant. It cannot be said that the debt incurred by Murli Manohar was tainted with immorality. Consequently it is the pious duty of his son to pay that debt, and for the discharge of this pious duty the ancestral property in his hands is liable. The view of the Court below is, therefore, right. We dismiss the appeal with costs including in this Court fees on the higher scale.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 231 OF 1913

February 8, 1915.

Present:—Mr. Justice Twomey.

MAUNG THA—PLAINTIFF—APPELLANT

versus

N. C. CHATTERJEE—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 8—Assignment of debt, whether arrears of interest on debt are included in assignment

The arrears of interest of an assigned debt form part of the interest which the transferor is capable of passing by assignment and must be held to have been transferred in the absence of any words restricting the interest transferred.

Mr. *Wiltshire*, for the Appellant.

Mr. *D. N. Palit*, for the Respondent.

JUDGMENT.—The arrears of interest accrued before the assignment formed part of the interest which the transferor was capable of passing in the property, and in the absence of any words restricting the interest transferred it must be held, under section 8, Transfer of Property Act, that the assignment was intended to exhaust the transferor's interest in the property. Section 8 expressly provides that the arrears of interest due on a debt are not included in the legal incidents of the property in the debt. They are part of the debt itself, and pass as a matter of course to the transferee in the absence of words to show a contrary intention.

As regards the interest allowed by the Divisional Court from the date of suit to the date of the Divisional Court's decree, I see no good reason for excusing the appellant who set up a false defence to the suit.

On the 11th November, *i. e.*, just before the appeal came on for hearing in this Court, the appellant filed an additional ground of appeal, namely, that the original suit was time-barred by one day. But it is clear from the record that the plaint was really presented on the 26th September 1910, and not on 27th September 1910 as contended by the appellant.

The appeal is dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 1211 OF 1914.

October 5, 1914.

Present:—Mr. Justice Johnstone.

MUNICIPAL COMMITTEE, JHANG—PETITIONER

versus

MUHAMMAD HAYAT—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 94, 96—Document in possession of accused—Search warrant, Magistrate, power of, to issue—'Person', meaning of—Document or thing, whether limited to document or thing, which is the subject of offence—Inspection of documents found in search.

Under section 96 of the Criminal Procedure Code, a Magistrate is competent to issue a search warrant for documents in possession of the accused, and such documents can, after production, be inspected by the prosecution or by any experts appointed by the Court in this behalf.

The words 'a person' in sections 94, 96, Criminal Procedure Code, include the person accused in the case, and the words 'document or thing' in the sections are general and cover *any* document the production or inspection of which is 'necessary or desirable' or will serve the ends of justice. There is nothing in the sections to limit their provisions to the finding of such documents or things only in respect of which the alleged offence may have been committed.

In the matter of the petition of Ahmed Mahomed, 15 C. 109; *Bajrangi Gope v. Emperor*, 9 Ind. Cas. 64; 38 C. 304; 15 C. W. N. 343, 13 C. L. J. 639; 12 Cr. L. J. 8; *Bisser Misser v. Emperor*, 20 Ind. Cas 229, 41 C. 261; 14 Cr. L. J. 405; 17 C. W. N. 1209; *Surey Kondareddi v. Emperor*, 15 Ind. Cas. 493; 37 M. 112; 13 Cr. L. J. 493 and *In re Lakhmidas*, 5 Bom. L. R. 980, referred to.

Ishwar Chandra Ghoshal v. Emperor, 12 C. W. N. 1016; 8 C. L. J 320, 8 Cr. L. J. 224 and *Raj Chandra Chakravarti v. Hara Kishore Chakravarti*, 9 Ind. Cas. 564, 12 Cr. L. J. 98, dissented from.

Case reported by the District Magistrate, Jhang, with his No. 1012, dated the 11th of June 1914, under section 438 of the Criminal Procedure Code.

FACTS.—The accused is prosecuted by the Municipal Committee for evasion of octroi. On February 21st, 1914, a commission was appointed by the Magistrate for the examination of the account books of the accused. On March 9th the accused filed an objection that such an order appointing a commission was illegal. The Magistrate agreed and cancelled the order appointing the commission by order, dated April 8th. Against this order that the Court was not authorised to appoint Commissioners to examine the account books of the accused, the Municipal Committee filed an application for revision in the Court of the District Magistrate. The District Magistrate (Mr. Lumsden) by his order, dated April 23rd, 1914, rejected the application on the ground that the Criminal Procedure Code contained no provision for the appointment of Commissioners, but held that the applicant's proper course was to apply for a search warrant under section 96, Criminal Procedure Code, and thereafter for inspection. Such an application was filed in the Magistrate's Court, but the Magistrate rejected the application on the ground that it had no authority to issue such a warrant under section 96.

The proceedings are forwarded for revision on the following grounds:—

The point raised is a legal point of some interest. There have been several rulings of the Calcutta High Court and one recent ruling of the Madras High Court, but apparently there has never been a ruling of the Punjab Chief Court on this question.

After the date of the order of the Magistrate rejecting the application for the issue of a warrant under section 96, Criminal Procedure Code, there have been two published rulings: *Bisser Misser* v. *Emperor* (1) and *Surey Kondareddi* v. *Emperor* (2). In the Madras ruling it is laid down that the Magistrate always has the power to issue a search warrant to obtain the production of a document or other thing in the possession of the accused. "The issue of a summons is a milder means of attaining the same, and I am of opinion that the ruling in *In the matter of the petition of Ahmed Mahomed* (3) should be followed." Reference was also made to *Ishwar Chandra Ghoshal* v. *Emperor* (4), in which a contrary view was taken, but this was dissented from.

Previous to the recent Calcutta case, *Bisser Misser* v. *Emperor* (1), there was a ruling of the Calcutta High Court, quoted in *Raj Chandra Chakravarti* v. *Hara Kishore Chakravarti* (5), in which it was held that a search warrant under section 96 cannot be addressed to an accused person on his trial and he cannot be prosecuted under section 175 because of his failure to produce

(1) 20 Ind. Cas. 229; 41 C. 261; 14 Cr. L. J. 405; 17 C. W. N. 1209.
(2) 15 Ind. Cas. 493; 37 M. 112, 13 Cr. L. J. 493.
(3) 15 C. 109.
(4) 12 C. W. N. 1016; 8 C. L. J. 320, 8 Cr. L. J. 224.
(5) 9 Ind. Cas. 564; 12 Cr L. J. 98.

the document mentioned in the warrant. I mention this case specially because it is not referred to in *Bisser Misser* v. *Emperor* (1).

All the other previous rulings of the Calcutta High Court are referred to and discussed in *Bissar Misser* v. *Emperor* (1). The Counsel for the accused has argued that the previous rulings have only been explained, but they have not been overruled and, therefore, they are still in force if applicable to any particular case. But the finding of the more recent ruling is equally applicable to this particular case. With reference to *Bajrangi Gope* v. *Emperor* (6), it was held in *Bisser Misser* v. *Emperor* (1) that the wide proposition laid down in that case was not supported by the case to which reference was made, *Ishwar Chandra Ghoshal* v. *Emperor* (4), and, *secondly*, that the meaning of the learned Judges was, not that search was prohibited altogether, but that it must be a search for a particular document or thing. The old ruling in *In the matter of the petition of Ahmed Mahomed* (3) was also referred to, in which it had been held that a search warrant could be issued for documents in possession of the accused and that such documents could, after production, be inspected by the prosecution. In the light of these rulings, there appears to be no reason why a summons should not be issued under section 94 or a search warrant under section 96 for the production of the account books of the accused.

I may note here one argument of the Counsel of the accused, namely, that it has been held that a commission is not allowed by the Criminal Procedure Code, but if the account books are produced in Court, a man versed in Hindi accounts will have to be appointed to examine the books, and this will be the same as a commission. In my opinion this argument cannot hold good, because once a document is in Court, if it is in a language which the presiding Magistrate does not understand, he must have it translated. This is very different to appointing Commissioners for the examination of the books outside the Court. After consideration of the rulings, I have formed the opinion that in this case summons can legally be issued under section 94 to the accused for the production of his account books, or under section 96 a search warrant can be issued, and that, after the production of the account books in Court, they may be examined by the prosecution, and I, therefore, forward the proceedings for revision of the order of the Magistrate, dated April 27th 1914, rejecting the application of the complainant for the issue of a search warrant for the account books of the accused and the subsequent inspection of those books by the prosecution.

Mehta *Bahadur Chand*, for the Petitioner.

Mr. *Fasl-i-Husain*, for the Opposite Party.

ORDER.—I have taken time to consider the question raised in this case and have consulted the following authorities :— *In the matter of the petition of Ahmed Mahomed* (3); *Bajrangi Gope* v. *Emperor* (6); *Bisser Misser* v. *Emperor* (1); *Surey Kondareddi* v. *Emperor* (2); *Ishwar Chandra Ghoshal* v. *Emperor* (4); *Raj Chandra Chakravarti* v. *Hara Kishore Chakravarti* (5); *In re Lakhmidas* (7); with the result that I am in entire agreement with the learned District Magistrate. The greater weight of authority is on his side, and *Bisser Misser* v. *Emperor* (1) explains and distinguishes *Bajrangi Gope* v. *Emperor* (6), which is quoted to one as against the District Magistrate. With the exception of *Ishwar Chandra Ghoshal* v. *Emperor* (4) and *Raj Chandra Chakravarti* v. *Hara Kishore Chakravarti* (5), there is thus nothing against the District Magistrate's view. There are apparently no Punjab cases in point and I will, therefore, discuss the point on its merits.

Section 94, Criminal Procedure Code, authorizes a Criminal Court, which considers that the production of any document or other thing is "necessary or desirable" for the purposes of any investigation, inquiry, trial or other proceeding under the Code, to issue, to the person in whose possession or power the document or thing is believed to be, a summons to produce it. Section 96 of the Code goes a step

(6) 9 Ind. Cas. 64; 38 C. 304; 15 C. W. N. 343; 13 C. L. J. 689; 12 Cr. L. J. 8.

(7) 5 Bom. L. R. 980.

further. If the Court thinks the person in possession or having power over the document or thing will not voluntarily produce it upon a summons or notice, or if it does not know in whose possession or power the document or thing is, or if it thinks that the purposes of justice will be served by a general search or inspection, it may issue a search warrant.

The facts are stated in the reference and need not be repeated here. The learned District Magistrate's request is that a search warrant be issued under section 96, Criminal Procedure Code, to be followed by inspection by the prosecution of the books found. Against this, accused's Counsel urges that sections 94 and 96, Criminal Procedure Code, cannot be used directly against an accused person, who must not be asked or compelled to produce matter which would incriminate himself. But I can find no such limitations in those sections. No doubt in *Bajrangi Gope* v. *Emperor* (6), it was ruled that an accused person cannot be prosecuted under section 175, Indian Penal Code, for disobeying a summons under section 94, Criminal Procedure Code, but, as pointed out in *Bisser Misser* v. *Emperor* (1), this is not the same as saying that a search warrant to find things likely to throw light on the case against an accused person cannot be issued for the search of his premises. There is nothing in the wording of section 96 to warrant such an idea, and it is immaterial what may be the law of England on the subject. The learned Counsel affirms that the law of England is against the District Magistrate: it may be so, but what we have to do is to administer the law of British India.

Raj Chandra Chakravarti v. *Hara Kishore Chakravarti* (5) seems to me an incorrect exposition of that law. It quotes no authority, and while it is oracular, it is brief and contains no explanation how and where the supposed limitation of the powers of the Courts comes into the section. The head note is defective, inasmuch as it confounds the question of a warrant addressed to the accused with that of a warrant *against* the accused; and altogether I am not disposed to look upon this ruling as a valuable authority. *Ishwar Chandra Ghoshal* v. *Emperor* (4), on the other hand, seems to me, with all deference, to be based on a misunderstanding of sections 342 and 343 of the Code. The argument used therein, which is also pressed upon me here, is that these sections show that the Legislature was anxious that an accused person should under no circumstances be compelled or unfairly induced to incriminate himself, and that calling upon an accused person to produce, or searching his house in order to procure documents, etc., which the prosecution say would prove his guilt, would be an infringement of the spirit of the law. This argument does not appear to me to possess any force whatever.

No doubt section 342 and section 343, Criminal Procedure Code, are so framed as to prohibit all efforts on the part of the Court, by pressure or by cleverly designed questions, to entrap the prisoner into making admissions against himself. An accused person is in a position of great danger and difficulty. He is usually an uneducated man of no very keen intelligence, and there is always a risk that, if he is searchingly and unfairly cross-examined, he may, even if innocent, in his efforts to find a way of escape from the charge against him, make statements, *which are not in accordance with the facts* but which in his clouded and perturbed mind may appear as being hopeful methods of evasion. This policy of the Legislature we can readily understand, we do not want in this country the procedure followed by the French *juge d'instruction*. But the issue of a search warrant, such as that asked for in the present case, is not in line with such procedure as that. The Court is bound by all the means in its power to find out the *truth*. The truth here will very likely be ascertained with certainty by an examination of accused's books. He has no reasonable right to complain of such an examination. If he is innocent, his books will clear him. If he is guilty, why should the Court be debarred from seeing the best evidence of his guilt? Under section 342 the Court can ask him questions. He is not bound to answer, and if he answers falsely, he is not punishable therefor, though the Court may draw such inferences as it thinks just from his refusal or his answers. Here the Court is allowed to go as far as it is *possible* to go in the search for the truth. Similarly, in taking action under section 96, Criminal Procedure Code, the Court is authorised to go as far as is physically possible in that

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search. The accused can perhaps defeat the Court by concealing or destroying the document, etc., or by having it concealed or destroyed, taking, of course, the consequences of such action, just as the accused in the dock can, when questioned under section 342, thwart the Court in its search for the truth by answering falsely or refusing to answer. But the mere fact that the accused can so defeat or thwart the Court is no reason for holding that the Court is debarred from *going as far as the sections specifically allow.*

In short, to my mind the provisions of section 96, Criminal Procedure Code, are clear and simple, and I can see no reason for holding that the words "a person" in that section do not include the person accused in the case. Nor can I assent to the further contention that when the premises to be searched are those of the accused person, the warrant can only be for the finding of the document, etc., in respect of which the alleged offence has been committed, *e. g.*, the forged cheque or deed or the original of the libel. The words "document or thing" in the section are general and seem to me to cover *any* document, the production and inspection of which are "necessary or desirable" or will serve the ends of justice.

For these reasons I allow this revision, set aside the order of the first Class Magistrate and direct that a search warrant be issued as asked for by the District Magistrate and that thereafter the books, etc., found be open to inspection by the prosecution or by any experts appointed by the Court in this behalf. The first Class Magistrate's difficulty about appointing Commissioners to examine the books is an imaginary difficulty. The Court, *of course*, has the power to invoke the aid of persons capable of helping it to read and understand the contents of the books.

Petition allowed.

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 689 OF 1914.

February 23, 1915.

Present:—Mr. Justice Spencer and Mr. Justice Seshagiri Aiyar.

In re SINGRI BHIMA AND OTHERS—PRISONERS—APPELLANTS.

Registration Act (XVI of 1908), s. 82—Thumb impression as executant while presenting document for registration—Similarity of thumb impression, how far sufficient for conviction.

The identity of a person as the executant or presenter of a document for registration though not conclusively proved by similarity of the thumb impression taken at the time of presentation, is sufficient for conviction when supported also by other evidence in the case.

Emperor v. *Abdul Hamid*, 32 C. 759; 9 C. W. N. 520; 2 Cr. L. J. 259, *Panchu Mandal* v. *Emperor*, 2 Cr. L. J. 311; 1 C. L. J. 385, followed.

Appeal against the order of the Court of Session of the Bellary Division in Case No. 70 of the Calendar for 1914.

Mr. *K. Pandalai*, for the Appellants.

Mr. *R. M. Palat*, for the Public Prosecutor, for the Government.

JUDGMENT.

SPENCER, J.—It has been argued that the evidence of prosecution witness No. 3, that the finger print on the forged document is by comparison that of first accused, by itself is not sufficient to prove that none else could have made a similar impression and to convict him of the offence.

In think in this case, it is sufficient. There can be no doubt that prosecution witness No. 3 was an experienced expert and although he mentioned only six points of similarity in the finger points which he compared, it must not be concluded that he could not have mentioned others if he had been asked to do so. Moreover prosecution witness No. 4 says, he saw first accused at the time of the execution and although he was not positive as to his identity, his evidence may be taken as reducing the possibility of error. The chances of another man having lines like the accused living in that locality (for villagers are not likely to have gone far afield to find a substitute for the supposed executant) are so infinitesimal that in my opinion the Court was justified in acting on the supposition that the first accused was identical with the person who put his mark as executant of Exhibit A. *Secondly*, it is urged that the offence, if any, committed by the accused was not forgery, as the mark which he put did not denote the execution of the document but its presentation for registration. We alter the conviction accordingly to one under section 82 of the Registration Act, and retain the sentence already imposed.

EMPEROR v. KHUDA BAKHSH.

Against the third accused there is the evidence of prosecution witnesses Nos. 4 and 6, which we think was rightly believed. Prosecution witness No. 4 also speaks to the presence of accused No. 2 at the execution and to his having put forward the first accused as Sugappa. The suggestion that this witness having as his *purohit* a relation of prosecution witness No. 7 is likely to have been influenced to get up a false case against a *protege* of third accused, depends on an allegation as to past enmity which we consider unsubstantial and remote. The document was in this accused's favour and it is unlikely that it could have been got up by others merely in order to get these accused into trouble.

We confirm the convictions with the modification above referred to in the case of first accused and dismiss the appeals.

SESHAGIRI AIYAR, J.—I do not wish to differ from my learned colleague who has had considerable experience regarding the value to be attached to the proof of thumb impressions. At the same time I wish to state that I share the doubts of the learned Judges who decided *Emperor* v. *Abdul Hamid* (1) and *Panchu Mondal* v. *Emperor* (2), that it is not safe to convict an accused on the bare proof of identity of thumb impressions. Sir Edward Henry points out that two out of four persons will have one distinguishing mark of the impression in common. In the present case six such marks are spoken to by the expert whose credentials seem to be strong for giving evidence on the subject. Applying Sir Edward Henry's test, there will be two persons from out of 46 men who will have all the six marks in common, that is to say, out of 4,096 persons, two persons would possess the marks spoken to by the expert. Having regard to the fact that suspicion rested on the first accused and that he was complained against, I am not prepared to say that the evidence is not sufficient to convict the accused. No motive for implicating him falsely has been alleged against the complainant. I agree with my learned brother that the case against second and third accused has been fully made out.

Appeal dismissed; Convictions affirmed.

(1) 32 C. 759; 9 C. W. N. 520; 2 Cr. L. J. 259.
(2) 2 Cr. L. J. 311; 1 C. L. J. 385.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION No. 1424 OF 1914.

October 21, 1914.

Present:—Mr. Justice Shadi Lal.

EMPEROR—APPELLANT

versus

KHUDA BAKHSH—RESPONDENT.

Workman's Breach of Contract Act (XIII of 1859)—Contract to perform agricultural service, whether within the Act—Provision of penalty for its breach.

The Workman's Breach of Contract Act (XIII of 1859) was not intended to apply to a contract to perform agricultural service.

Empress v. *Bhagwan Bhirdi*, 7 B 379, followed.

Where a contract prescribes a penalty for its breach, the remedy prescribed by the Act cannot be availed of.

Emperor v. *Muhammad Din*, 22 Ind. Cas. 742; 96 P. L. R. 1914; 23 P. R. 1913 Cr.; 15 Cr. L. J. 166, followed.

Case reported by the Sessions Judge, Multan Division, with his No. 199-J, dated the 16th July 1914, under section 438 of the Criminal Procedure Code.

FACTS.—It is alleged that the complainant made an advance of Rs. 110 to Khuda Bakhsh, accused, to perform agricultural work on a certain well and got a bond written from him. The accused neither worked for him for a single day nor re-paid him the advance money.

The accused, on conviction by *Mirza* Nawazish Ali, exercising the powers of a Magistrate of the first Class in the Muzaffargarh District, was sentenced, by order, dated 9th June 1914, under section 12 of Act XIII of 1859, to three months' rigorous imprisonment.

The proceedings are forwarded for revision on the following grounds:—

1. The Magistrate recorded the statement of Murad, complainant, when the complaint was instituted and thereafter summoned Khuda Bakhsh. On the appearance of the latter the Magistrate recorded his statement and, at once passed the order which is under revision, sentencing Khuda Bakhsh to three months' rigorous imprisonment. The Magistrate did not ask the complainant what his wishes were and did not order Khuda Bakhsh to re-pay the advance made or to perform the work according to the terms of the contract, as required by section 2 of Act XIII of 1859.

The order of the Magistrate is, therefore, not according to law.

2. The contract provides a penalty of Rs. 50 for non-performance of the contract, the employer, therefore, could not adopt an alternative remedy by proceeding under Act XIII of 1859 [See *Emperor* v. *Muhammad Din* (1)].

3. The contract is to perform agricultural duties, such a contract does not come under Act XIII of 1859 [See *Emperor v. Bhagwan Bhivsan* (2)].

For the above reasons I recommend that the order of the Magistrate be set aside and that Khuda Bakhsh be discharged from his bail bond, on which he has been released pending the orders of the Chief Court.

ORDER.—The accused entered into a contract with the complainant to perform agricultural work for the latter, received an advance of Rs. 110 and stipulated to pay a penalty of Rs. 50 in the event of the non-performance of the service. On these facts, it is quite clear that the provisions of Act XIII of 1859 do not apply to the case. In the *first* place, the preamble and other provisions of the Act show that it was not intended to apply to a contract to perform agricultural service [vide *Empress* v. *Bhagwan Bhivsan* (2)].

In the *second* place, the judgment of this Court in *Emperor* v. *Muhammad Din* (1) is an authority for the view that where a contract prescribes a penalty for its breach, the remedy prescribed by Act XIII of 1859 cannot be availed of.

For these reasons I accept the application for revision and set aside the order of the Magistrate.

Revision accepted.

(1) 22 Ind. Cas. 742; 96 P. L. R. 1914; 23 P. R. 1913 Cr.; 15 Cr. L. J. 166.
(2) 7 B. 379.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATIONS NOS. 65 AND 69 OF 1914.

June 30, 1914.

Present:—Mr. Crouch, A. J. C., and Mr. Boyd, A. J. C.

LOKUMAL *valad* VALABDAS AND ANOTHER—APPLICANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 420, 482, 486—Trade-mark and property mark, distinction between—"National Bank of India" stamped on gold bars, whether trade-mark or property mark—Counterfeit trade-mark—Interference in revision—Criminal Procedure Code (Act V of 1898), s. 439.

Where the object of stamping the words "National Bank of India" on gold bars is to inform the public that the bars are the merchandise of the Bank, imported, sold and guaranteed by it, the mark is a trade mark and not a property mark.

For the purposes of the Penal Code it is not essential that an imitation should be exact in order to be "counterfeit."

Where, therefore, the accused used marks on his bar likely to deceive an ignorant and unwary purchaser, but which would be obvious on ordinary observation by comparison with a genuine bar:

Held, that this was a case of using a false trade-mark and not a counterfeit one and the accused was not guilty of an offence under section 486, Indian Penal Code.

It is not usual for a High Court in revision, to interfere with any finding of fact, so far as it is a finding of fact pure and simple based on evidence on the record; but where the lower Courts have erred in their inferences from facts as found and have found applicants guilty of offences which are not constituted by such facts, the High Court will interfere in revision.

Application against the judgment Mr. Hayward, Judicial Commissioner.

Mr. *T. G. Hlphinston*, for Applicant No. 1.

Mr. *Wadhumal Oodharam*, for Applicant No. 2.

Mr. *E. Raymond*, Public Prosecutor, for the Crown.

JUDGMENT.—Applicants Lokumal and Topandas are, respectively, the owner and manager of a Shroff business carried on in Karachi.

The National Bank of India have, for many years, imported and sold gold in bars bearing the following marks:

NATIONAL BANK OF INDIA
(also in Gujerathi).
Touch 100 (in Gujerathi).
SAMUEL MONTAGUE & Co., BULLION MERCHANTS, LONDON.

It is alleged that Topandas, acting under

instructions from Lokumal, sold to one Chutterbhuj the piece of gold, Exhibit 4, bearing the following marks:

AL BANK OF I
L Bank O I (in Gujerathi characters)
Nbr 100 (in Gujerathi characters)
MAL WALABDASS SHROI.

Exhibit 4 is one-fourth broader than Exhibit 5, and the letters of "Bank of" in Exhibit 4 are substantially bigger and deeper cut than in Exhibit 5.

It has been found by the Sessions Court that:—

(I) Lokumal was frequently at the place of business and was fully responsible for all the acts of his Manager.

(II) Chutterbhuj, acting under special instructions from the National Bank, went to the applicants' shop and asked for "National Bank Gold," and that the bar Exhibit 4 was sold and handed to him by Topandas.

(III) "National Bank of India" is the "property mark" of the Bank.

(IV) The marks on Exhibit 4 are an imitation of these, Exhibit 5, close enough to deceive casual purchasers.

The Court of Session has not found that the gold of Exhibit 4 is inferior to that of Exhibit 5, and the evidence was given to show that it was National Bank gold melted down and re-moulded. Its touch is approximately 100. It has not been proved that the whole bar of which Exhibit 4 forms part originally bore the word National.

The original Court found applicants guilty of using a false "property mark," of selling goods with a counterfeit "property mark" and of cheating, and convicted them under sections 482, 486, 420 and 109, Indian Penal Code, sentencing Lokumal to 18 months' rigorous imprisonment and a fine of Rs. 1,000, and Topandas to nine months' rigorous imprisonment and a fine of Rs. 300.

It is not usual for a High Court, in revision, to interfere with any finding of fact, so far as it is a finding of fact pure and simple based on evidence on the record; but we are of opinion that both lower Courts have, in certain of the charges, erred in their inferences from facts as found and have found applicants guilty of offences which are not constituted by such facts. A property mark is a mark used for denoting that moveable property belongs to a particular person, whereas a trade mark is a mark used for denoting that goods are the manufacture or merchandise of a particular person. The object of stamping gold bars with the words "National Bank of India" is not to inform the public that the gold belongs to the Bank, but to give the assurance that the gold, no matter to whom it for the time being may belong, was originally imported and sold and guaranteed by the Bank; that is, the mark is a "trade mark," not a "property mark."

Nor, in our opinion, is the mark on Exhibit 4 a counterfeit trade mark. A "counterfeit" is, strictly, an exact imitation, but, for the purposes of the Penal Code, it is not essential that the imitations should be exact. But a thing is not, ordinarily, said to be counterfeit unless it bears, on the face of it, the semblance of validity, and is such as to deceive the average person on ordinary observation. Having regard to the patent differences between Exhibit 4 and Exhibit 5, differences which would be obvious on ordinary observation even to an unintelligent person who could read either Gujerathi or English, and unless he could read one of the languages the inscription would convey nothing at all, the conviction under section 486 cannot, in our opinion, stand. It is a case of using a false trade mark, not a counterfeit one. Exhibit 4, on its very face, declares itself to be the merchandise of Lokumal Valabdas, though the imitation may be, as found by the lower Court, sufficiently close to deceive an ignorant and unwary purchaser who had no immediate opportunity of comparison with a genuine bar. Mr. Elphinston has contended that it has not been proved that the words "National Bank of India" constitute a trade mark, but this is a case in which "*res ipsa loquitur*"; there can be no doubt that the words are impressed on the gold bars to inform the world generally that the bars are the merchandise of the Bank. The conviction for cheating is really based not on the false trade mark, for it is not alleged that it was examined or that it actually deceived, but on the fact that when Topandas was asked for National Bank of India gold he gave Exhibit 4. The learned Judicial Commissioner was of opinion that

a person who asks for National Bank of India gold means, not gold of a certain touch, but gold that bears the stamp and guarantee of the Bank, and that the offence of attempting to cheat consisted in passing off Exhibit 4 as a portion of a genuine and original bar of the National Bank. Mr. Carnegie says that their gold bars are known in the bazar as National Bank Gold. But no offence is committed under section 420 unless there is actual cheating and a dishonest inducing to deliver property by means of such cheating. But, as pointed out by the learned Judicial Commissioner, there was no cheating in this case, for Chaturbhuj expected to receive a bar marked as Exhibit 4; there was, at most, an attempt to cheat, an offence punishable under sections 417 and 511 only, and Lokumal could be punished only under section 116.

We consider, therefore, that the only charge on which the conviction could stand is that under section 482, which covers the case of using a false trade mark as well as a false property mark. We reverse the convictions under sections 486 and 420.

Having regard to the findings of fact of both Courts we are not prepared to interfere with the conviction of either applicant under section 482.

There remains the question of sentence. The offence is punishable with imprisonment which may extend to one year, or with fine, or with both. It is a rare thing to punish a trade mark offence with imprisonment, but the lower Courts took a very serious view of the case and were of opinion that applicants had been using the false trade mark for the fraudulent purpose of selling, at a profit, inferior gold. There is evidence on the record to justify this view. But the original sentences cannot stand in view of the reversal of the conviction under section 420. We consider that the ends of justice will be met if we reduce the term of imprisonment in each case to that already served, namely 2½ months, and we reduce it accordingly. As regards the fine the sentences are confirmed.

Revision allowed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 408 OF 1913.

January 21, 1915.

Present:—Sir John Edward Power Wallis, KT., Chief Justice, and Mr. Justice Hannay.

In re MANNAR CHETTI AND OTHERS—(PLAINTIFFS IN ORIGINAL SUIT No. 3 OF 1911 ON THE FILE OF THE COURT OF THE SUB-JUDGE OF KUMBAKONAM)—PETITIONERS.

Criminal Procedure Code (Act V of 1898), ss. 439, 476—Order of prosecution—Interference in revision.

The High Court has no power under section 439 of the Criminal Procedure Code to interfere in revision with an order made by a Civil Court under section 476, Criminal Procedure Code.

Petition under section 115 of Act V of 1908, praying the High Court to revise the proceedings of the Court of the Subordinate Judge of Kumbakonam, dated the 18th April 1913, in Original Suit No. 3 of 1911, on the file of the said Court.

Mr. *T. S. Ramaswami Aiyar*, for the Petitioners.

Messrs. *S. T. Srinivasa Gopalachariar, K. Srinivasa Aiyangar, C. V. Ananthakrishna Aiyar, K. Ramachandra Aiyar* and *S. Muthiah Mudliar*, as *Amicus Curiæ*.

ORDER.—Following the decision of Bashyam Aiyangar, J., in *In re Chennanagoud* (1) and of the Full Benches of the Allahabad and Calcutta High Courts, *In the matter of the petition of Bhup Kunwar* (2) and in *Har Prasad Das* v. *Emperor* (3), we think it may now be taken as settled that we have no power under section 439 of the Criminal Procedure Code to interfere with an order made by a Civil Court under section 476 of the Criminal Procedure Code. There is no case for interference under section 115 of the Civil Procedure Code. The petition is dismissed.

Petition dismissed.

(1) 26 M. 180; 2 Weir 197.
(2) 26 A. 245; A. W. N. (1904) 15; 1 Cr. L. J. 73.
(3) 19 Ind. Cas. 197; 17 C. L. J. 245; 14 Cr. L. J. 197, 17 C. W. N. 647, 40 C. 477.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEALS NOS. 26 AND 30 OF 1914.

August 18, 1914.

Present:—Mr. Fawcett, J. C. and Mr. Crouch, A. J. C.

PUNHU *valad* HOTU AND OTHERS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Accomplice—Evidence before Committing Magistrate retracted in Sessions Court, admissibility and credibility of—Evidence of identification, value of.

The statement of an accomplice before the Committing Magistrate, though retracted in the Sessions Court, can be treated as substantial evidence, on the same footing as any other evidence on the record

Emperor v. *Dwarka Kurmi*, 28 A. 683; 3 A. L J. 852; 4 Cr. L. J. 61; A. W. N. (1906) 187, referred to.

But this evidence must be treated with caution in so far as it implicates any particular accused or assigns him a particular part in the actual crime

The value of the statement of any witness that he recognises a particular man depends ultimately on the opportunities he had of observing the man and on his personal veracity.

Appeal against the decision of the Additional Sessions Judge, Hyderabad.

Mr. *Lalchand Hassomal*, for Appellants Nos. 1 to 5.

Mr. *E. Raymond*, Public Prosecutor for the Crown.

JUDGMENT.

FAWCETT, J. C.—The evidence against the appellants consists of (*a*) the direct evidence of the accomplice, Jaffer, given in the Committing Magistrate's Court, which implicates all of them, (*b*) evidence of witnesses who identify them as having taken part in the dacoity, and (*c*) against some of them evidence of their being in possession of part of the stolen property or arms used in the dacoity.

In judging of the admissibility and credibility of Jaffer's evidence, I think the proper rule to be followed is that the statement before the Magistrate, though retracted in the Sessions Court, can be treated as substantial evidence, on the same footing as any other evidence on the record, *cf. Emperor* v. *Dwarka Kurmi* (1). Its reliability is no doubt injuriously affected by the fact of its being retracted in the Sessions Court and the fact of Jaffer being a self-confessed accomplice, who had received a pardon, but it does not follow that it is not entitled to any weight or credibility at all.

(1) 28 A. 683; 3 A. L. J. 852; 4 Cr.L.J. 61; A. W. N. (1906) 187.

A perusal of his deposition before the Magistrate leaves no doubt on my mind as to his having taken part in the dacoity and as to the substantial truth of the incidents mentioned in it, most of which are corroborated by other evidence. I do not believe that he was merely tutored to give the account which he does, and it is, in my opinion, far more probable that he retracted in the Sessions Court through a desire to favour the accused than that he gave his previous deposition falsely through pressure, from which he became free in the Sessions Court. This is to some extent corroborated by his statement: "I was told that I would be set at liberty after I have given my evidence in the Sessions Court and that that is the law: now I am no more in fear of the Police and fearing God I tell the truth." He probably thought a retraction in the Sessions Court would not affect his personal liberty.

Points on which his evidence is corroborated are as to Punhu (accused No 2) carrying the ornaments, Naban (accused No. 1) carrying a gun and Gulu (accused No. 4) a pistol; as to their taking away Hotchand's gun; and as to their staying in a pit on a sand-hill. There are also other minor details on which corroboration is forthcoming. His deposition reads as a natural and not a tutored account of the affairs. None of the arguments advanced by Mr. Lalchand are, in my opinion, sufficient to justify me in holding that he did not really take part in the dacoity.

On the other hand, his evidence must of course be treated with caution, in so far as it implicates any particular accused or assigns him a particular part in the actual dacoity. Jaffer might easily introduce a wrong name to shield a friend, and would probably have a tendency to minimize his own part of the affair. To this extent, I do not think his evidence should be accepted without some reliable corroboration.

As regards the evidence of identification, I concur generally with the remarks of my learned colleague. I think there is no doubt that in this case the Police officers, who were conducting the investigation, did honestly try to have their identification tests held under conditions which would,

as far as possible, ensure their reliability, and that there is no real basis for the allegations made against them by Mr. Lalchand. But it is of course possible that the identifying witnesses had opportunities of knowing beforehand that the persons they identified were actually suspected of having taken part in the dacoity; and this must to a certain extent detract from the reliability of such a test. In this case I think the weight to be given to a particular witness's identification of any of the accused depends more on the opportunities he had of being in a position to identify him and his general credibility than on any evidence that he actually picked out the accused from a number of other men, though of course this must also be taken into consideration and may entitle his identification to more credence on that account.

For the above reasons, we dismiss the appeals of all the appellants, except accused No. 5, Ramzan, who is acquitted and ordered forthwith to be set at liberty.

CROUCH, A. J. C.—I concur in the order of the learned Judicial Commissioner.

There is, *prima facie*, abundant evidence against all appellants, but Mr. Lalchand has, with much skill and industry, analysed the evidence, and has endeavoured to convince us that each several item of evidence affords but frail ground on which to base a conviction.

Jaffer, the informer, is admittedly a bad character and a confessed liar: his original statement must of course be accepted with much caution.

The identification of the appellants by the *basia* witnesses may have been, as Mr. Lalchand urges, a mere sham; but no identification ever held was entirely free from suspicion of Police collusion, and the value of the statement of any witness that he recognises a particular man depends ultimately on the opportunities he had of observing the man and on his personal veracity. When a man of respectable position states positively, on oath, that one of the accused was seen by him, at close quarters, taking part in the dacoity, that statement has evidentiary value. If there be good grounds for suspecting that, at the first formal identification, the witness was assisted in picking out this particular accused, then the formal identification itself must be assessed low; but the evidentiary value of the sworn statement is by no means altogether destroyed by discounting the value of the incident which the prosecution rely on as corroborative. Even if we make full allowance for police overzeal, for inaccuracy of perception, for exaggeration, and even for deliberate lying on the part of the witnesses, we still have a sufficient body of evidence to justify the conviction of, at any rate, six of the seven appellants. All that the Court can do in such a case as the present is to conscientiously peruse the evidence, and after carefully considering the arguments both for the prosecution and for the defence, which affect its credibility, to say whether or not it believes that the accused are guilty. A perusal of the whole record convinces me that the Police investigation was honestly directed towards the discovery of the real offenders, and that the witnesses were desirous of bringing the real offenders to justice.

Appeal accepted in part.

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 603 OF 1914.

January 12, 1915.

Present:—Mr. Justice Spencer, and Mr. Justice Seshagiri Aiyar.

In re MADIGA POTHUGADU—PRISONER —APPELLANT.

Criminal Procedure Code (Act V of 1898), s. 339—Forfeiture of pardon—Practice

Where an accomplice forfeits the pardon offered to him, it is the duty of the Sessions Judge to record a finding as to the forfeiture. It is not enough that the Committing Magistrate does so

Appeal against the order of the Court of Session of the Cuddapah Division, in Case No. 45 of the Calendar for 1914.

Mr. *P. R. Grant*, for the Government.

JUDGMENT.—The Sessions Judge has not asked the prisoner whether he relies on the pardon granted to him and has not tried the issue whether the pardon has been forfeited. *Kullan* v. *Emperor* (1).

It is not enough that the Committing

(1) 2 Ind. Cas. 343; 32 M. 173; 9 Cr. L. J. 571.

ceedings under section 145 and to act against both opposing parties in the same proceedings under section 107, *cf.* the cases of *Queen-Empress* v. *Nathu* (7), *Queen-Empress* v. *Abdul Kadir* (8), *Mahadeo Kunwar* v. *Bisu* (3), *Pran Krishna* v. *Emperor* (9), *Kamal Narain Chowdhry* v. *Emperor* (10). If the Magistrate thinks it desirable to proceed against either of the parties concerned under section 107, this should be by separate proceedings against each in accordance with the provisions of sections 112 to 118 of the Code. It also appears that there was no information before the Magistrate, at the time that he passed his order, that the two Mirs, to whom notices have been issued, were likely personally to commit a breach of the peace or disturb the public tranquillity, as charged against them in the order. Even the subsequent application of the 8th July 1914 by certain *haris* of the Mirs does not allege this against them. They might no doubt be proceeded against as instigators, but if so, the information as to this should be clearly alleged in the order in accordance with section 112. As that section obviously implies and as ruled in *In the matter of the petition of Jai Prakash Lal* (11), the information must be of a clear and definite kind directly affecting the person against whom process is issued, and it should disclose tangible facts and details, so that it may afford notice to such person of what he is to come prepared to meet. I am not prepared to go so far as to say that these objections render this Magistrate's order absolutely illegal, and it may be remarked that, though the order in question was passed against the two parties jointly, it does not follow that the Magistrate has taken or intended to take proceedings under Chapter VIII against all together, instead of having separate proceedings in the case of each party or person. But I think this is a case where it is better to interfere with the contemplated proceedings at the beginning than at the end, when they might have to be upset as being irregular or illegal; and we are also assured that the danger of a breach of the peace on account of the alleged action of the Mirs in closing the canals or preventing cultivation is, at any rate for the present, now past. We, therefore, quash the latter part of the Magistrate's order, which he passed under section 107 of the Criminal Procedure Code.

CROUCH, A. J. C.—I concur in the proposed order. Section 435 (3) of the Criminal Procedure Code must be strictly followed right up to its obvious limits. Once the local Magistrate is satisfied that a dispute likely to cause a breach of peace exists concerning any land or water or the boundaries thereof, he is bound to proceed under Chapter XII. But, as held by this Court in Criminal Revision Application No. 113 of 1906, the proceedings under Chapter XII referred to in section 435 (3) are proceedings "in a lawful and right sense," and, where the Magistrate purports to proceed under Chapter XII with reference to a dispute as to moveables only (Sadar Court Criminal Revision Application No. 43 of 1900), or mixes up several inquiries and purports to hold them all under Chapter XII, the High Court has power to interfere in order to limit the proceedings under Chapter XII to their proper scope.

Revision allowed in part.

(7) 6 A. 214.
(8) 9 A. 452, A.-W. N. (1887) 111.
(9) 8 C. W. N. 180; 1 Cr. L. J. 58.
(10) 11 C. W. N. 472; 5 C. L. J. 231; 5 Cr. L. J. 197.
(11) 6 A. 20.

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 625 OF 1914.

January 8, 1915.

Present:—Mr. Justice Sadasiva Aiyar.

In re NATESA PADAYACHI—PRISONER—APPELLANT.

Penal Code (Act XLV of 1860), s. 366—Kidnapping girl from lawful guardianship—Child temporarily in custody of maternal uncle—Mother resuming custody—Taking with mother's consent, whether amounts to offence.

Where the accused was charged with kidnapping a girl from the lawful guardianship of her maternal uncle and it appeared that the mother of the girl was present with the accused when he was leading the girl to a railway station, and consented to the girl's being so taken:

Held, (1) that the maternal uncle had ceased to have the girl under his guardianship and the mother had again taken custody of the girl as her guardian;

(2) that taking with her consent did not amount to an offence under section 366 of the Penal Code.

EMPEROR *v.* ASLUM.

Appeal against the order of the Court of Session of the Tanjore Division, in Case No. 45 of the Calendar for 1914.

The Hon'ble Mr. *T. Richmond*, for the Appellant.

The Public Prosecutor, for the Government.

JUDGMENT.—The appellant has been convicted under section 366 of the Indian Penal Code of having kidnapped a girl named Gnanambal on the 2nd day of June 1914 at Rajagiri from the lawful guardianship of her uncle, Venkatachala Padayachi, with intent or knowing it to be likely that she may be compelled to marry against her will The charge does not make it clear that she was to be compelled to marry against her will. The suggestion of the prosecution seems to be that she was to be compelled to marry the prisoner himself against her will, because the allegation is that he tied a *tali* round her neck after abducting her. This suggestion is *prima facie* rather improbable. The prisoner has got his wife living with him and there is also the evidence on the side of the defence indicating that the girl had been promised in marriage to the prisonser's brother and that the father of the girl had been given *parisam* and jewels in connection with that contemplated marriage. There is also a rival candidate for the hand of the girl, namely, the brother of P. W. No. 1, who is her maternal uncle, and who is said to have had the girl in his guardianship at the time of the alleged offence. It is a curious fact (admitted by the prosecution) that both on the day previous to the date of the alleged offence and also on the day subsequent to the date of the alleged offence, the girl's mother, P. W. No. 8, was at the village of Rajagiri where the alleged offence took place. The story that P. W. No. 8 had gone to that village before the date of the offence from her own village (about 18 miles distant from Rajagiri) in order to see if she could secure a wife for P. W. No. 1 is not worth a moment's belief. Her story that, though she was in Rajagiri on the previous day, she left for some other village eight miles off before the hour of the alleged offence and then returned next day to Rajagiri is, again, very improbable. The prisoner's statement corroborated by the evidence on the side of the defence that the prisoner and the girl's mother went to Rajagiri from their own village of Thiruvesanallur to take the girl from Rajagiri to the prisoner's village in order to have the marriage with the prisoner's brother celebrated in accordance with the previous contract entered into between the prisoner and the girl's parents, is much more probable. The evidence of P. W. No. 4 also shows that at the time of the alleged offence, the girl's mother was at the place of the offence and that her story that she was absent is, in all probability, a falsehood. I think that the evidence as to the tying of *tali* is not true. If (as I find) the mother was present with the accused when the accused was leading the girl in broad daylight towards the railway station at Rajagiri and consented to the girl's being so taken, P. W. No. 1 had ceased to have the girl under his guardianship and the mother had again taken custody of the girl as her guardian. This case brought on the footing that P. W. No. 1 continued to be the girl's guardian at the time of the offence cannot, therefore, stand. I, therefore, reverse the conviction and sentence and direct the bail bond to be cancelled.

Conviction set aside.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 61 OF 1914.

August 27, 1914.

Present:—Mr. Fawcett, J. C., and Mr. Crump, A. J. C.

EMPEROR—APPELLANT

versus

ASLUM *valad* GUL MAHOMED—AND OTHERS—ACCUSED—RESPONDENTS.

Bombay Gambling Act (IV of 1887), ss. 5, 6—Criminal Procedure Code (Act V of 1898), ss. 1 (2), 103, 243—Search under Gambling Act—Mashira, absence of, effect of—Accused pleading guilty—Magistrate, duty of, to convict.

THUMBALABED HAMPANNA *v.* PARISI GANGAMMA.

All searches under a special or local law are not to be conducted in accordance with the provisions of the Criminal Procedure Code and, therefore, the absence of *Mashirs* at a search held under the Bombay Gambling Act, 1887, does not make the search illegal.

Where an accused pleads guilty but shows no sufficient cause why he should not be convicted, the Magistrate should not acquit him.

Appeal against the order of the City Magistrate, Karachi.

Mr. *E. Raymond*, Public Prosecutor, for the Crown.

JUDGMENT.—This is an appeal made by the Public Prosecutor on behalf of the Local Government from an order of the City Magistrate, Karachi, acquitting the 10 accused of the offence of gaming in a common gaming house under section 5 of Bombay Act IV of 1887. Accused No. 10 was also accused of an offence under section 4.

The accused Nos. 9 and 10 are recorded to have pleaded guilty to the offence under section 5, but the Magistrate refused to accept it, being of opinion that it was not a genuine plea and that they only did so because they thought they might thereby gain an advantage in certain other Police proceedings against them. No statement of this kind is, however, recorded as having been made by either of these two accused, as should have been done if any such statement were made under sections 243 and 263 (*g*) of the Criminal Procedure Code, and we must presume that the plea was an unreserved and voluntary one. As the two accused showed no sufficient cause why they should not be convicted, the Magistrate should have convicted them accordingly under section 243.

The Magistrate acquitted the other accused on the ground that no *Mashirs* were present at the search, and in his opinion all searches must be conducted in accordance with the provisions of the Criminal Procedure Code. This opinion is clearly erroneous (as already ruled by this Court in Criminal Revision Application No. 22 of 1902 of 16th July 1902) in view of the provisions of section 6 (*d*) of Bombay Act IV of 1887, and sections 1 (2) and 103 of the Criminal Procedure Code.

The evidence against the accused, coupled with the presumption arising against them under section 7 of the Bombay Prevention of Gambling Act, clearly proves their guilt, and we accordingly convict all the accused (except No. 8 who has not been served) and sentence each of accused Nos. 1 to 7 and 9 to pay a fine of Rs. 5, in default to suffer five days' rigorous imprisonment, and accused No. 10 to pay a fine of Rs. 10, in default to suffer rigorous imprisonment for seven days.

Order reversed.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 321 OF 1914.

February 10, 1915.

Present:—Mr. Justice Spencer and Mr. Justice Seshagiri Aiyar.

THUMBALABED HAMPANNA—APPELLANT

versus

PARISI GANGAMMA AND ANOTHER—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), ss. 145, 146—Magistrate, duty of, to find who is in possession on date of his order—Previous possession, effect of—Order under s. 146, when ultra vires.

Under section 145 of the Code of Criminal Procedure a Magistrate should find as to who is in actual possession of the property in dispute on the date of his order, not on any date anterior to that, although previous possession may be a guide to his finding peaceful and actual possession on the date.

An order under section 146, Criminal Procedure Code, would be *ultra vires*, unless the Magistrate records a finding that he is unable to find which party is in actual possession under section 145, Criminal Procedure Code.

Appeal, under section 15 of the Letters Patent, against the decision of the Hon'ble Mr. Justice Ayling in Criminal Revision Case No. 416 of 1914, preferred to the High Court to revise the order of the Deputy Magistrate of Adoni in Miscellaneous Case No. 3 of 1914.

FACTS.—After the death of one Narasinga and his wife, a dispute arose as to the possession of the property between Narasamma, mother-in-law of Narasinga, and Gangamma, the widow of a brother of Narasinga. The Magistrate of Adoni found

Gangamma in possession of the property and he found also that Narasamma's alienees had harvested the crops without disturbance. The Magistrate issued an order attaching the property under section 146, Criminal Procedure Code, holding that he was unable to find who was in possession of the property when he passed the order. The revision petition to the High Court is against that order passed by the Magistrate.

Mr. *R. Kuppusami Aiyar*, for the Appellant.

Dr. *S. Swaminadhan*, for the Respondents.

JUDGMENT.—A preliminary objection was taken that no Letters Patent Appeal lies, as there was no judgment by the learned Judge. We overrule this objection.

The property in dispute in these proceedings originally belonged to Narasamma. She is said to have made a gift of it to her son-in-law, Narasinga, and to her daughter, Basamma. Both these latter died in September 1913 within a few days of each other. The petitioner in the Court below and the respondent in this Court obtained a sale-deed of the property from one Gangamma, the widow of the divided brother of Narasinga. The appellant purchased the property from the original owner, Narasamma, and from a *dayadhi* of the deceased Narasinga on the 27th January 1914. On the death of the last owner Narasinga, disputes as to the possession of the properties arose between Gangamma, the brother's widow, on the one hand and Narasamma, the mother-in-law, on the other. The respondent complained to the Magistrate that on the 4th of February 1914, the appellant unlawfully trespassed upon property in his possession and that he has been creating disturbance. He further stated that he apprehended a disturbance of the peace in consequence of the wrongful acts of the appellant and another who was the second counter-petitioner in the Court below. The Magistrate passed an order on the 22nd February 1914, to the effect that he was satisfied that a dispute likely to cause a breach of the peace existed and called upon the parties to produce evidence regarding possession. He found that the evidence regarding the enjoyment of the property by Gangamma "up to date" is very doubtful and held that the possession of her alleged vendee was also not established. As regards the appellant he found against the forcible entry on the 4th of February, as alleged in the petition by the other party, and said that "it is difficult to say in whose possession the lands were in the interval", that is, between the 27th January 1914, which was the date of the sale, and the 4th February 1914, which was the date on which he found that the appellant was peacefully picking the cotton on the land. Nowhere in his judgment does he make any reference to the 20th February 1914, which was the date of his order and on which date under section 145, clause 4, he had to find who was in actual possession. It was no doubt open to him to say that, notwithstanding that the appellant was in possession on the 4th February 1914, he has not been shown to have been in possession on the later date, namely, 20th February 1914. But under the Code of Criminal Procedure he has to find as to who was in possession on the date of his order, not on any date anterior to that, although previous possession may be a guide to his finding as to peaceful and actual possession on the date of his order.

We must hold that he failed to exercise his jurisdiction, as he has failed to give a finding as required by law regarding possession of both or either of the counter-petitioners on the date of the order. Section 146, which refers back to possession under section 145, should not have been applied until a finding had been arrived at that the Magistrate was unable to find which of the disputing parties was in possession of the property on the date of his preliminary order. His order attaching the property under section 146 is, therefore, *ultra vires* and illegal. We must set it aside without prejudice, if he thinks desirable, to his taking such further action as he thinks fit in the matter. We will make no order as to costs.

Order set aside.

KANHI RAM v. DURGA PRASAD.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 62 OF 1914.

January 22, 1915.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

KANHI RAM—DEFENDANT—APPELLANT

versus

DURGA PRASAD AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 95—*Suit between rival claimants to tenancy—Cognisable by Civil Court—Jurisdiction*—Res judicata.

Section 95 of the Agra Tenancy Act deals with questions arising between landlord and tenant, and not between rival claimants to a tenancy.

Therefore, a suit between rival claimants to a tenancy that the plaintiff is entitled to it is cognisable by a Civil Court.

A decree of a Revenue Court in a previous suit, holding that the plaintiff was the sub-tenant of the defendant in respect of the holding, does not operate as *res judicata* in the plaintiff's suit in the Civil Court to establish his claim to the holding.

Jagar Nath v. *Ajudhya Singh*, 17 Ind. Cas. 876; 10 A L. J 408; 35 A. 14, *Dewan Singh* v. *Randhera*, 26 Ind Cas 718; 12 A. L. J. 1322, referred to.

Letters Patent Appeal against the decision of the Hon'ble Mr. Justice Sundar Lal, in Second Appeal No. 1377 of 1913, dated 16th of July 1914.

FACTS.—The defendant in the present suit brought a suit in the Revenue Court for ejectment of the present plaintiff, on the allegation that he was his sub-tenant, and obtained a decree. Thereupon the plaintiff instituted a suit in the Civil Court for a declaration that he was the occupancy tenant and the defendant was a mere trespasser. Both the Courts below dismissed the suit on the ground that the decision of the Revenue Court was *inter partes* and operated as *res judicata*. In second appeal, Mr. Justice Sundar Lal set aside the decision of the Courts below and remanded the case for trial on the merits.

The defendant went up in appeal under section 10 of the Letters Patent.

Mr. *Lakshmi Narayan*, for the Appellant, contended that the present suit was not maintainable, by reason of the fact that the status of the parties had been determined by the Revenue Court which was competent to decide that question. The decision had become final and was binding on the Civil Court.

He relied on *Maharaja Vizianagram* v. *Ohhango Kurmi* (1), *Ram Dei Kuari* v. *Bindesri Upadhaya* (2), *Sheo Prakash* v. *Karna* (3) and *Asad Ali* v. *Anand Sarup* (4), Second Appeal No. 1001 of 1911 decided by Chamier, J.

Moreover the granting of a declaration by the Civil Court will be wholly infructuous as the Revenue Court cannot go behind its own decree.

That a suit between rival tenants is maintainable in the Civil Court is no doubt true; but it has to be proved in the present suit that the plaintiff is a tenant. This cannot be proved, as the Revenue Court has held that he is not a tenant.

JUDGMENT.—This appeal arises out of a suit which was brought under the following circumstances:—

The defendant in the present suit brought a suit in the Revenue Court against the plaintiff in the present suit, alleging that he was his sub-tenant and seeking to eject him. The Revenue Court granted him a decree. The defendant in the Revenue Court then brought the present suit, in which he claimed that he was entitled to a certain occupancy holding and for possession if he was found not to be in possession. There are other claims which may be disregarded for the purpose of our present judgment. Both the Courts below dismissed the plaintiff's claim, on the ground that the suit was not maintainable. It was contended that the decision of the Revenue Court operated as *res judicata* and that in any event the present suit was one which could not be maintained in a Civil Court.

On second appeal a learned Judge of this Court held with some reluctance that having regard to the rulings of this Court, the decision of the Court below was wrong and he accordingly allowed the appeal and remanded the suit for disposal on the merits. It seems to us that the decision of the learned Judge of this Court was correct.

(1) 6 Ind Cas 834; 7 A L. J. 555.
(2) 11 Ind Cas 287; 8 A. L J. 940.
(3) 21 Ind. Cas 2; 11 A L J 671; 35 A. 464
(4) 27 Ind Cas. 35; 12 A L. J. 1238.

The plaintiff in the present suit does not allege the existence of the relationship of landlord and tenant between himself and the defendant. His claim is that he is the owner of a certain occupancy tenancy and that the defendant is a trespasser. True it is that if the plaintiff in the present suit is successful, the decision in his favour will be inconsistent with the decision of the Revenue Court in favour of the defendant. It seems to us, however, quite clear that the decision of the Revenue Court cannot be relied upon as *res judicata*, because the Revenue Court was not competent to try the present suit. If the decision of the Revenue Court cannot be successfully pleaded as *res judicata*, then that decision does not render the present suit unmaintainable.

It is next contended that the existing relation between the plaintiff and defendant is one of the matters which could be decided under section 95 of the Tenancy Act. In our opinion this section deals with questions arising between landlord and tenant and not between rival claimants to a tenancy. We have already decided the very point in the case of *Jagar Nath* v. *Ajudhya Singh* (5).

The decision in the case of *Dewan Singh* v. *Randhera* (6) is relied upon by the appellant. The learned Judge in that case seems to have been of opinion that the question of title to an occupancy holding arising between rival claimants could be dealt with by the Revenue Court under section 95 of the Tenancy Act. The attention of the learned Judge does not appear to have been drawn to the decision in *Jagar Nath* v. *Ajudhya Singh* (5) and it is certainly inconsistent with it. We dismiss the appeal, but without costs as no one appears for the other side.

Appeal dismissed.

(5) 17 Ind. Cas. 376; 10 A. L. J. 408; 35 A. 14.
(6) 26 Ind. Cas. 718; 12 A. L. J. 1322.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 273 OF 1914.
February 5, 1915.

Present:—Justice Sir P. C. Banerji, KT.

BALBHADDAR CHAUBEY—DEFENDANT—APPELLANT

versus

SOMAROO RAI AND OTHERS—PLAINTIFFS AND OTHERS—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 190), ss. 79, 81—Dispossession of tenant by zemindar through another tenant—Limitation—Rival claimants to tenancy, suit between—Jurisdiction of Civil or Revenue Court—Res judicata.

A suit between rival claimants to a tenancy can only be brought in a Civil Court, and not in a Revenue Court. Therefore, a decision of the Revenue Court in a suit for rent between rival claimants to a tenancy would not operate as *res judicata* in a subsequent suit in the Civil Court between the same parties.

Where a lessee from the *zemindar* dispossess a previous lessee, the dispossession of the latter must be deemed to be a dispossession by the *zemindar* through his tenant. The remedy of the dispossessed lessee is a suit under section 79 of the Tenancy Act within six months of the dispossession.

Ram Lal v. *Chunni Lal*, 27 A. 372; 2 A. L. J. 69; A. W. N. (1904) 148; *Sokhni* v. *Ram Persad*, 7 Ind. Cas. 486, referred to.

Second appeal from the decision of the District Judge of Ghazipur, dated the 15th November 1913.

FACTS.—The plaintiff brought a suit for possession of certain plots of land in the Civil Court, on the allegation that he had been dispossessed by the defendants in 1909. The plaintiff had been put in possession of the plots in 1904 as a lessee by defendant No. 2, who subsequently gave another lease to defendant No. 1 in 1906. Defendant No. 2 sold the *zemindari* to defendants Nos. 3 to 7 in the year 1908. Defendant No. 1, the subsequent lessee, contested the suit on the ground, among others, that the suit was not cognizable by the Civil Court; that section 79 of Act II of 1901 barred the suit; and that the suit in respect of certain plots was barred by *res judicata*, by reason of the fact that the contesting defendant had obtained a decree against the plaintiff for arrears of rent and the present plaintiff's status had been determined by the Revenue Court to be that of a *shikmi* tenant. The Court of first instance held that section 79 did not apply, but that the suit in respect of certain plots was barred by *res judicata*,

BALBHADDAR CHAUBEY v. SOMAROO RAI.

Both the parties appealed and the lower Appellate Court decreed the whole claim. The defendant No. 1 appealed to the High Court.

Mr. *Parmeshwar Dyal*, for the Appellant:—On the plaintiff's own allegation, he was dispossessed by the *semindar*. In any event, the *semindar* having given a second lease to the defendant and the latter having admittedly dispossessed the plaintiff, it must be taken that the plaintiff was dispossessed by the *semindar* through the subsequent lessee. The cause of action as alleged by the plaintiff himself arose in 1909. The plaintiff ought to have brought his suit within six months of his dispossession. He relied on *Ram Lal* v. *Chunni Lal* (1). This case he submitted had been followed in *Sokhai* v. *Ram Pershad* (2). The plaintiff not having brought his suit within six months. his right to the holding became extinguished. He referred to *Dalip Rai* v. *Deoki Rai* (3). He further referred to *Bani Bai* v. *Parbati* (4), *Maula* v. *Bahala* (5), *Sri Mahant Bramha Khushal* v. *Sumera* (6), *Hoymobutty Dossee* v. *Sreekishen Nundee* (7), *Bissessur Kurmokar* v. *Juggobundoo Kurmokar* (8).

The suit in respect of three plots, *viz.*, Nos. 116, 2939 and 165, was barred by *res judicata*, because the Revenue Court in a previous litigation between the parties had decided that the plaintiff was the *shikmi* tenant of the present defendant. The status of the parties having been once determined by a competent Court, it was not open to the plaintiff to question that decision in the Civil Court. In fact the Civil Court had no jurisdiction to entertain the suit.

Mr. *Lakshmi Narayan*, for the Respondent:—The real question is as to whether the Civil Court has jurisdiction or not. He submitted that the dispute being one between rival claimants to a holding, such a suit was exclusively cognisable by the Civil Court. The latest case on the point was the case of *Kanhi Ram* v. *Durga Prasad* (9). As to the question of limitation, he submitted, that the suit being cognisable by the Civil Court and being for possession of immoveable property, 12 years' limitation ought to apply. Section 79 of Act II of 1901 was intended to protect the rights of the *semindar*. In this case two of the *semindars* actually came forward and supported the plaintiff's claim, while the rest did not contest it. It was not open to the subsequent lessee to take advantage of the provisions of section 79 of Act II of 1901.

In *Ram Lal* v. *Chunni Lal* (1) there was an actual ouster of the tenant by the *semindar*, while in the present case there is no *direct* dispossession. The *semindars* in the present suit are, merely *pro forma* defendants and no relief is sought against them. It is the *semindars* alone who can raise the defence of limitation.

JUDGMENT.—This and the connected Appeal No. 274 of 1914 arise out of a suit brought by the plaintiff Somaroo Rai for possession of nine plots of land under the following circumstances. The land in dispute lies in the *semindari* of Lachhmi Narain, who granted him a lease of the said plots for a term of 16 years on the 11th of January 1904. On February 12th, 1906, the same Lachhmi Narain granted a perpetual lease to the appellant, Balbhaddar Chanbe, in respect of the said lands and other property and he got mutation of names effected in favour of Balbhaddar. Subsequently in 1908 he sold his *semindari* to the other defendants. Balbhaddar brought a suit in the Revenue Court against the present plaintiff for arrears of rent in respect of three out of the disputed plots, *namely*, Nos. 116, 165 and 2939, on the allegation that the plaintiff was his sub-tenant. He obtained a decree on the 13th of January 1913. It is stated in the plaint that suits were brought for arrears of rent in respect of some of the other plots against *shikmi* tenants holding those plots and decrees were obtained against them. All this, according to the allegations in the plaint, took place before 1909. The plaintiff states that these acts amounted to his dispossession and he accordingly brought the present suit for recovery of possession and damages in the Civil Court. The defend-

(1) 27 A. 372; 2 A. L. J. 69; A. W. N. (1904) 281.
(2) 7 Ind. Cas. 486.
(3) 21 A. 204; A. W. N. (1899) 38.
(4) A. W. N. (1893) 196.
(5) 19 A. 34; A. W. N. (1896) 169.
(6) 18 Ind. 967; 11 A. L. J. 310, 35 A. 290.
(7) 14 W. R. 58 at p 59.
(8) 14 W. R. 183.
(9) 27 Ind. Cas. 913; 13 A. L. J. 278.

ants to the suit are Balbhaddar, the subsequent lessee, Lachhmi Narain, the former *zemindar*, and the purchasers of the *zemindari* from Lachhmi Narain. The Court of first instance dismissed the claim in respect of the three plots Nos. 116, 165 and 2939 and decreed it in regard to the remaining plots. The claim for damages was dismissed. The plaintiff filed an appeal as regards the portion of the claim dismissed and Balbhaddar appealed against that portion of the decree which decreed the claim in respect of the plots other than the three plots mentioned above. The learned Judge allowed the appeal of the plaintiff and dismissed the appeal preferred by Balbhaddar; so that it decreed the plaintiff's claim for possession of all the nine plots. The defendant Balbhaddar has preferred these appeals. As regards the three plots Nos. 116, 165 and 2939, the contention put forward on his behalf is that the decision of the Revenue Court in the suit for arrears of rent operates as *res judicata* between the appellant, Balbhaddar, and the plaintiff, Somaroo. This contention has, in my opinion, been rightly disallowed by the Court below. So far as these plots are concerned, the claim is between rival claimants to the tenancy and such a claim could only be brought in the Civil Court and not in the Revenue Court. This has been held in several cases to which I need not refer. The subsequent suit now brought could not be brought in a Court of Revenue and consequently the decision of that Court in the previous suit was not the decision of a Court competent to try the subsequent suit. As regards the remaining plots, the main contention is that the plaintiff has lost his title to the tenancy created in his favour under the lease granted to him on the 11th of January 1904 by reason of lapse of time. It is urged that the plaintiff was dispossessed from these plots so far back as 1906 and as he did not bring a suit to recover possession as against his landlord and the lessee from the landlord under section 79 of the Tenancy Act within six months from the date of his dispossession, his right to the tenancy no longer subsists. It was admitted by the Pleader for the plaintiff in the Court of first instance in a statement recorded on the 4th of June 1913 that the three plots Nos. 116, 165 and 2939 were in the actual cultivation of the plaintiff and that the remaining plots were cultivated by sub-tenants. It was stated that the plaintiff received rent from these tenants for two years, *i.e.*, from 1904 to 1906, and that since the year 1906 the rent payable by the sub-tenants holding the six plots has been realized by the appellant Balbhaddar. It is contended, as I have said above, that the realization of rent by Balbhaddar amounted to a dispossession by the landholder and as this took place long before the institution of the present suit, the plaintiff's right has become extinguished. This contention is supported by the ruling of this Court in *Ram Lal* v. *Chunni Lal* (1). In that case the learned Judge who decided it held as follows:—"When a landholder lets land in the occupation of a tenant to a third party and that third party, acting under the land-holders' authority, takes possession of the land, then in my opinion the tenant must be deemed to have been ousted by the land-holder, and his remedy is a suit under section 79 of Act II of 1901, the person claiming through the land-holder being joined as a defendant to the suit under the provisions of section 81 of the Act. Such a suit must be brought within six months of the date of dispossession." This view appears to have been accepted by Mr. Justice Chamier in a case reported in 7 Indian Cases, page 486 [*Sokhai* v. *Ram Pershad* (2), Second Appeal No. 1139 of 1909, decided on July 11th, 1910]. The fact that on the plaintiff's own showing the rent payable by the tenants occupying the six plots mentioned above has been realized by Balbhaddar since the year 1906 by virtue of the lease granted to him by the *zemindar*, shows that the plaintiff was dispossessed so far back as 1906 and this dispossession must be deemed to be a dispossession by the *zemindar* through his tenant. It appears from the provisions of section 81 of the Tenancy Act that when a tenant is dispossessed by a person claiming through the *zemindar*, the tenant's remedy is a suit under the Tenancy Act for recovery of possession against the *zemindar* and the person claiming through him. Therefore the plaintiff's right to recover possession of the six plots having accrued long prior to six months antecedent to the date of the suit, the right to bring such a suit for recovery of possession has become time-barred. This circumstance

not only barred his remedy but extinguished his right, as held in *Dalip Rai* v. *Deoki Rai* (3). That the dispossession of the plaintiff was a dispossession by the *zemindar* is also manifest from the fact that in the plaint itself it is stated that the *zemindar* brought suits for rent against some of the tenants holding the plots in question and obtained decrees and that the plaintiff himself regarded this as amounting to his dispossession. Furthermore, he has claimed relief not only against Balbhaddar but also against the *zemindars*, defendants. The plaintiff has thus ceased to have any right to the six plots other than the three plots numbered 116, 165 and 2939. The claim as regards those three plots has been rightly decreed and this appeal must fail. The connected appeal must prevail. I accordingly dismiss this appeal with costs.

Appeal No. 273 *dismissed*;
Appeal No. 274 *allowed.*

CALCUTTA HIGH COURT.
CIVIL RULE No. 1302 OF 1914.
February 2, 1915.

Present:—Mr. Justice D. Chatterjee and Mr. Justice Chapman.

SIVAPROSAD RAM AND OTHERS—PLAINTIFFS—PETITIONERS

versus

TRICOMDAS COVERJE BHOJA—DEFENDANT No. 1—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 10, scope of—Jurisdiction—Res judicata—*Title—Issue—Parties—Charter Act*, 1861, *s. 15.*

Section 10 of the Code of Civil Procedure, 1908, requires, among other things, that the suit should be between parties litigating under the same title and the issue should be the same in both suits.

A Court has no jurisdiction to decide the question of *res judicata* in a proceeding under section 10 of the Code of Civil Procedure. Its only jurisdiction in the proceeding is to stop the new suit if it finds the existence of the circumstances mentioned in the section as conditions precedent to the passing of the order.

A High Court can interfere under section 15 of the Charter Act with interlocutory orders when they might lead to failure of justice or irreparable injury.

Dhapi v. *Ram Pershad*, 14 C. 768; *Gobinda Mohun* v. *Kunja Behari*, 4 Ind. Cas. 364, 10 C. L. J. 407; 14 C. W. N 147 and *Amjad Ali* v. *Ali Hussain Johar*, 6 Ind. Cas. 574, 15 C. W. N. 353; 12 C. L. J. 519, followed.

Civil Rule against an order of the Subordinate Judge, Burdwan, dated the 17th December 1914.

Babus *Bipin Behary Ghose* and *Mohini Nath Bose*, for the Petitioners.

Dr. *Rash Behary Ghose*, Dr. *Dwarka Nath Mitter* and Babu *Tarakeswar Pal Chowdhury*, for the Opposite Party.

JUDGMENT.

D. CHATTERJEE, J.—The petitioners and the opposite party hold two contiguous collieries under the Maharaja of Pachoti. The Maharaja brought a suit, No. 391 of 1910, in the Court of the Subordinate Judge of Burdwan against the opposite party for the recovery of extra royalty for coal said to have been appropriated by him by encroaching on the lands of the colliery of the petitioners who were made *pro forma* defendants. The claim was based on the terms of the contract entered into by the opposite party with the Maharaja. In that suit the opposite party pleaded that the encroachment, if any, was made not by him, but by his vendor who was not a party to the said suit. One of the issues in that suit was whether the opposite party had made any encroachment on the lands of the petitioners and the Court found that they had. Pending the decision of that suit, the petitioners brought the present suit in the same Court against the opposite party as defendant No. 1 and his vendor as defendant No. 2 for damages for the encroachment found in the previous suit as well as further encroachment and loss caused by flooding the petitioners' mine and other reliefs. The opposite party also filed a suit against the petitioners making counter-charges of encroachment. These two fresh counter-suits were ordered to be tried together. The opposite party then made an application under section 10 of the Civil Procedure Code for stopping the suit of the petitioners and the learned Subordinate Judge has passed an order which has the effect of stopping the trial of the petitioners' suit for an indefinite time, whilst the opposite party is at liberty to proceed with his suit against the petitioners. The petitioners obtained this Rule on the ground that the order was incompetent, illegal and irregular. I think that the order made by the learned Subordinate Judge ought not to stand. Section 10 of the Civil Procedure

Code requires among other things that the suits should be between parties litigating under the same title. The Maharaja was suing in the previous suit as landlord for royalty under contract and the present suit is by one tenant of the Maharaja against another and based on tort. Then again the issue can hardly be said to be the same, as the encroachment charged in this suit covers a larger area than that found in the prior suit. This is quite sufficient to take the case out of the purview of section 10, but the learned Subordinate Judge says he is clearly of opinion that the decision in the previous suit would operate as *res judicata* between the two defendants in that case and would, therefore, bar this suit. I do not think it proper to express any opinion on this point at this stage of the case and the learned Subordinate Judge was not called upon to express the opinion that he has expressed in this connection in a proceeding under section 10.

It is contended by the learned Vakil for the opposite party that we cannot interfere with the order of the Court below, as it does not violate any rule of jurisdiction. Reliance is placed on the decision of the Privy Council in the case of *Amir Hussan Khan* v. *Sheo Baksh Singh* (1). It is also contended that the case has not been decided and we have no jurisdiction to interfere with an interlocutory order.

As regards the question of jurisdiction I feel difficulty. The learned Subordinate Judge had no jurisdiction to decide the question of *res judicata* in a proceeding under section 10. His only jurisdiction in this proceeding was to stop the new suit if he found the existence of the circumstances mentioned in the section as conditions precedent to the passing of the order. He has come to no finding as to whether the parties were litigating under the same title. If he had come to a finding, right or wrong, that would have been another matter, but he has come to none and I think he had no jurisdiction to pass the order: but supposing he had the jurisdiction, he has exercised it in violation of the provisions of the law and under a misapprehension of the question at issue and has, therefore, acted with material irregularity in the exercise of his jurisdiction. See *Venkubai* v. *Lakshman* (2), *Sew Bux Bogla* v. *Shib Chunder Sen* (3), *Jugobundhu Pattuck* v. *Jadu Ghose Alkushi* (4), *Tarini Charan* v. *Chandra Kumar Dey* (5).

As regards the second objection there is ample authority in this Court for our interference with interlocutory orders when they might lead to failure of justice or irreparable injury. See *Dhapi* v. *Ram Pershad* (6), *Gobinda Mohan* v. *Kunja Behari* (7), *Amjad Ali* v. *Ali Hussain Johar* (8). Even if it were doubtful whether section 115 does empower us to interfere in a case of this kind, I think that our powers under section 15 of the Charter Act are wide enough to enable us to do justice. In this case the opposite party may go on encroaching on the petitioners' land, he may flood the petitioners' mine or even let down the surface and make investigation impossible and yet the petitioners would not have a word to say until the previous suit is finally decided years later when investigation may be impossible, when evidence may have disappeared and when a decree may be nugatory; and while the petitioners are thus handicapped by the order of the Court, the opposite party may run his own suit against the petitioners unhampered by either the suit of the Maharaja or the suit of the petitioners. I cannot conceive of a greater injustice and I have no hesitation in setting aside the order of the learned Subordinate Judge and making the Rule absolute with costs, five gold *mohurs*.

CHAPMAN, J.—I agree.

Rule made absolute.

(1) 11 C. 6; 11 I. A. 237; 4 Sar. P. C. J 559; Rafique and Jackson's P. C. No. 83.

(2) 12 B. 617.
(3) 13 C. 225.
(4) 15 C 47.
(5) 6 Ind. Cas. 193; 14 C. W. N 788; 12 C. L. J. 1.
(6) 14 C 768.
(7) 4 Ind. Cas 364; 14 C. W. N. 147; 10 C. L. J. 407
(8) 6 Ind. Cas. 574, 15 C. W. N. 853; 12 C. L. J. 519.

SADINI KONDAYYA v. KOSAGANI PEDASWAMY.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 71 OF 1914.

November 4, 1914.

Present:—Mr. Justice Oldfield.

SADINI KONDAYYA—PLAINTIFF—PETITIONER

versus

KOSAGANI PEDASWAMY AND ANOTHER—DEFENDANTS—RESPONDENTS.

Madras Abkari Act (I of 1886), s. 22—License to sell toddy, transfer of—Promissory note given in consideration, legality of.

A promissory note given in consideration of the transfer of a right to sell toddy prohibited under section 21 of the Madras Abkari Act (I of 1886) is unenforceable, as being for an illegal consideration.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif of Kovur, in Small Cause Suit No. 20 of 1913.

Mr. *B. Narasimha Rao*, for the Petitioner.

Mr. *V. Ramadoss*, for the Respondents.

JUDGMENT.—The lower Court dismissed the suit on the ground that the suit promissory note was not enforceable, being given as part of a contract forbidden by Act I of 1886.

There is no doubt that the note was given as consideration for the transfer to the defendant of the plaintiff's rights under a toddy lease. It is urged that such a transfer is permitted by section 22 of the Act and that the question whether the plaintiff obtained a license from the defendant does not arise in this connection, but could arise only in connection with the latter's enjoyment of the right transferred to him. It is clear that in this case the transfer to the defendant was intended to be absolute and that it was not conditional on any further license in his name being obtained. The lower Court has found this and it appears from the terms of Exhibit I and the plaintiff's statement made after the lease had terminated. In these circumstances there can be no doubt as to the character of the transaction between the parties or as to the correctness of the lower Court's finding that the consideration for Exhibit A was illegal. The civil revision petition fails and is dismissed with costs.

Petition dismissed.

Musammat BAYABAI v. PURSHOTTAM.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 41B OF 1913.

November 12, 1913.

Present:—Mr. Mittra, Offg. A. J. C.

Musammat BAYABAI—DEFENDANT—APPELLANT

versus

PURSHOTTAM AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIV, r 2, 5—Payment made out of Court—Certified in Court by decree-holder on application by judgment-debtor—Payment in Court.

Where an application is made to Court within the period allowed by Article 174 of the Limitation Act to compel the decree-holder to certify the payment made out of Court in satisfaction of a mortgage-decree, the payment, if proved, must be recorded and then it will in law be treated as a payment in Court within the meaning of Order XXXIV, rule 2 of the Civil Procedure Code.

Appeal against the decree of the Additional District Judge, East Berar, dated the 23rd October 1912, confirming that of the Subordinate Judge, Amraoti, dated the 14th October 1911.

Dr. *H. S. Gour*, for the Appellant.

The Hon'ble Sir *Bipin Krishna Bose* and Mr. *K. W. Brahma*, for the Respondents.

JUDGMENT.—This is a second appeal against a decree absolute for foreclosure. Both the lower Courts have refused to extend time for payment of the decretal amount. It is contended on behalf of the respondents that the law contemplates only one appeal from an order refusing to extend time and that it is not competent to the appellant to challenge the order passed by the lower Appellate Court by way of appeal, even though in point of form this is an appeal from the final decree. The appellant points out some verbal changes made in the new Code. His Counsel relies on the wording of section 104 (2):—"No appeal shall lie from an order passed in appeal under this section", whereas the Code of 1882, section 588, declared that orders passed in appeals shall be final. A similar alteration in the language has been made in the Chapter relating to review (*cf.* section 629 of the old Code with Order XLVII, rule 7). I do not think it necessary to decide this question, as, assuming that I have the power under my appellate or revisional jurisdiction to interfere with the orders passed by the Courts below, no case has been made out for such interference.

The appellant's application to have the *ex parte* decree *nisi* set aside was dismissed on the 21st March 1911 and there is no explanation of any kind on the record for the delay till the 27th July 1911. In this view the appeal would have failed, but there is another point raised on which I think the appellant is entitled to a remand. It is alleged that Rs. 1,800 (more than the amount due under the decree) was paid to the mortgagees on the 28th July 1911 in satisfaction of the mortgage-decree. On the 16th August 1911 the appellant's son, the first defendant, applied to the Court to have an inquiry made into this alleged payment of Rs. 1,800 to the decree-holders. On the 14th October 1911 the Subordinate Judge held that "a payment out of Court is no payment at all and that it could not be recognised by the Court (*vide* Order XXXIV, rule 5, Civil Procedure Code)." The Court then refused to make an inquiry, and it would appear that the parties and their Pleaders acquiesced in this decision as correct. It has now been challenged before me, and I think the parties are not bound by an admission on a point of law, if the admission is erroneous. Assuming that the interpretation put by the Subordinate Judge on the wording of Order XXXIV, rule 5, is correct, an application was made to the Court on the 16th August 1911 within the period allowed by Article 174 of the Limitation Act to compel the decree-holders to certify the payment. This was an application under Order XXI, rule 2, which applies to a decree of any kind including a mortgage-decree. If the alleged payment is proved, the Court is bound to record the same and upon such a record being made, the payment will in law be treated as a payment in Court. If such a payment out of Court is accepted by a decree-holder, he must be taken to have condoned the delay and the Court will not pass a decree absolute for foreclosure. This view appears to me to be in accordance with the Civil Procedure Code, for it is difficult to believe that the Legislature meant to prohibit altogether payment out of Court. I need not say what equities may arise when no such application is made by the debtor within the period allowed by Article 174 of the Limitation Act. If no payment as alleged is proved, the appeal will be dismissed, and if the payment is proved, the appellant has a right to take advantage of a payment made by her co-mortgagor. The lower Appellate Court will now frame an issue as to whether Rs. 1,800 was paid to the decree-holders in satisfaction of the mortgage-decree on the 28th July 1911. Evidence may be taken in the first Court if found more convenient. The finding on this issue together with the evidence is to be returned by the 15th January 1914. One week will be allowed for filing objections and the case will be finally disposed of on the 26th January 1914.

Case remanded.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1626 OF 1913.

November 25, 1914.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Hannay.

CHENGALAVALA GURRAZU AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

MADAPATI VENKATESWARA ROW PANTHULU GARU AND OTHERS—DEFENDANTS—RESPONDENTS.

Easements Act (*V of* 1882), *s.* 4—*Consideration paid, nonetheless an easement.*

The mere fact that the owner of the dominant tenement paid something to the owner of the servient tenement periodically for the enjoyment of the right to do something upon the servient tenement is not inconsistent with the right claimed coming under the definition of "easement". An easement right can be conferred by the owner of the servient tenement for cash consideration and whether that cash consideration takes the shape of a sum paid once for all or paid from time to time cannot make any difference in the legal nature of the right conferred on the dominant tenement.

Second appeal against the decree of the Court of the Subordinate Judge of Masulipatam, in Appeal Suit No. 6 of 1913, preferred against that of the Additional District Munsif of Masulipatam, in Original Suit No. 561 of 1909.

FACTS.—Exhibit A, the *rasinamah* decree, gave the plaintiffs right to take water from the plaint tank for irrigating their lands in consideration of a recurring payment. It was entered into with a predecessor-in-title of the defendants. The plaintiffs claim an irrevocable right to take water on payment by virtue of the easement granted. The

defendants contended it was only a license to use water and was revokeable.

Messrs. *V. Ramesam* and *V. Ramadoss*, for the Appellants.

Mr. *A. Krishnasamy Iyer*, for the Respondents.

JUDGMENT.—The only question in this case is whether the plaintiffs by the terms of the *rasinamah* decree (Exhibit A) obtained an irrevocable right to take water from the plaint tanks for the irrigation of the three lands mentioned in the said *rasinamah*, a right irrevocable not only by the then owner of the tanks, but by the subsequent assignees of the ownership of the tanks from that owner.

Having heard the terms of Exhibit A, fully analysed and commented upon by both sides, we are clearly of opinion that a right of easement was created and declared in favour of the defendants' three lands (which became dominant tenements) to take water from the plaint tanks (which became the servient tenements in relation to the defendants' lands).

In this view it is unnecessary to consider the question whether if the grant to the defendants under Exhibit A was merely the grant of a license, it could be revoked by the grantor himself (section 60 of the Easements Act) or at least by the grantor's assignee or whether the provisions of section 40 of the Transfer of Property Act, paragraph II (which deals with the benefit of an obligation not amounting to an interest in land or an easement in land), apply to this case.

The mere fact that the owner of the dominant tenement has to pay something to the owner of the servient tenement. periodically for the enjoyment of the right to do something upon the servient tenement is not inconsistent with the right claimed coming under the definition of "easement." An easement right can be conferred by the owner of the servient tenement for cash consideration and whether that cash consideration takes the shape of a sum paid in cash once for all or paid from time to time cannot, in our opinion, make any difference in the legal nature of the right conferred on the dominant tenement.

We, therefore, reverse the decrees of the lower Courts and give a decree for the plaintiffs for the reliefs claimed by them with costs throughout on the defendants.

Decree reversed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 59 OF 1914.

December 16, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Napier

GOPAMMAL—RESPONDENT No. 1—APPELLANT

versus

V. SREENIVASA IYENGAR AND ANOTHER—RESPONDENTS.

Guardians and Wards Act (VIII of 1890), s. 34, 47—Order fixing amount of maintenance etc. of ward, whether appealable—Statute, interpretation of.

No appeal lies from an order under section 34 of the Guardians and Wards Act fixing the amount to be applied for the maintenance, education and advancement of the ward and of the persons depending on him.

Where the Legislature has specifically omitted a certain section in providing for appeals, a High Court cannot allow an appeal from that section by giving a wide effect to the general words in an another section or because appeals have been allowed from certain minor matters.

Appeal from an order of the District Court of Ramnad at Madura, in Original Petition No. 437 of 1912, dated 19th January 1914.

Mr. *J. L. Rosario*, for the Appellant.

Messrs. *T. Rangachariar*, *C. S. Venkatachariar* and *P. S. Vaidhiasatha Iyer*, for the Respondents.

JUDGMENT.—Adequate reason has not been shown for dissent from the lower Court's appointment of Mr. V. Sreenivasa Iyengar as the guardian of the property of the ward.

On the memorandum of objections taking objection to the amount which has been directed to be applied for the maintenance, education and advancement of the ward and of the persons dependent on him under section 34 of the Act, a preliminary point is taken that the Act gives no right of appeal. It is clear that section 47, under which appeals lie, does not provide specifically for an appeal. But it is contended that these directions, although given under section 34, are given under powers vested in the Court by section 32 of the Act; and that as orders under section 32 are by section 47 (*f*) appealable, this Court has power to hear this memorandum of objections. In our opinion, this contention is not sound. Section 47, in providing for appeals, specifies the sections from which an appeal shall lie in order and it is clear that the Legislature must have examined each section for the

purpose of deciding whether an appeal shall lie. The omission of section 34 must, therefore, be intentional. And we cannot accept the proposition that, where the Legislature has specifically omitted a certain section in providing for appeals, we can, by giving a wide effect to the general words in another section, allow such an appeal. The words in section 32 are certainly wide. They are: "The Court may, from time to time, by order define, restrict or extend the powers of a guardian of the property of a ward," and if section 34 was not in the Act it might fairly be argued that an order may be made as to the amount to be applied for maintenance and education under the provisions of this section. But we are satisfied that where there is a specific section empowering the Court to give certain directions, we cannot look to the general words in any other section to find the powers. It is pointed out that under section 47 (*i*) there is an appeal from orders and directions passed under section 43; and it is argued that those orders "regulating the conduct or proceedings of a guardian" relate to very minor matters and yet an appeal is allowed; and that, therefore, the Legislature must have intended to allow an appeal in matters under section 34 (*c*). The answer to that is, that that is purely a matter for the Legislature. If the Legislature, with knowledge of what provisions are contained in the sections, provides for appeals from certain sections, we cannot, because it is arguable that an appeal is allowed in certain minor matters, assume that the Legislature intended that an appeal should lie in matters of great importance where it is not specifically provided.

Both the appeal and the memorandum of objections will be dismissed with costs. The respondents' costs in the appeal will be paid out of the estate.

Appeal dismissed.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 117 OF 1914.

November 25, 1914.

Present:—Justice Sir George Knox, KT.

PAHLAD DAS AND OTHERS—PLAINTIFFS—APPLICANTS

versus

THE COLLECTOR OF JAUNPUR AS MANAGER OF COURT OF WARDS AND OTHERS—DEFENDANTS—OPPOSITE PARTY.

Amendment of decree—Mistake as to costs—Pleader's fee—Arithmetical or clerical error—Revision.

Where in the preparation of a decree two sets of Pleader's fee were erroneously charged instead of one, and an application for amendment made nearly after a year was refused.

Held, that the High Court could not interfere in revision, as it was very doubtful whether the error could properly be considered either as a clerical or an arithmetical mistake.

Civil revision against the decision of the Subordinate Judge of Benares, dated 7th February 1914.

Mr. *Kailas Nath Katju*, for the Applicants.

Mr. *H. A. Ryves* (with him Mr. *Jang Bahadur Lal* and Mr. *Kalindi Prasad*), for the Opposite Party.

JUDGMENT.—Pahlad Das, the plaintiff, had brought two suits in the Court of the Subordinate Judge of Benares. Another suit had been brought by Babu Girdhar Das. To all three suits the Collector of Jaunpur and certain other persons were made defendants. By consent of parties the suit which was fully heard out was Suit No. 90 of 1910 in which Babu Girdhar Das was plaintiff. Full judgment was recorded in that case by the Subordinate Judge of Benares, and in Suit No. 92 of 1910 he recorded the only order: "For the reasons given in my judgment in Suit No. 90 of 1910 the suit is dismissed with costs. The other issues need not be tried." I am told by the learned Vakil for the applicant that the concluding words of this judgment refer to additional issues which were raised in this case only and not in the other two cases. This decision was passed on the 23rd of September 1911. A decree was prepared and apparently no objection was taken to the minutes of the decree when they were drawn up as required by Order XX, rule 21, of

the Code of Civil Procedure.* It is contended that into the decree thus prepared an error got in, namely, that in the schedule of costs drawn up two sets of Pleader's fees were charged, when only one set should have been charged if the rules prescribed by this Court for the guidance of subordinate Civil Courts in this matter had been followed. The special rules referred to by the learned Vakil for the applicant are rules 30 and 31 in Chapter XXI of the General Rules (Civil) of 19 1.* It was not until the 17th of August 1912, or nearly a year after, that the applicant discovered what he considered to be an error and went to the Subordinate Judge of Benares and asked him to correct the decree and amend it by substituting only one set of Pleader's fees instead of two sets. The Subordinate Judge refused to amend the decree. The reasons he gives are that the record before him did not show whether the defendants in Suit No. 92 had succeeded on a joint defence or on separate defences. He held that it was the duty of the applicant to send for the record or to file a copy of the judgment in the case, namely, the judgment in Suit No. 80. He was not satisfied from what was before him that there was anything wrong about the decree and he refused the application to amend. It is contended before me that there is a manifest error in the decree. The defendants had on a joint and common defence succeeded and were entitled in law as provided in the judgment, only to one set of costs. This being so, the lower Court acted illegally and with material irregularity in refusing to amend the decree so as to bring it in accordance with the judgment. In support of his contention the learned Vakil referred me to the case of *Baijnath Prosad Singh* v. *Sham Sunder*

*RULES FRAMED BY THE HIGH COURT OF JUDICATURE N.-W. P., UNDER SECTION 122 OF THE CIVIL PROCEDURE CODE, ACT V OF 1908

ORDER XX, RULE 21.

(1) Every decree and order as defined in section 2, other than a decree or order of a Court of Small Causes or of a Court in the exercise of the jurisdiction of a Court of Small Causes, shall be drawn up in the Court vernacular. As soon as such decree or order has been drawn up, and before it is signed, the *munsarim* shall cause a notice to be posted on the notice board stating that the decree or order has been drawn up, and that any party or the Pleader of any party may, within six working days from the date of such notice, peruse the draft decree or order and may sign it, or may file with the *munsarim* an objection to it on the ground that there is in the judgment a verbal error or some accidental defect not affecting a material part of the case, or that such decree or order is at variance with the judgment or contains some clerical or arithmetical error. Such objection shall state clearly what is the error, defect, or variance alleged, and shall be signed and dated by the person making it.

(2) If any such objection be filed on or before the date specified in the notice, the *munsarim* shall enter the case in the earliest weekly list practicable, and shall, on the date fixed, put up the objection together with the record before the Judge who pronounced the judgment, or, if such Judge has ceased to be the Judge of the Court, before the Judge then presiding.

(3) If no objection has been filed on or before the date specified in the notice, or if an objection has been filed and disallowed, the *munsarim* shall date the decree as of the day on which the judgment was pronounced and shall lay it before the Judge for signature in accordance with the provisions of rules 7 and 8.

(4) If an objection has been duly filed and has been allowed, the correction or alteration directed by the Judge shall be made. Every such correction or alteration in the judgment shall be made by the Judge in his own handwriting. A decree amended in accordance with the correction or alteration directed by the Judge shall be drawn up and the *munsarim* shall date the decree as of the day on which the judgment was pronounced and shall lay it before the Judge for signature in accordance with the provisions of rules 7 and 8.

(5) When the Judge signs the decree he shall make an autograph note stating the date on which the decree was signed.

*GENERAL RULES (CIVIL) OF 1911 FOR CIVIL COURTS SUBORDINATE TO THE HIGH COURT OF JUDICATURE FOR THE N.-W. P.

Chapter XXI, rule 30—If several defendants, who have a joint or common interest, succeed upon a joint defence, or upon separate defences substantially the same, not more than one fee shall be allowed, unless the Courts shall otherwise order for a reason which shall be recorded in the judgment. If only one fee be allowed, the Court shall direct to which of the defendants it shall be paid, or shall apportion it among the several defendants in such manner as the Court shall think fit.

Rule 31—If several defendants, who have separate interests, set up separate or distinct defences and succeed thereon, a fee for one legal practitioner for each of the defendants who shall appear by a separate legal practitioner may be allowed in respect of his separate interest. Such fee, if allowed, shall be calculated with reference to the value of the separate interest of such defendant in the manner hereinbefore prescribed.

Kuer (1), also the case of *Sankuratri Timmayya* v. *Sri Rajah Uppalapati Venkatavijaya Gopalaraju Bahadur Zemindar Garu* (2), which is to be found in Indian Cases Volume 24, page 878. In the latter case the error put forward for correction was a patent arithmetical error in the calculation of Vakil's fees. The Calcutta case is more on all fours with the case before me, and there is no doubt that the learned Judges of the Calcutta High Court did act in revision and did calculate the fees on a different scale from that which the Court below had given. I was also referred to the case of *Sheo Balak Pathak* v. *Sukhdei* (3), in which the orders given were that a clerical error should be amended throughout the record beginning with the plaint down to the decree. Apparently the error had run through the whole case. So far as I know Order XX, rule 21, is not to be found in the rules made under the Civil Procedure Code either by the Calcutta or the Madras High Court. It may be so but it has not been pointed out to me. It is a rule which is now part of the procedure enjoined by law. So far as the subordinate Courts are concerned Order XX, rule 21, gives a special and particular mode of procedure when a decree has been drawn up by which the accuracy of the decree may, as far as possible, be ensured. As I have already pointed out, the Pleader connected with the case did not follow the rules there laid down, but has now come in very nearly a year after he got the decree and asks that that decree may be amended. I am not in favour of exercising the powers of revision even if I have them in this direction. I am also very doubtful whether the present error can properly be considered either as a clerical or an arithmetical mistake. I decline to grant the application and I dismiss it. I make no order as to costs.

Application dismissed.

(1) 22 Ind. Cas. 402; 41 C. 687; 18 C. L. J. 643.
(2) 24 Ind. Cas. 878.
(3) 23 Ind. Cas. 344; 12 A. L. J. 185.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL MISCELLANEOUS APPEAL No. 8 OF 1912.

September 10, 1914.

Present:—Mr. Fawcett, J. C., and Mr. Crouch, A. J. C.

USTO SAHEBDINO *walad* RATO—PLAINTIFF—APPELLANT

versus

GHULAM KADIR AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XVII, rr. 2, 3, O. IX, r. 9—Dismissal of suit for non-appearance at adjourned hearing—Application for restoration—Sufficient cause.

The Civil Procedure Code clearly intends that the parties should be in readiness to proceed on the dates of the hearing and that if they do not, their cases must suffer unless there was "sufficient cause" for their non-appearance or default.

Therefore, if a plaintiff does not want his case to go on and absents himself deliberately, he does so at his risk.

Where a case was originally fixed for the 6th September 1911 but the hearing was adjourned to the 11th October, and some of the plaintiff's witnesses were served and were even present on that date but because some important witnesses were not present, the plaintiff through a Pleader applied for an adjournment, which was refused, whereupon the Pleader withdrew saying he had no instructions, and the Court dismissed the suit:

Held, (*i*) that the order dismissing the suit fell under rule 2 and not rule 3 of Order XVII of the Civil Procedure Code;

(*ii*) that the plaintiff did not shown that there was "sufficient cause" for his non-appearance within the meaning of Order IX, rule 9.

Per *Fawcett, J. C.*—It is not within the province of a Court to disregard the strict letter of the law and to grant an application for the restoration of the suit on the ground that it discloses a just and reasonable cause even though "sufficient cause" is not shown.

Appeal against the order of the Joint Judge, Sukkur-Larkana.

Mr. *Kimatrai Bhojraj*, for the Appellant.

Mr. *Lalchand Hassomal*, for the Respondents.

JUDGMENT.

FAWCETT, J. C.—On the point of law raised in this appeal, I am of opinion that the order of the District Judge dismissing the plaintiff's suit must be held to fall under rule 2, and not rule 3, of Order XVII of the Civil Procedure Code. The main distinction between those rules is that the former rule applies to hearings adjourned at the instance of the Court, while the latter applies to hearings adjourned at the instance of a party

to whom time has been allowed to do some act to further the progress of the suit, but who has defaulted, *cf.* case of *Enatulla* v. *Jiban Mohan Roy* [*Reajuddin Basunia* v. *Jiban Mohan Roy* (1)]. The hearing of the suit in this case had been adjourned to 11th October 1911 by the Court, and not at the instance of any party to whom time was specially granted. As also no evidence had been adduced in the suit, there were no materials on the record for the Court to proceed to decide the suit under rule 3, so that that rule cannot apply under the view taken in *Mariammisa* v. *Ram Kalpa* (2), which has been approved in the case of *Fakir Mahomed* v. *Viran* (3). I think, therefore, that the application for restoration of the suit under Order IX, rule 9, lay to the District Court.

The District Judge has, however, also held that if Order IX, rule 9, applies, there are not sufficient reasons to grant the application. In this view I think he is entirely right. The case had been specially fixed for the first taking of evidence on the 11th October 1911. Some of plaintiff's witnesses had been served and were present, but because some important witnesses were not present, plaintiff through a Pleader applied for an adjournment, which was refused, the Judge saying the case should proceed with the witnesses present. In my opinion this was the proper order to pass in the case. Thereupon plaintiff's Pleader withdrew saying he had no instructions, and the Court thereupon dismissed the suit. It is admitted also that plaintiff not only took no steps to secure the attendance of his Hyderabad Pleader, but actually wrote to him on the 10th October not to come, as the case would be postponed. It is impossible, in the circumstances, to hold that there was "sufficient cause" for plaintiff's non-appearance within the meaning of Order IX, rule 9, Civil Procedure Code.

But then it is argued that even if sufficient cause is not shown, the application may be made on any other ground and in that case the Court may restore the suit, if the application discloses a just and reasonable cause for restoring the suit. This position is no doubt accepted in the cases of *Samayya* v. *Subbamma* (4), *Gopal Row* v. *Maria Susaya* (5) and *Lalta Parsad* v. *Ram Karan* (6). But, with due deference, I would most strongly dissent from this view, which infringes the ordinary principle of construction, *expressio unius est exclusio alterius* and the ruling of the Privy Council that "the essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction." See *Gokul Mandar* v. *Padmanund Singh* (7). This view has also, as pointed out by the District Judge, been dissented from in *Esmail* v. *Haji Jan Mahomed* (8) and other cases.

There may be some cases where section 151 of the Civil Procedure Code can be appealed to, though the case does not come within Order IX, rule 9. But the present is certainly not such a case. The plaintiff's absence in person or by Pleader was deliberate, because he did not want the case to go on, and if he chose to take this course he did so at his own risk, *cf.* *Munilal* v. *Gulam Hussin* (9). It is certainly not "necessary for the ends of justice" that, in spite of this, the suit should be restored to the file. The Code, in my opinion, clearly intends that parties should be in readiness to proceed on the dates of hearing, and that if they do not, their cases must suffer, as provided in Order IX or Order XVII, rule 3, unless there was "sufficient cause" for their non-appearance or default.

There is too much tendency on the part of litigants to think they are entitled to a postponement at their pleasure, and when a plaintiff who has witnesses present refuses to go on with the case though a postponement is refused, he has no claim to indulgence. To take the contrary view, even if appellant pays up all costs throughout up-to-date, would be to encourage litigants in the not uncommon belief that they can force a postponement on the Court.

(1) 23 Ind. Cas. 769; 18 C. W. N. 775; 19 C. L. J. 535; 41 C. 956.
(2) 34 C 235; 5 C L. J. 260.
(3) 6 Ind. Cas 851, 3 S. L. R 208 at p 215.
(4) 26 M. 599.
(5) 30 M. 274; 17 M. L. J. 225.
(6) 14 Ind. Cas. 187; 34 A. 426; 9 A. L. J. 666.
(7) 29 C 707 at p. 715; 4 Bom. L. R. 793; 6 C. W. N 825, 29 I. A. 196 (P. C.).
(8) 10 Bom. L. R. 904.
(9) 13 B. 12.

The fact that there are *pardanishin* ladies, who were co-plaintiffs with plaintiff Hasso, makes no difference. They entrusted the conduct of the suit to him, and are bound by his action. In my opinion the District Judge rightly refused the application under Order IX, rule 9, and I would dismiss the appeal with costs.

CROUCH, A. J. C.—The order passed by the Court in this case was :—

"Plaintiffs and their Pleaders are absent. Defendants are present as shown above. Suit dismissed."

Now, the case had, originally, been fixed for the 6th September 1911, but the hearing had been adjourned to the 11th October, and it was on the latter date that the above order was passed.

Under Order XVII, rule 2, when at an adjourned hearing the parties or any of them fail to appear, the Court may proceed under Order IX, rule 8, and that rule states that "where the defendant appears and the plaintiff does not appear when the suit is called for hearing, the Court shall make an order that the suit be dismissed."

Prima facie the Court passed orders in this case under Order XVII, rule 2, and Order IX, rule 8.

Under Order XVII, rule 3, where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith.

Now, the foundation of the Court's jurisdiction under this rule is the failure of a party to produce evidence, etc., while the foundation for an order under rule 2 is the failure of a party to appear. As the order contains no reference whatever to the failure of plaintiff to do any of the things mentioned in rule 3, but does state, in perfectly clear terms, the facts which justify an order under rule 2, we are entitled to presume that the Court intended to pass an order under rule 2, and not under rule 3.

A Court, acting under rule 3, "proceeds to decide the suit forthwith," that is to say, the Court, instead of proceeding to hearing arguments and examination of witnesses under Order XVIII, may at once give judgment under Order XX, on such materials as are before it. And, when judgment is given, the Court must proceed in due form under Order XX, rules 4 and 5. To decide a suit is to give a concise statement of the case, the points for determination, and the decision thereon. There was no attempt in this case to give a decision; the Court did not even purport to give a decision.

As the Court had recorded that both plaintiffs and their Pleaders were absent, that is, had consented to treat them both as absent, it is, in my opinion, concluded from asserting that the order passed was not an *ex parte* order, and I would hold that the order was passed under rule 2 of Order XVII.

But I consider that plaintiffs have failed to show that they were prevented by sufficient cause from not appearing at the adjourned hearing. One of the plaintiffs and a duly authorised Pleader were, in fact, in the Court premises, and knew that the suit had been called on. The Pleader should have appeared and have asked for a postponement, and, on its being refused, should have done his best with the materials available; apparently some witnesses were present. If, after disposing of all evidence available, the Court had refused to grant an adjournment for taking the evidence of the important witnesses, who could not attend the Court for unavoidable reasons, relief would possibly have been obtained from this Court, but there is nothing on the record to lead us to infer that the lower Court would have unreasonably refused an adjournment, had the Pleader representing the plaintiffs appeared and done all that he could under the circumstances.

The appeal is, therefore, dismissed with costs.

Appeal dismissed

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1671 OF 1914.

January 19, 1915.

Present:—Mr. Justice Shah Din

AHMAD AND OTHERS—DEFENDANTS—APPELLANTS

versus

SULTAN—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), s. 14—One suit for pre-emption of several properties sold on different occasions to separate vendees—Plaint restricted to one—Subsequent institution of other suits after time.

Where several portions of a property have been sold to separate vendees on different occasions, but the pre-emptor in good faith sues all the vendees jointly and the suit is restricted to only one of the sales, section 14 of the Indian Limitation Act IX of 1908 applies in computing the period of limitation for the other suits subsequently instituted in respect of the sales of rest of the property.

Second appeal from the order of the Additional Divisional Judge, Mianwali, dated the 17th March 1914, reversing that of the Munsif, second Class, Mianwali, dated the 12th November 1913, dismissing the claim.

Mr. *Brij Lal*, for the Appellants.

Mr. *Nand Lal*, for the Respondent.

JUDGMENT.—This appeal and Civil Appeal No. 1672 of 1914 are connected and both will be disposed of in one judgment. The facts are fully stated in the Additional Divisional Judge's order of remand, dated the 17th March 1914, and the sole question for decision in these appeals is whether the suits for pre-emption brought by the plaintiff-respondent against the defendants-appellants concerned in the two appeals were within limitation or not. As pointed out by the Additional Divisional Judge, the suit which the plaintiff had brought in the first instance against the three vendees jointly and which comprised the whole land sold by the vendor by the three different unregistered sale-deeds, dated the 5th of August 1911, was instituted within limitation. The Court of first instance held that the three separate sales in favour of the three separate vendees had furnished the plaintiff with three distinct causes of action and that he should have brought three separate suits against the three vendees. Accordingly the one suit brought by the plaintiff was restricted to one of the three sales, and he filed two separate plaints subsequently, each embodying a claim in respect of the subject-matter of each of the two remaining sales. These plaints were, however, filed after the period of limitation had expired. I entirely agree with the Divisional Judge that section 14, Explanation III, of the Indian Limitation Act fully applies to the facts of this case, and that under that section the two suits brought by the plaintiff subsequently must be held to have been brought within time. The appeals fail and are dismissed with costs.

Appeals dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 948 OF 1910.

September 14, 1914.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Hayward.

ANTAJI VASUDEV KELKAR —DEFENDANT—APPELLANT

versus

VINAYAK KESHAV BHISE AND OTHERS —PLAINTIFFS—RESPONDENTS.

Pensions Act (XXIII of 1871), s 6—Suit relating to grant of land revenue—Certificate of Collector—Procedure, where certificate not obtained.

A suit relating to a definite share in an *inam*, which consists in the enjoyment by the *inamdars* of 1rds of the revenue of a certain village, is a suit relating to a grant of land revenue and cannot be taken cognizance of without a certificate from the Collector under the Pensions Act.

Antaji v. Kashinath, 6 Bom. L. R. 423; distinguished.

Where the plaintiff has not obtained a certificate, the hearing of the appeal may be adjourned to enable him to procure the certificate.

Sardar Ganpat Rao Moharkar v. Sardar Anand Rao, Baji Sahib, 5 Ind Cas. 689; 12 Bom. L. R. 267 at p. 278; 14 C. W. N. 310; 7 M. L. T. 53; 7 A. L. J. 165; 11 C. L. J. 281 (P. C.); 20 M. L. J. 164; 32 A. 148; 37 I. A. 39; followed.

Second appeal from the decision of the first Class Subordinate Judge, Thana, in Appeal No. 87 of 1909, confirming the decree passed by the second Class Subordinate Judge at Mahad, in Civil Suit No. 574 of 1908.

Messrs. *B. A. Khare* and *J. R. Gharpure*, for the Appellant.

Mr. *W. B. Pradhan*, for the Respondents.

JUDGMENT.—The questions which have been argued in this appeal are questions raised by the defendant-appellant. He contends, *first*, that the plaintiff's claim is barred by limitation; *secondly*, that it is

barred by the law of *res judicata*; and, *thirdly*, that the suit cannot be taken cognizance of by the Court unless a certificate under section 6 of the Pensions Act is produced. We have heard arguments upon all these points.

The first question which logically arises is, whether the objection under the Pensions Act is good or not. We are of opinion that it is a good objection. The suit relates to a definite share in an *inam*, which consisted in the enjoyment by the *inamdars* of 2/3rds of the revenue of a certain village. The plaintiff contended that he was entitled to the portion of the revenue in dispute between him and the defendant. The defendant contended that he was entitled, for various reasons, to receive that portion of the revenue from Government as a transferee of the *inam* rights, either by the purchase at the Court sale or by acquisition through adverse possession. It is not, therefore, a suit in which one who is admittedly the grantee of the Government revenue at the time of the institution of the suit, sues to recover from an inferior holder the amount of the revenue payable in respect of his holding, and it does not, therefore, fall under the exception provided by section 9 of the Pensions Act. In our opinion it is a suit relating to a grant of land revenue. Therefore, it should not be entertained or taken cognizance of without a certificate from the Collector that the case may be tried. It has, however, been contended that in relation to a similar suit against the same defendant regarding the *inam* it was held by a Bench of this Court that section 9, and not sections 6 and 4, of the Pensions Act were applicable.

There, however, were certain admissions from which the Court concluded that it was in effect a suit by an acknowledged grantee of the land revenue against his *khatedar* as an inferior holder, and, therefore, fell within the provisions of section 9.

We cannot, having regard to the pleadings and contentions of the parties in this suit, take the same view of this case. Therefore, we cannot follow the decision in *Antaji* v. *Kashinath* (1).

(1) 6 Bom. L. R. 423.

The case has been tried by the lower Courts on the assumption that no certificate is necessary, and, as already observed, the substantial points in the case have been argued in this Court before the question arising under the Pensions Act was taken up. Under the circumstances we think we should follow the procedure which was adopted in *Ganpat Rao* v. *Ananda Rao* (2), a procedure which was not disapproved of by the Privy Council in the final appeal in that case. The High Court there allowed the hearing of the appeal to be adjourned in order to enable the respondent to procure a certificate, and so avoid the necessity of disposing of the technical question raised in regard to it: *Sardar Ganpat Rao Moharkar* v. *Sardar Anand Rao Baji Sahib* (3).

Although we have come to a definite conclusion upon the other points which have been argued, we do not think that we ought, in view of the words of sections 4 and 6 of the Pensions Act, to express our opinion upon those questions before receiving a certificate from the Collector that the case may be tried. We, therefore, adjourn the case for three months in order that the plaintiff may produce to this Court a certificate from the Collector under section 6 of the Pensions Act.

(2) 28 A. 104; A. W. N. (1905) 206.
(3) 5 Ind. Cas. 689; 12 Bom. L. R. 267 at p. 273; 14 C. W. N. 310, 7 M. L. T. 53, 7 A. L. J. 165, 11 C. L. J. 281 (P. C.); 20 M. L. J. 164; 32 A. 148; 37 I. A. 39.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREES NOS. 950 AND 1153 OF 1912.

January 7, 1915.

Present:—Mr. Justice Holmwood and Mr. Justice Mullick.

M. G. MALACHI—PLAINTIFF—APPELLANT

versus

AHALAD MAHATO AND OTHERS—DEFENDANTS—RESPONDENTS.

Putni, *purchaser of—Merger—New tenancy, creation of—Transferee, right of—Bengal Rent Act (X of 1859)—Khudkasht right, nature of, before and after the passing of Act X of 1859.*

MALACHI *v.* AHALAD MAHATO.

A purchaser under the Putni Regulation (VIII of 1819) is entitled to eject tenants from their holdings when they have no protected right.

There is no merger where the purchaser possesses the land as a third person wholly distinct from the *putnidars*, although he happens to be the son of one of them.

The purchaser cannot obtain the original holding before the *patni* was created, though he is in possession of the same holding.

Chandrabati Koeri v. *Harrington*, 18 C. 349 (P.C.); 18 I. A. 27, referred to and followed.

The effect of a transfer of such a holding with the consent of the landlord under Act X of 1859 can only be that the original tenant is considered to have relinquished the holding altogether and that a new tenancy is created in the transferee.

After the enactment of Act X of 1859 the original *khudkasht raiyats* continued to hold the same rights as they held before, but the *khudkasht* right ceased to exist as a right that can be acquired after the passing of the Act.

Appeal against the decrees of the District Judge of Manbhum, in Title Appeal No. 165 of 1911, dated the 23rd January 1912, affirming that of the Munsif, first Court, Purulia, in Suit No. 1287 of 1910, dated the 14th of June 1911.

Dr. *D. N. Mitter*, Babus *N. N. Banerjee* and *B. N. Mitter*, for the Appellant

Babu *Satya Charan Sinha*, for Babu *Sarat Chandra Roy Chowdhury* and Babu *Govinda Chandra Chakravarti*, for the Respondents.

JUDGMENT.—These two appeals arise out of suits brought by the plaintiff to eject certain defendants from their holdings, on the grounds that he is the purchaser under the Putni Regulation VIII of 1819, and that they have no protected rights. The cases appear to have been based upon quite different circumstances and pleadings, and the learned Munsif tried them separately and passed separate judgments. Reading the judgment of the Court of Appeal below which professes to deal with both the cases in one judgment, we are unable to find that he has directed his attention to Suit No. 1288 at all. His judgment seems to apply exclusively to Suit No. 1287 out of which Appeal No. 950 arises.

As far as Appeal No. 950 is concerned two points have been raised in appeal, one that the purchase of Shibram can only have resulted in the merger of the *jote* with the *putni*, and the other that there being no transfer of a right of occupancy under Act X of 1859, Shibram cannot be considered to be holding the same tenancy which Khusal held before the creation of the *putni* and that his is a new tenancy created after the *putni* and is, therefore, in no way protected. On the findings of fact of the learned Judge in the Court below we cannot hold that there was any merger. He finds that Shibram purchased and possessed the land as a third person wholly distinct from the *putnidars*, although he happened to be the son of one of them. But as regards the question of his now being in possession of the same holding as Khusal had before the *putni* was created, we are of opinion that in view of the Privy Council decision in *Chandrabati Koeri* v. *Harrington* (1) it is impossible to hold that Shibram obtained the original holding of Khusal. The effect of a transfer of such a holding with the consent of the landlord under Act X of 1859 of can only be that the original tenant is considered to have relinquished the holding altogether and that a new tenancy is created in the transferee.

It has been argued before us by the learned Vakil for the respondent that Khusal was a *khudkasht raiyat* and that his *khudkasht* right may have been transferable; but this position does not seem to be tenable. After the enactment of Act X of 1859 the original *khudkasht raiyats* no doubt continued to hold the same rights as they held before, but the *khudkasht* right ceased to exist as a right that can be acquired after the passing of the Act.

We are, therefore, of opinion that Appeal No. 950 must be allowed and the judgments and decrees of both the lower Courts set aside and the plaintiff's suit decreed with costs in all Courts.

With regard to Appeal No. 1153 the case is different. There the Munsif decided that as far as the rights of Kanta Mahato were concerned there was no doubt that his tenancy was created after the *putni* and it was admitted that the defendant took a fresh settlement and did not step into the shoes of Kanta Mahato. But the learned Munsif said that the plaintiff's case must fail by reason of the fact that two separate holdings belonging to Khusal and Kanta have been mixed

(1) 18 C. 349 (P. C.); 18 I. A. 27.

together in the plaint, and he found the description of these lands in one joint boundary was a fatal defect. This question has not been touched upon by the learned Judge in the Court below at all, and the parties are entitled to a decision from him upon the matter.

It is clear as far as Khusal is concerned that if any of the land in suit belongs to him, he being Khusal's *raiyat* cannot be ejected. But there does not *prima facie* seem to be any reason why the transferee from Kanta should not be ejected. But it is not clear whether the Munsif means that Khusal is now in actual occupation of a part of this holding, or whether the defendant is a transferee from Khusal. If he is a transferee from Khusal, then the same principle would apply to him as we have laid down in Appeal No. 950. The learned Judge must consider this objection and come to a decision whether the suit is bad for this reason or not. The case is, therefore, remanded to the lower Court and costs will abide the result.

Appeal No. 950 *allowed*;
Appeal No. 1153 *remanded.*

MADRAS HIGH COURT.
SECOND CIVIL APPEAL No. 711 OF 1913.
December 2, 1914.
Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Hannay.
VENKATARAMANACHARI—PLAINTIFF—APPELLANT
versus
THIRUNARANACHARI AND OTHERS—DEFENDANTS—RESPONDENTS.

Construction of document—Mortgage executed by mother of minor for her husband's debt—Minor, liability of—Mortgagee having only incorporeal right, whether dispossessed by denial of such right—Adverse possession—Incorporeal right, whether can be adversely possessed.

Where a mortgage-deed executed by the mother of a minor mentions that the mortgage is made in order to discharge her husband's debts and also contains a reference to the property being in the enjoyment of herself and her minor son after her husband's death:

Held, that the mortgage-deed can be fairly construed to be one executed by the mother on behalf of her son.

Where a mortgagee has only an incorporeal right and is not entitled to possession of the mortgaged properties, the mortgagor's denial of the mortgagee's right cannot make him get possession of the incorporeal right nor can such incorporeal right be possessed adversely by the mortgagor by a mere denial.

Second appeal against the decree of the District Court of South Arcot, in Appeal Suit No. 199 of 1912, preferred against that of the Additional District Munsif of Villupuram, in Original Suit No. 104 of 1911.

FACTS.—In this case the plaintiff sued to recover from the representatives-in-interest of the original mortgagor a sum of money due on the footing of a mortgage executed in his deceased father's favour by the mother of the original mortgagor. The defendants contended *inter alia* that the present suit was barred by the principle of *res judicata* under section 11, Civil Procedure Code, and also by Order II, rule 2, Civil Procedure Code, by reason of two previous suits filed by the present plaintiff's father against the mother of the minor mortgagor in the first instance and afterwards against the minor mortgagor himself in the circumstances fully set out in the judgment of the High Court. They also contended that the mortgage bond, which was executed by the mother of the mortgagor without describing herself as the guardian of her minor son, was ineffectual to create a valid mortgage as against the minor's property. Both the lower Courts dismissed the plaintiff's suit, the lower Appellate Court holding that though the bond was executed by the mother in her own name, yet she intended to do so on behalf of her minor son for a debt binding on the minor, but that the suit was barred under Order II, rule 2, Civil Procedure Code, by reason of the first of the two suits above referred to.

Mr. *L. S. Viraraghava Iyer*, for the Appellant:—Order II, rule 2, has no application to this case as the parties are not identical, *Ramaswami Ayyar* v. *Vythinatha Ayyar* (1) (per Bhashyam Iyengar, J.)

Mr. *B. Narasimha Rao*, for the Respondent, while admitting that he could not support the judgment of the lower Appellate Court on the ground on which it was rested, contended that he was entitled to support it on other grounds, and argued that in the first place the finding of the lower Appellate Court that the mother executed the mortgage bond on behalf of her minor son was absolutely unsupported by evidence; secondly that the present suit was barred under section 11 of the Civil Procedure Code; and lastly that the mortgagor having been in possession of the property for over 12 years after the termination of the second of the above suits, in which the plaintiff's right to proceed against the property was negatived, he must be deemed to have acquired the mortgagee's interest by adverse possession and that the mortgage was extinguished by merger.

JUDGMENT.

SADASIVA AIYAR, J.—The plaintiff is the appellant. The plaintiff's claim as finally put forward is for the recovery of Rs. 1,100 due on a hypothecation bond of 25th June 1878 executed to the plaintiff's father by one Narasammal, who was on the date of that document the guardian and protector of her minor son, Venkataramanachari. Venkataramanachari sold the lands to his sister's husband (the 1st defendant) in 1900, the defendants Nos. 2 and 3 being the 1st defendant's sons. The suit was brought in August 1910 within the two years allowed by section 31 of the new Limitation Act.

The learned District Munsif in an exhaustive judgment dismissed the suit on the following ground. Narasammal did not purport to execute the document, Exhibit A, as guardian of her minor son to whom the mortgaged property belonged. Hence her mortgage document of 1878 was not binding on her minor son and, therefore, it is not binding on the vendee from her son, namely, the first defendant. (The sale by the son was made after he became a major).

On appeal, the learned District Judge held that having regard to the recitals in Exhibit A and to the nature of the transaction and to the fact that Exhibit A was executed by Narasammal with the intention of binding her husband's estate on behalf of her minor son in a legal manner, she must be deemed to have executed the document as guardian and manager of his property and hence it was binding upon the minor; he thus differed from the view of the learned District Munsif on this point. But he held that the plaintiff's father having brought a suit, Original Suit No. 355 of 1883, for certain reliefs against Narasammal on this same bond of 1878 and having omitted in that suit to pray for a relief against Narasammal's son's interest in the hypothecated property, the plaintiff's present suit is barred under Order II, rule 2 (old section 43), of the Civil Procedure Code. On this ground, therefore, he confirmed the District Munsif's decree dismissing the plaintiff's suit. We think that the learned District Judge's view that the present suit is barred by Order II, rule 2, cannot be supported. The cause of action on which Original Suit No. 353 of 1883 was based was one directed against Narasammal in her personal capacity and it was not a suit directed against her son and his interest in the mortgaged properties. In a subsequent suit, Original Suit No. 242 of 1886 brought by the plaintiff's father against Narasammal's son, it was decided by the District Court on appeal that the decree in the suit, Original Suit No. 355 of 1883, must be deemed to have been passed against Narasammal in her personal capacity and against any interest which she had in the mortgaged property, such interest being found to be *nil*. The present suit, however, is against the interest of her son, Venkataramanachari, in the mortgaged properties, the 1st defendant, who purchased from Venkataramanachari, being now the owner of such interest. As Sir V. Bhashyam Aiyangar, J., said in the case of *Dampanaboyina Gangi* v. *Addala Ramaswami* (2): "This clearly shows that the cause of action is not an abstraction, something independent of the defendant, but that the plaint should disclose

(1) 26 M. 760; 13 M. L. J. 448.

(2) 23 M. 736 at p. 740; 12 M. L. J. 103.

a cause of action against the defendant. And section 43 only provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action and that if a plaintiff omit to sue in respect of any portion of his claim arising from the cause of action for the enforcement of which the suit is brought, he shall not afterwards sue in respect of the portion so omitted." In the light of these observations, it is clear that the cause of action against Narasammal on which Original Suit No. 355 of 1883 was brought having been conclusively (as between the plaintiff and 1st defendant's vendor) decided in Original Suit No. 242 of 1886 to be only a cause of action directed against Narasammal personally and against her interest, if any, in the mortgaged property, the present suit based on a cause of action directed against her son's interest in the mortgaged property and against the purchaser from her son is not the same cause of action as that on which Original Suit No. 355 of 1883 was brought and hence Order II, rule 2, cannot be a bar. In fact Mr. Narasimha Rao, the learned Counsel for the respondent, did not argue that the present suit was barred under Order II, rule 2. But Mr. Narasimha Rao attempted to support the dismissal of the plaintiff's suit on several grounds decided against him by the lower Courts, which, of course he was entitled to do. He contended that this suit was barred by *res judicata* by reason of the decision in Original Suit No. 242 of 1886. To understand this plea of *res judicata*, it is necessary to give some details of that suit. The plaintiff's father having obtained an *ex parte* decree against Narasammal and her interest in the mortgaged property in Original Suit No. 355 of 1883, attached the said property (according to the old and mistaken and unnecessary procedure followed by Mofussil Vakils) in order to bring it to sale in execution of his mortgage decree. Then Venkataramanachari, Narasammal's minor son, through a guardian, put on a claim petition on the ground that his mother (the judgment-debtor) had no interest in the mortgaged property which was attached in execution. His claim was allowed. Thereupon the plaintiff's father brought the suit, Original Suit No. 242 of 1886 (within one year of the order in favour of the minor son, Venkataramanachari) for establishing his right to bring the property to sale in execution of the decree in the suit of 1883. The District Munsif decreed the plaintiff's father's suit, taking the view that Narasaimmal incurred the debt for the benefit of her minor son, that the decree debt in Original Suit No. 355 of 1883 was binding upon that son and that, therefore, the property including the son's interest could be brought to sale in execution of that decree. On appeal, the District Judge took the view that though the debt was incurred by Narasammal for her son's benefit, as she did not purport to execute the bond as her son's guardian and as the decree was passed against her alone without making her minor son a party, the plaintiff's father could not bring the property to sale in execution of the decree passed against the mother. He, therefore, dismissed that suit (Original Suit No. 242 of 1886). Mr. Narasimha Rao argued that that decision, which held that the minor son's interest in the property could not be brought to sale for the mortgage debt incurred by Narasammal, is *res judicata* in this suit. But I am of opinion that the District Judge in this case has given a sufficient answer to this contention. In the words of the learned District Judge, the only point raised in that suit (Original Suit No. 242 of 1883) was whether the decree obtained in Original Suit No. 355 of 1883 was a decree which could be executed against Narasammal's son and his property. The question whether a suit could be brought upon that mortgage bond against Narasammal's son and his interest in that property and whether a decree could be obtained in such a suit against Narasammal's son's interest in the property, was not put in issue in that Suit No. 242 of 1886 and was not decided by the Appellate judgment in that suit.

Mr. Narasimha Rao next contended that the lower Appellate Court was wrong in its view that the document, Exhibit A, executed by Narasammal could be treated as a document executed by her in her capacity as guardian of her minor son; on the true construction of Exhibit A, having read the document more than once carefully, I agree with the learned District Judge that it could be fairly construed, without any violence to the ordinarily accepted rules of construction, as one executed by her on behalf of her minor son. In *Murari* v. *Tayana* (3), the mother

(3) 20 B. 286.

of a minor sold the property of her minor son to pay off her husband's debts. No reference whatever was made in the sale-deed to the existence of the minor son. Not only that, she said in the deed that she sold whatever interest she had in the property. And yet it was held that as she purported to sell the land itself and said that she sold the land to pay off her husband's debts, her intention was to use her authority as her minor son's guardian to sell the land in order to pay off her husband's debts, and that when she thus had the full authority and also the intention to so sell, her act effectually conveyed the property of her son, notwithstanding that it was not correctly described as property belonging to her son. In the present case the mortgage-deed, Exhibit A, executed by Narasammal not only mentions that the mortgage was made in order to discharge her husband's debts, but it also contains a reference to the property being in the enjoyment of herself and her minor son after her husband's death. A liberal interpretation of such documents is justified by the observations of the Privy Council in *Hurooman Persaud Panday* v. *Musammat Babooee Munraj Koonweree* (4) and by the opinion of Sir Barnes Peacock, C. J., in *Judoonath Chuckerbutty* v. *James Tweedie* (5).

Mr. Narasimha Rao finally argued that Narasammal's son's guardian having set up in 1886 in the suit, Original Suit No. 243 of 1886, that the mortgage executed by his mother did not affect his interest in the mortgaged property, there was a sort of adverse possession of the mortgagee's interest under Exhibit A, held by Narasammal's son from that date and that the mortgagee thereby lost his rights in the mortgaged property by adverse possession for twelve years in Narasammal's son and his alienees. I have found it somewhat difficult to understand this ingenious argument. The mortgagee had only an incorporeal right and he was not entitled to possession of the mortgaged property. How the mortgagor's denial of the mortgagee's right could make the mortgagor get possession of the incorporeal right of the mortgagee, or how such incorporeal right, which did not carry with it the right to physical possession of the mortgaged property and did not carry with it in favour of the mortgagee any right to get the rents or profits of the mortgaged property, could be possessed adversely by a mere denial of such incorporeal right, I am unable to see [See also the judgment in *Lakshminarayana Aiyar* v. *Ulagammal* (6) in which a similar contention as to adverse possession of an incorporeal right was negatived by us and which judgment was pronounced to-day].

In the result, in reversal of the decrees of the lower Courts, I am inclined to give the plaintiff a decree for the sum of Rs. 1,100 claimed as due under Exhibit A on the date of suit, with interest on the principal sum of Rs. 200 at 1¼ per cent. per mensem from the date of suit till the expiry of three months from this day and with other provisions usual in preliminary mortgage decrees mentioned in Order XXXIII, rule 4, Civil Procedure Code. Interest shall cease to run on the Rs. 200 after the expiry of the three months. Under the circumstances we order the parties to bear their respective costs throughout.

HANNAY, J.—I concur.

Appeal allowed.

(4) 6 M. I. A. 393, at pp. 411, 412; 18 W. R. 81; Sevestre 253 n.; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 9 E. R. 147.

(5) 11 W. R. 20.

(6) 26 Ind. Cas. 528; 28 M. L. J. 256.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 34 OF 1912.

October 12, 1914.

Present:—Mr. Crouch, A. J. C., and Mr. Fawcett, A. J. C.

BHERUMAL TECKCHAND AND OTHERS—PLAINTIFFS—APPELLANTS

versus

DUHLANOMAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 100—Second appeal—Mixed question of law and fact.

The pleas of limitation or estoppel involving questions of fact which are not admitted or undisputed cannot be taken for the first time in appeal.

Per *Crouch, A. J. C.*—It is improper for a Court of Appeal to raise a fresh issue of fact and to proceed to decide it on such evidence which chances to be on record.

Second appeal against the decree of the Assistant Judge, Hyderabad.

Mr. *Isardas Oodharam*, for the Appellants.

Mr. *Rupchand Bilaram*, for the Respondents.

JUDGMENT.

CROUCH, A. J. C.—The facts of this case are fully set out in the judgments of the two lower Courts.

Appellants in their memorandum of appeal attack the judgment of the lower Appellate Court on three grounds only :—

I. That the Court erred in holding that defendants could object to the validity of the award after the three years allowed by Article 91 of the Limitation Act.

II. That the Court erred in refusing to try a fresh issue: "Has the award been acted on ? If so, what is the result?"

III. That the Court erred in its findings in the first issue so far as they were in favour of defendant, Duhlanomal, and should not have entertained objections which were not specially raised in the written statement.

Now the first point was not raised at all in the original Court. Nor was the question of limitation mentioned in the memorandum of appeal filed in the lower Court ; but that Court permitted the following issue to be raised and discussed—"Can defendants be permitted to raise these objections more than three years after the award?" and, treating the issue as a purely legal one, found on it in the affirmative. But under Article 91, the three years runs not from the date of the award, but from the time when the facts entitling the plaintiff to have the instrument cancelled or set aside became known to him.

Respondents have had no opportunity to show when the facts on which they relied became known to them, for the question of limitation had not been raised when evidence was being led and it is impossible for this Court to decide a mixed question of law and fact without any facts being on the record.

Whether or not the award has been acted on is obviously a question of fact and the lower Court had discretion to refuse to raise it. Mr. Isardas contends that there is ample evidence on record, consisting of defendants' own admissions, on which to come to a finding; but it would be wholly improper for a Court of Appeal to raise a fresh issue of fact and to proceed to decide it on evidence which chanced to be on record.

It was suggested that the case might be remanded for further evidence, but there is no formal application that this be done and there are no special circumstances, which in our opinion make this extraordinary course necessary in the interests of justice.

The third point raised deals with questions of fact exclusively. There was plenty of evidence on record on which the Court could reasonably come to the conclusion that the arbitrators had been guilty of misconduct.

The appeal is dismissed with costs.

FAWCETT, A. J. C.—I concur. If the plaintiff wanted to rely on the pleas of limitation and estoppel urged in the lower Appellate Court and this Court, he should have raised them at any rate at the time of framing issues; and as they involve questions of fact which are not admitted or undisputed, they cannot, in my opinion, be allowed to be taken for the first time in appeal. It is not a case where the alleged bars to respondents' objection to the award arise on the face of the proceedings, but where they necessitate further inquiry, and the rule applicable is that approved by the Privy Council in *Macnaghten* v. *Mahabir Pershad Singh* (1) as explained in the case of *Ahsanulla Khan* v. *Haricharn Mozumdar* (2).

In this Court appellant raised a further point which is not even contained in his memorandum of appeal, *viz.* that by the terms of the reference the respondents were precluded from disputing the validity of the award : but this plea also should have been raised in the Court of first instance and respondents would be unduly prejudiced by allowing it to be raised at this late stage.

Appeal dismissed.

(1) 9 C. 656 (P. C.); 11 C. L. R. 494; 10 I. A. 23; 7 Ind. Jur 164, 4 Sar. P. C. J. 417; 4 Shome L. R. 285.

(2) 20 C. 86 at p 92, 19 I. A. 191.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 44 OF 1912-13 OF SULTANPUR DISTRICT.

August 28, 1913.

Present:—Sir Duncan Colvin Baillie, S. M., and Mr. Tweedy, J. M.

JAGDAMBA SINGH—PLAINTIFF—APPELLANT

versus

Raja BHAGWAN BAKHSH SINGH—DEFENDANT—RESPONDENT.

Occupancy rights, claim for—Claimant's relative under-proprietor, effect of—Ejectment case—Statutory tenant, status superior to that of, claimed—Inquiry to be complete.

Where a co-sharer in a holding has got a decree for under-proprietary rights, no occupancy rights shall be claimed in that holding; but a person can claim occupancy rights even though his relatives may have got under-proprietary rights in the village.

Ejectment cases in which rights superior to those of statutory tenants are claimed, should not be adjudicated upon without a complete inquiry being made.

Appeal from the decree of the Officiating Commissioner, Fyzabad, dated 22nd October 1912, upholding that of the Assistant Collector, Sultanpur, dated 15th April 1912.

Syed *Ali Mohammad*, for the Appellant.

Babu *Rudra Dat Singh*, for the Respondent.

JUDGMENT.

BAILLIE, S. M. (*August 8th*, 1913.)—Appellant contests a notice of ejectment on the ground that he has rights superior to those of a statutory tenant. In one paragraph of his plaint he alleged that his relatives have obtained decrees for *sir*. In the last paragraph he himself claims occupancy rights. The Court of first instance found that it had been proved that plaintiff's ancestors were *zemindars* of the village in question and that his kinsmen had obtained under-proprietary rights during Settlement proceedings. He found it, however, not proved that appellant had possession in this land in 1866 and on that ground upheld the notice. The Commissioner called for a report as to whether appellant had occupancy rights. The reply was to the effect that appellant had proved possession of certain numbers in 1866. The question whether his ancestors had been *zemindars* in this village within the thirty years before annexation obviously remained unenquired into because of the finding of the Court of first instance on this subject. The Commissioner dismissed the appeal of the appellant, (1) on the ground that it had not been proved that the appellant's ancestors had been *zemindars* of the village and (2) on the ground that collaterals of the appellant had got decrees for under-proprietary rights. This latter finding is justified by no consideration of reason or law that I can imagine. The law provides that when a co-sharer in the holding has got a decree for under-proprietary rights, no occupancy rights shall be claimable in that holding, but it does not provide, and could not possibly provide, that because a relative of appellant had got under-proprietary rights appellant can have no rights at all. It cannot be permitted that cases of so vital importance to persons claiming rights superior to those of statutory tenants should be adjudicated upon without a complete inquiry being made and I consider it necessary, therefore, that the case be again returned for inquiry:—

(1) Whether the predecessors-in-interest of the appellant were proprietors in this village before annexation.

(2) At what date did they lose their proprietary rights?

(3) Is there anything to distinguish the case of the appellant from that of the persons in whose favour decrees for *sir* were given at Settlement?

Appellant will be allowed to produce evidence of his relationship to the persons who have already obtained decrees.

TWEEDY, J. M.—I concur.

Issues remitted.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 99 OF 1914.

October 2, 1914.

Present:—Mr. Stanyon, A. J. C.

MURLIDHAR—DEFENDANT—APPELLANT

versus

MULU—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 29—

MURLIDHAR *v.* MULU.

Growing crops, whether moveable property—Wrongful attachment—Suit for damages.

The Law of Limitation must be strictly interpreted and applied. That is to say, no right or remedy is to be regarded as barred unless it is clearly shown to be shut out by the enactment.

Growing crops until severed from the soil are immoveable property within the meaning of the Limitation Act; the attachment of such crops is not a seizure of moveable property for the purposes of Article 29 of the Act and a suit for damages arising out of such seizure is not governed by that Article.

Pandah Gazi v. *Jennaddi*, 4 C. 665; 2 C. L. R. 526; 3 Ind. Jur 515; 2 Shome L. R 28; *Surat Lall* v. *Unar Haji*, 22 C. 877 at pp. 883, 887, 888, *Mangun Jha* v *Dolhin Golab Koer*, 25 C. 692; 2 C W. N. 285; *Hari Charan* v. *Hari Kar*, 32 C. 459, 9 C W. N. 376 and *Jadu Nath* v. *Hari Kar*, 1 Ind. Cas. 788; 36 C. 141; 9 C. L. J. 109; 12 C. W. N. 1090, followed.

Damaraju v. *Thadinada*, 31 M. 431; 4 M. L. T. 271; 18 M. L. J. 500, distinguished.

Appeal against the decree of the District Judge, Saugor, dated the 28th November 1913, modifying that of the Subordinate Judge, Saugor, dated the 29th August 1913.

Dr. *H. S. Gour*, for the Appellant.

Mr. *A. Bhagwant*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for damages for a wrongful attachment of growing crops. The attachment was effected on the 9th March 1912: it was raised on the 4th July 1912: and the suit for damages was filed on the 2nd May 1913. The Courts below have concurred in holding that the suit is not time-barred, and the first Court gave the plaintiff a decree for Rs. 426, which the lower Appellate Court reduced to Rs. 350 with an appropriate order as to costs. The defendant has made this second appeal on the single ground that growing crops being defined as moveable property in section 2, clause 13, of the Code of Civil Procedure, 1908, the wrongful attachment of them was a "wrongful seizure of moveable property under legal process" for the purposes of Article 29 of the Limitation Schedule, 1908, and the suit, having been brought more than one year after the date of the seizure, is barred by time.

At the first glance this argument appears to be unanswerable. An attachment of growing crops in execution of a decree is undoubtedly a seizure of property under legal process. For all the purposes of the Code it is undoubtedly an attachment of moveable property, and any execution-sale of such crops would have to be conducted in accordance with the provisions of the Code for the sale of moveable property. It is at least a plausible argument that since the Civil Procedure Code and the Limitation Act appertain to the same branch of law, *viz.*, the Adjective Law, the Legislature must be deemed to have employed the words 'moveable property' to convey the same meaning in both enactments. Indeed, if there was nothing else to assist interpretation, this argument would prevail. But, as the law stands, the contention is demonstrably unsound.

It is a settled principle that the Law of Limitation must be strictly interpreted and applied. That is to say, no right or remedy is to be regarded as barred, unless it is clearly shown to be shut out by the enactment. Therefore, Article 29 of the Limitation Schedule, which the appellant seeks to apply in this case, will only be applied where the property illegally seized under legal process is beyond all doubt and dispute such property as is regarded as moveable, not for attachment under the Civil Procedure Code, but for computing limitation under the Limitation Act. That Act itself contains no definition of the term 'moveable property.' Therefore its definition is governed by section 3, clause (34), read with clause (25), of the General Clauses Act, 1897. These imperative provisions exclude any interpretation by analogy from the Civil Procedure Code, the Transfer of Property Act, or any other enactment. Growing crops are undoubtedly "things attached to the earth." They come, therefore, within the definition of immoveable property, and, *ipso facto*, are excluded from the definition of moveable property for the purposes of all Acts of the Governor-General in Council—and the Limitation Act is one such enactment—which do not contain anything repugnant thereto in the subject or context. The Indian Limitation Act, Bill No. 1 of 1908, proposed to define 'moveable property' as including growing crops, in accordance with the amendment in the Civil Procedure Code, 1908, but the definition was objected to and the Select Committee omitted it.

Growing crops, until severed from the soil, have consistently been held by the Calcutta High Court to be immoveable property within the meaning of the Limitation Act: *Panda'i Gari* v. *Jennuddi* (1), *Surat Lall* v. *Umar Haji* (2) where five earlier cases are cited, *Mangun Jha* v. *Dolhin Golab Koer* (3), *Hari Charan* v. *Hari Kar* (4) and *Jadu Nath* v. *Hari Kar* (5). The same view was taken by this Court in *Khem Balaram* v. *Narhar Ganesh* (6), and I do not think that the peculiar case of *Murtazakhan* v. *Gajraj Singh* (7) in any way contradicts that view. I can find nothing to help the appellant in the perfectly correct *dicta* in *Nagoba* v. *Madholala* (8). Stress was laid on *Damaraju* v. *Thadinada* (9), but the relevancy of that case is not apparent, because there was no attachment of any standing crop, but of some paddy which had apparently become moveable before attachment.

For the reasons given, I am of opinion that the attachment of the crop in execution of a decree, while such crop was still standing, was not a seizure of moveable property within the meaning of Article 29 of the Limitation Schedule, and that this suit for damages, arising as a result of such seizure, is not governed by that Article, or by any other Article of that Schedule requiring the institution of the suit within one year of the seizure. It is not necessary to decide whether Article 36 applies to the trespass on the standing crop, or any other Article applies to injury caused by negligence or misappropriation subsequent to the reaping of the crop. In any view, the suit is within time. This appeal is, therefore, dismissed with costs.

Appeal dismissed.

(1) 4 C. 665, 2 C. L. R. 526; 3 Ind. Jur. 515; 2 Shome L. R. 28.
(2) 22 C. 877 at pp 883, 887, 888.
(3) 25 C. 602, 2 C. W. N. 265.
(4) 32 C. 459; 9 C. W. N. 376.
(5) 1 Ind. Cas. 788, 36 C. 141; 9 C. L. J. 109; 12 C. W. N. 1090.
(6) Ref. No 51, dated 29th August 1882, Dig. C. R. Part I, 20.
(7) 14 C. P. L. R. 89.
(8) 4 N. L. R. 40.
(9) 31 M. 431; 4 M. L. T. 271; 18 M. L. J. 590.

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 76 TO 85 OF 1913.

January 6, 1915.

Present:—Mr. Justice Sadasiva Aiyar.

G. NARAYANASWAMI NAIDU, RECEIVER, NIDADAVOLE AND MEDUR ESTATES, ELLORE—PLAINTIFF—PETITIONER

versus

BALIJEPALLI SUNDARARAMIAH AND OTHERS—DEFENDANTS—RESPONDENTS.

Madras Proprietary Estates Village Service Act (II of 1894), s. 18—Madras Rent Recovery Act (VIII of 1865), s. 37—Kattubadi amounts, rate of interest payable on arrears of, whether 6 per cent. or 12 per cent.—Interpretation of Statute—One Act repealed and another enacted—Applicability of provisions of old and new Acts—Madras General Clauses Act (I of 1891), s. 18—Madras Estates Land Act (I of 1908), s. 61—Custom, if can be proved by a single witness—Contract Act (IX of 1872), s. 73, applicability of.

The rate of interest payable on arrears of *kattubadi* amounts is only 6 per cent. and not 12 per cent.

Section 18 of Madras Proprietary Estates Village Service Act, II of 1894, only extends the *procedure* enacted in section 37 of the Madras Act VIII of 1865 (Rent Recovery Act) to proceedings for the recovery of arrears of *kattubadi*. The substantial provision declaring the rate of interest claimable on arrears of rent has not been extended to arrears of *kattubadi*.

Gopisetti Narainsawmi Naidu v. *Tallapraju Venkatasubrayudu*, 9 Ind Cas 642; (1911) 2 M. W. N. 233; 9 M. L. T. 315, dissented from

In construing section 18 of Madras Act II of 1894, in respect of arrears of *kattubadi* which fell due after the repeal of Madras Act VIII of 1865, reference must, under section 18 of Madras General Clauses Act, I of 1891, be made to the corresponding provision of the Madras Estates Land Act, I of 1908, *viz*, section 61.

A recognised and enforceable custom cannot be proved by the evidence of a single witness as to the practice.

Quære:—Whether section 73 of the Indian Contract Act applied to the case?

Kamalammal v. *Peeru Meera Levvai Brothers*, 20 M. 481; 7 M. L. J. 263, referred to.

Petitions, under section 25 of Act IX of 1887, praying the High Court to revise the decrees of the Court of the District Munsif of Tanuku, in Small Cause Suits Nos. 1146, 1148, 1193, 1197, 1198, 1166, 1165, 1167, 1261 and 1263 of 1912, respectively.

FACTS.—The suits were for the recovery of arrears of *kattubadi* amounts. The plaintiff claimed interest on arrears at 12 per cent. per annum. The District Munsif awarded only 6 per cent. The plaintiff, thereupon, preferred these civil revision petitions to the High Court.

Mr. *M. Purushotham Naidu*, for the Peti.

tioner:—The arrears of *kattubadi* being recoverable as if they were arrears of rent, under Madras Act VIII of 1865 (section 18, Madras Act II of 1894), the interest payable on such arrears is 12 per cent. *Vide* section 37 of Madras Act VIII of 1865.

Mr. *P. Somasundaram*, for the Respondents:—It is only the procedure laid down in Madras Act VIII of 1865 that has been extended to proceedings under Act II of 1894. The substantial provisions of the former Act have not been extended to the proceedings under the latter Act. In any event, Madras Act VIII of 1865 was repealed before the arrears claimed fell due, and under section 18 of the Madras General Clauses Act, I of 1891, only the 6 per cent. allowed by section 61 of the Madras Estates Land Act, I of 1908, can now be awarded.

JUDGMENT.—This and the nine connected civil revision petitions have been filed by the plaintiff, because the plaintiff was allowed interest on *kattubadi* amounts due for *Fasli* 1319 and subsequent *Faslis* at the rate of only 6 per cent. per annum and not at the rate of 12 per cent.

Plaintiff contends that because section 18 of Act II of 1894 empowered the *zemindar* to "recover quit rent, etc." as if it were an arrear of rent under Act VIII of 1865 and because section 37 of Act VIII of 1865 provides for interest at the rate of 12 per cent. being payable on arrears of rent, therefore, *kattubadi* amounts also carried 12 per cent. interest.

In the first place, I agree with the learned District Munsif that it was only the procedure enacted in Act VIII of 1865 for recovery of rent which was extended to proceedings taken for recovery of *kattubadi* and that the substantial provision declaring the rate of interest claimable on arrears of rent was not extended to arrears of *kattubadi*. The petitioner's learned Vakil quoted *Gopisetti Narainsawmi Naidu* v. *Tallamraju Venkatasubrayudu* (1) in support of his view that the provision in Act VIII of 1865 about the rate of interest also attached to *kattubadi* arrears by the strength of section 18 of Act II of 1894. With the greatest respect to the learned Judge who decided that case, I differ.

(1) 9 Ind. Cas. 642; 9 M. L. T. 315; (1911) 2 M. W. N. 237.

Even if that provision of the Rent Recovery Act did apply to *kattubadi* arrears, that Act had been repealed before the arrears in question fell due and under section 18 of the Madras General Clauses Act, I of 1891, the corresponding provision of the Estates Land Act must be referred to in construing section 18 of Act II of 1894. If so, the 6 per cent. interest allowed by the Munsif is correct (section 63 of the Estates Land Act).

It is doubtful whether the Munsif was right in applying section 73 of the Contract Act, having regard to the decision in *Kamalammal* v. *Peeru Meera Levvai Rowthen* (2).

The question of custom was not put in issue and a mere practice of collecting interest spoken to by one of the witnesses cannot prove a recognised and enforceable custom.

The petitions are dismissed. (Civil Revision Petition No. 80 of 1913 with costs).

Petitions dismissed.

(2) 20 M. 481; 7 M. L. J. 268.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 230 OF 1913.

November 11, 1914.

Present:—Mr. Lindsay, J. C.

RAM SARUP AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

BINDESHURI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), s. 17—Title, fresh, not conferred by document—Document declaring antecedent title by way of inheritance—Mutation proceedings—Compromise-deed, unregistered, filed in mutation case, whether enforceable.

Section 17 of the Registration Act, which renders compulsory the registration of certain documents, is aimed at those documents which operate by themselves to confer a fresh title, and not at those in which no new interest is created but simply a declaration is made as to an antecedent title of certain persons by way of inheritance.

Hence, where certain persons claim mutation by right of inheritance as heirs to the deceased and eventually a compromise is arrived at between them, under which they agree as to the respective shares of the deceased's property to be allotted to each of them, the deed of compromise does not amount to a transfer from one of them to the other, but merely to

declaration by them that each of them has a right by way of inheritance and that by virtue of that right they are entitled to be put in possession of the said shares, and the agreement is binding upon them and enforceable as such, even though unregistered.

Khunni Lal v. *Gobind Krishna Narain*, 10 Ind. Cas. 477; 15 C. W. N. 545 (P. C.), 8 A. L. J. 552; 13 Bom. L. R. 427; 13 C. L. J. 575; 10 M. L. T. 25; 21 M. L. J. 645; (1911) 2 M.W. N. 432, 33 A. 356; 38 I. A. 87; *Dilipat Singh* v. *Kanshi Nath*, 24 Ind. Cas. 542; 17 O. C. 108; and *Lalla Oudh Behares Lall* v. *Ranee Mewa Koonwar*, 3 Agra H. C. R. 82, referred to.

Appeal from the decree of the Subordinate Judge, Partabgarh, dated 15th March 1913, modifying that of the Munsif, Partabgarh, dated 28th June 1913.

Mr. *Mohammad Wasim*, holding brief of Pandit *Gokaran Nath Misra*, for the Appellants.

Babu *Ram Chandra*, for the Respondents.

JUDGMENT.—Both these appeals are connected and may be disposed of by one judgment. The learned Counsel, who appears for the appellants, has admitted that if his Appeal No. 230 fails this will involve the dismissal of Appeal No. 231 also. The property in dispute in these cases belonged at one time to a man named Behari, who is said to have died more than 20 years ago, leaving a widow *Musammat* Surja. Surja died in the year 1903 and at the time of her decease there were living three collateral relatives of her deceased husband. Two of these, Ram Sarup and Ram Autar, are the appellants in these cases. They are nephews of Behari. The respondent Bindeshuri in Appeal No. 230 is a grand-nephew of Behari, being the grandson of Behari's brother, Durga. The property belonging to Behari consisted of some lands held under a perpetual lease and some under-proprietary tenure and certain groves. When Surja died in the year 1903, an application was made in the Revenue Court by the two nephews and the grand-nephew of Behari claiming that they were in possession of Behari's property by right of inheritance. There appears to have been some dispute between the parties, but that dispute was put an end to by a petition of compromise dated the 26th of August 1903. This was admittedly presented to the Revenue Court and mutation was effected in accordance with its terms. Since August 1903 the parties have been in possession according to the terms of the compromise and have been dealing with the property in various ways. Briefly put, the claim which Ram Sarup and and Ram Autar are trying to advance in the suits out of which these appeals have arisen, is that this compromise of the 26th of August 1903 is not binding upon them, that they were nearer heirs of Behari's at the time when the succession opened on the death of *Musammat* Surja, and that Bindeshuri had no right to any share in the property. They, therefore, claim to recover a one half share in the property left by Behari which is now in possession of Bindeshuri or of certain persons to whom Bindeshuri has made transfers. The principal question for consideration is the effect which ought to be given to the compromise which has been referred to above. It is quite true, as the learned Counsel for the appellants has argued, that this document is not registered and could not by itself operate to create any fresh title. It is also admitted that the order of the Revenue Court given in mutation proceedings could not operate to transfer the property from one of the parties to the other. But the learned Counsel for the respondents claims that this settlement ought to be supported on the ground that it is what is known as a family settlement or arrangement. Transactions of this nature are by no means uncommon and effect has been given to them by Courts of the highest authority. In this connection I need only refer to a ruling of their Lordships of the Privy Council reported in *Khunni Lal* v. *Gobind Krishna Narain* (1). This ruling was followed in a judgment of my own which is reported in *Dilipat Singh* v. *Kanshi Nath* (2). The principle upon which arrangements of this kind have been upheld by Courts is that they do not create or confer any fresh title. They are in the nature of agreements by which an antecedent title in the parties is acknowledged and defined. To quote the words of the judgment in *Lalla Oudh Behares Lall* v. *Ranee Mewa Koonwer* (3), "The true character of the transaction appears to us to have been a

(1) 10 Ind. Cas. 477; 33 A. 356; 15 C. W. N. 545 (P. C.); 8 A. L. J. 552; 13 Bom. L. R. 427; 13 C. L. J. 575; 10 M. L. T. 25; 21 M. L. J. 645; (1911) 2 M. W. N. 432, 38 I. A. 87.

(2) 24 Ind. Cas. 542; 17 O. C. 108.

(3) 3 Agra H. C. R. 82.

settlement between the several members of the family of their disputes, each one relinquishing all claim in respect of all property in dispute other than that falling to his share, and recognising the right of the others, as they had previously asserted it to the portion allotted to them respectively. It was in this light, rather than as conferring a new distinct title on each other that the parties themselves seem to have regarded the arrangement, and we think that it is the duty of the Court to uphold and give full effect to such an arrangement."

To turn now to this petition of compromise, dated the 26th August of 1903, it recites that the parties have come to terms and have agreed that the land which had been in possession of *Musammat* Sur'a, the widow of Behari, should be recorded half in the names of two brothers Ram Sarup and Ram Autar and the other half in the name of Bindeshuri. It was stated distinctly in this petition that Ram Autar, Bindeshuri and Ram Sarup were the heirs of *Musammat* Surja's, meaning of course that they were heirs of Surja's deceased husband. It was further stated clearly that mutation was to be made in favour of these parties by right of inheritance. The question then is, what interpretation should be put upon the arrangement which is evidenced by this document? The parties to it were the only persons interested in the property left by Behari. They were the only possible claimants and the contest between them in the Revenue Court was clearly one in which each side was asserting a right by way of inheritance. This deed is a declaration by the parties that each of them has a right by way of inheritance and that by virtue of that right they are entitled to be put in possesion in equal shares of the property left by Behari. The Court was asked to recognise the title of inheritance in Bindeshuri and it was on that footing that the entry in the Revenue Records was made. It cannot be said, I think, that this document in any way amounts to a transfer from one of these contesting parties to the other. It is I think merely an acknowledgment agreed to by both parties that both of them had a previous title as heirs of Surja's husband. Section 17 of the Registration Act, which renders compulsory the registration of certain documents, is aimed at those documents which operate by themselves to confer a fresh title. I do not think this section should be applied to a document of the present kind in which no new interest is created in favour of one or other of the parties. All that we have is a declaration that the parties have an antecedent title by way of inheritance. The property, therefore, came to them in virtue of that admitted right of inheritance and it cannot be said that their title to the property rests upon this petition of compromise dated the 26th of August 1903. For these reasons and following the principle laid down by their Lordships of the Privy Council reported in *Khunni Lal* v. *Gobind Krishna Narain* (1), I am of opinion that the lower Court was right in deciding that this arrangement, which is evidenced by the document of the 26th of August 1903, should be upheld. The result, therefore, is that Appeal No. 230 fails and is dismissed with costs.

I have already mentioned that the learned Counsel admitted that the dismissal of this appeal involves the dismissal of Appeal No. 231 also. The order, therefore, is that Appeal No. 231 be also dismissed with costs.

Appeals dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 121 OF 1913.

April 29, 1914.

Present:—Mr. Hallifax, A. J. C.

CHANDAN SINGH—DEFENDANT—APPELLANT

versus

FAKIRGIR—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 52, applicability of—Partition proceedings—Subsequent agricultural lease void.

Section 52 of the Transfer of Property Act applies to an agricultural lease as well as to partition proceedings when they are contentious.

Narain Patil v. *Abdul Majid Khan*, 15 C. P. L. R. 6; and *Dhiraj Singh* v. *Dina Nath*, 8 Ind. Cas. 288, 6 N. L. R. 140, followed.

Khan Ali v. *Pestonji Edulji Gaydar*, 1 C. W. N. 62, distinguished.

An agricultural lease granted during the pendency of partition proceedings which are contentious in

CHANDAN SIGNH *v.* FAKIRGIR.

their origin and nature is void, even though summons had not been served on the opposite party at the time of the grant.

Krishna Kamini Debi v. *Dino Moni Chowdhurani*, 31 C 658, distinguished.

Fayaz Husain Khan v *Prag Narain*, 29 A. 339 (P. C.); 11 C W N 561, 4 A L. J. 341; 5 C. L J. 563, 17 M. L. J. 263, 9 Bom. L. R 656; 2 M. L T. 191; 10 C. C. 314; 34 I. A. 102, followed.

Appeal against the decree of the Divisional Judge, Nerbudda Division, dated the 4th November 1912, confirming that of the District Judge, Chhindwara, dated the 15th May 1912.

Messrs. *M. B. Dadabhoy*, *R. B. Gadgil* and *Atmaram Bhagwant*, for the Appellant.

Messrs. *V. Bose* and *J. C. Ghosh*, for the Respondent.

JUDGMENT.—One Chhuttan Singh is the *lambardar* of the village in which the fields in dispute are situated, and he and his son Ude Singh own a half share in it. The other half share belongs to the plaintiffs, Fakirgir and his brother Umedgir. On the 23rd of March 1901 these plaintiffs presented an application to the Deputy Commissioner for a partition of their share by metes and bounds. The other two co-owners of the village resisted the application in every possible way. In particular, they asserted that they had a right to remain in possession of the whole of the *sir* and the whole of the *khudkasht*, in which the fields now in dispute were included, on account of their undisturbed separate possession of them for 25 or 30 years. They managed to drag the proceedings on for ten years, so that there can be no doubt about their having been in every way contentious. Eventually a partition was made and the fields in suit fell in the *patti* allotted to he plaintiffs as their *khudkasht*. But when they attempted to take possession, they were resisted by the defendant Chandan Singh, son-in-law of Ude Singh, who said he had been made an ordinary tenant by a written lease executed in his favour by Chhuttan Singh on the 4th of May 1901. The plaintiffs, therefore, sued to eject him.

The finding in the Court of the District Judge in regard to the lease is that "a *bona fide* lease of *khudkasht* lands is no doubt within the powers of the village *lambardar*, but the lease in question is not of that nature." In appeal the learned Divisional Judge wrote: "The learned District Judge has given valid reasons for holding that this was a mischievous (*sic*) lease in favour of Ude Singh's own son-in-law in order that plaintiff might not be able to get *khas* possession of *khudkasht* lands allotted to his share at partition. I concur in the finding and the reasons therefor." If these findings had been clear and full statements of what they seem to mean, there would have been an end of the case. Both Courts would seem to have arrived at a finding that no real lease was ever given to the defendant at all, that the *lambardar* merely executed a deed in his favour and got his name entered as tenant of the land, but never intended to make him a tenant and never did in fact do so. Unfortunately there is no definite expression of such a finding in either judgment. If this very simple issue of fact had been worked out to an end, that would have probably given us a final and satisfactory decision of the whole case.

The Courts below have, however, preferred to examine the issues of law, and have decided that the lease is void under both section 52 and section 53 of the Transfer of Property Act. The defendant now urges in appeal:

(*i*) that section 52 does not apply to an agricultural lease;

(*ii*) that it does not apply to partition proceedings;

(*iii*) that in any case it does not apply to a transfer completed before the transferor was served with notice of the institution of the proceedings;

(*iv*) that section 53 does not apply to the case, because the consideration for the lease has not been shown to be inadequate.

The first two points must be decided against the appellant on the authority of the rulings of this Court in *Narain Patel* v. *Abdul Majid Khan* (1), and *Dhiraj Singh* v. *Dina Nath* (2). In support of the second, the appellant relies on the Calcutta case of *Khan Ali* v. *Pestonji Edulji Guydar* (3). There the section was held not to

(1) 15 C. P. L. R. 6.
(2) 8 Ind. Cas. 288; 6 N. L. R. 140.
(3) 1 C. W. N. 62.

apply because the partition proceedings in question were not contentious. This distinction was drawn in *Narain Patel* v. *Abdul Majid Khan* (1) already quoted, and by the Calcutta Court itself in *Jogendra Chunder Ghose* v. *Fulkumari Dasi* (4). Apart, however, from judicial authority, I cannot see how either contention could stand for a moment in view of the plain words of section 52 of the Transfer of Property Act.

The third contention is also concluded by the authority of the Privy Council in *Faiyaz Husain Khan* v. *Prag Narain* (5) in these words: "Their Lordships are unable to agree in the view which seems to have obtained in India that a suit contentious in its origin and nature is not contentious within the meaning of section 52 of the Act of 1882 until a summons is served on the opposite party. There seems to be no warrant for that view in the Act, and it certainly would lead to very inconvenient results in a country where evasion of service is probably not unknown or a matter of any great difficulty." In the case of *Krishna Kamini Debi* v. *Dino Moni Chowdhurani* (6) cited by the appellant, the proceedings were not contentious in their origin and nature, but only became so after the transfer which it was sought to set aside under section 52.

Proof that the transfer was gratuitous or for a grossly inadequate consideration is merely one of the two grounds on which it may be presumed, without further evidence, that the transfer was of the kind declared voidable by section 53 of the Transfer of Property Act. That of course does not exclude proof of the same matter by entirely different evidence not including either of the points mentioned in the rule of evidence attached to section 53. As a matter of fact we have one of those two points in this case, that the effect of the transfer was to defraud and defeat the co-owners. We have further the facts that the lease was to Ude Singh's son-in-law, that it was made shortly after the institution of the proceedings in which the *lambardar* pleaded that the plaintiffs had no right to partition at all, that it was of *khudkasht* land which the *lambardar* himself pleaded had been *khudkasht* for more than a quarter of a century. These facts furnish quite sufficient ground for the finding of fact at which both the Courts below have arrived that the transfer was made with the intent mentioned in section 53, or, as they have put it, was not *bona fide*. The fact that Chhuttan Singh was *lambardar* and, therefore, presumably the agent of the proprietary body in all matters of this sort is not, in this case, any evidence to the contrary, because he himself demolished the presumption that he acted as agent for the plaintiffs in granting this lease, by his plea in the partition proceedings that the land was his own separate *khudkasht* in which the plaintiffs had no right to a share.

The appeal is, therefore, dismissed and the appellant is ordered to pay all the costs in all three Courts.

Appeal dismissed.

(4) 27 C. 77.
(5) 29 A. 339 (P. C.); 11 C. W. N. 561; 4 A. L. J. 44; 5 C. L. J. 563; 17 M. L. J. 263; 9 Bom. L. R. 356; 2 M. L. T. 191; 10 C. C. 314; 34 I. A. 102.
(6) 31 C. 658.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION APPLICATION No. 50 OF 1912.

October 12, 1914.

Present:—Mr. Crouch, A. J. C., and Mr. Fawcett, A. J. C.

Munshi SHIVANDAS—DEFENDANT—APPLICANT

versus

PAMANMAL MANGHARAM—PLAINTIFF—OPPONENT

Civil Procedure Code (Act V of 1908), O. XVII, r. 1—Application for adjournment—Discretion of Court, object of—Party deliberately neglecting, effect of.

It is purely a matter of discretion for the Court to grant an adjournment in any particular case. The discretion should be exercised judicially and reasonably and is not subject to any definite rules.

The main purpose for which a Judge is given a discretion under Order XVII, rule 1, is to enable him to prevent a party improperly delaying proceedings and abusing the process of the Court with that object.

If a party deliberately neglects to summon all his witnesses and those cited do not appear, he has only himself to blame if the Court regards this as an indication that the intention is to prevent the case proceeding on the day fixed.

Civil revision application against an order of the District Judge, Hyderabad.

SHIVANDAS v. PAMANMAL MANGHARAM.

Mr. *G. A. Kikla*, for the Applicant.

JUDGMENT.—The applicant in this case was defendant in an application under Schedule II, rule 20, Civil Procedure Code, to file an award made out of Court. He put in a written statement of objections on 9th February 1912, on which issues were framed the same day, and the case was adjourned for final hearing to 18th March 1912. On the 5th March, he applied for summonses to witnesses, both residing in Sakrand at a distance of some 24 miles from Hala, the place where the Court is situate, and paid expenses the same day. The summonses were not served as both the witnesses were absent at other places. On the 18th March defendant was absent, but his Pleader applied for an adjournment on the ground of his witnesses being absent. This was refused by the Sub-Judge. An appeal was made to and rejected by the District Judge of Hyderabad, and applicant now applies to this Court in revision for a reversal of the order refusing him an adjournment.

Under Order XVII, rule 1, Civil Procedure Code "The Court *may*, if sufficient cause is shown at any stage of the suit, grant time to the parties or to any of them, and *may* from time to time adjourn the hearing of the suit." It is, therefore, purely a matter of discretion for the Court to grant an adjournment in any particular case—a discretion which no doubt should be exercised judicially and reasonably but which is not subject to any definite rules. As pointed out by Russell, J., *in re Taja Noora* (1) where a discretion is vested in any legal authority, such authority must be free to exercise it in each case and rules which are unchangeable and which compel such authority to exercise its discretion in any particular manner are invalid. English authorities such as *Gardner* v. *Jay* (2) are to the same effect. In accordance with this principle it is certainly not a rule that a party is entitled to an adjournment, merely because witnesses summoned have not been served. On this point we concur with the following remarks contained in paragraphs 94 and 97 at page 29 of the Bombay High Court Manual of Circulars:—"The grant of an adjournment is a matter which generally is entirely within the discretion of the Court.....A party is not entitled as of right to an adjournment because witnesses who have been summoned have not appeared. The question is one for the discretion of the Judge. In granting adjournments in such cases the principle should be borne in mind that the trial should be conducted within a period short enough to enable the Judge to deal satisfactorily with the evidence." Similarly rule 28 at page 76 of the Sind Courts Civil Circulars lays down that "adjournments are not to be granted unnecessarily. Parties must have their evidence ready on the day fixed for hearing. If they omit to take the necessary steps for this purpose in good time they will not usually be allowed further time. The Judge should not ordinarily refrain from proceeding with a case merely because all the witnesses are not present."

In his reasons for refusing the adjournment, the Sub-Judge says:—"The defendant had more than a month to summon witnesses. He had ample time to take out summonses repeatedly until the witnesses were served, but he took no steps until the 5th March for summoning witnesses. The time left was too short to serve the witnesses or for the witnesses to appear even if served." The last statement is controverted in an affidavit which has been put in by the applicant, and we assume that there was sufficient time for the witnesses to have been served, if they had been present at Sakrand on the 16th March, when the bailiff went there to serve the summonses, and for them to have appeared at Hala on the 18th. To this extent the applicant no doubt sufficiently complied with the requirements of rule 12 at page 72 of the Sind Courts Civil Circulars that "applications for summonses to witnesses shall be presented . . . .and process fees and travelling and subsistence allowances shall be paid . ....so long beforehand as may be sufficient for service and compliance in case the witnesses do not reside within five miles of the Court." But, for the reasons already given, the mere fact of compliance with this rule did not entitle applicant to an adjournment. On the other hand, we do not think that the mere fact that the

(1) 4 Bom. L. R. 768 at p. 772.
(2) (1885) 29 Ch. D 50; 58; 54 L. J. Ch. 762, 52 L. T 395; 33 W. R 470.

delay in applying for summonses so that they could not be re-issued to the witnesses in time to secure service by the 16th March necessarily disentitles him to an adjournment. The case falls under the general rule that in exercising a judicial discretion a Judge has to "consider as a Judge, what are vaguely termed all the circumstances of the case and the purposes for which he is invested with discretion, and to make his order by reference to considerations of convenience or utility or saving of expense rather than on considerations of strict law or technicalities," see Encyclopædia of Laws of England, Volume IV, page 609, sub-tit. "Judicial discretion."

Now one of the main purposes for which a Judge is undoubtedly given a discretion under Order XVII, rule 1, is to enable him to prevent a party improperly delaying proceedings and abusing the process of the Court with that object. In the present case the Sub-Judge was clearly of opinion that the real object of the applicant was to delay the proceedings in this manner. He says:—"It is remarkable that the defendant gave the names of six witnesses and deposited costs only for two. It would seem to show that he did not want the case to go on to-day and, therefore, he did not want all the witnesses for the present." The statement in the first sentence of the above has not been controverted by the applicant in the affidavit filed by him, and must be taken as correct. In our opinion it fully justifies the view taken by the Sub-Judge as to the real object of the applicant. The case had been fixed for final hearing on the 18th Mach and the applicant's duty was to summon all his witnesses so that those served and present could have been examined, even though some of the witnesses were unserved and did not appear. If a party deliberately neglects to summon all his witnesses and those cited do not appear, he has only himself to blame if the Court regards this as an indication that the intention is to prevent the case proceeding on the day fixed. The fact that defendant himself was absent on the 15th March supports the suspicion against him, which is also strengthened by the nature of the application he was resisting. The Courts cannot but take judicial notice of the fact that persons, against whom an award has been given and who have no real ground for resisting an application to file it in Court, often resort to every possible stratagem for the purpose of delaying the filing of the award and consequent issue of execution thereon.

As remarked by Jenkins, C. J., in *Ramachandra* v. *Balmukand* (3) it is a sound rule that Courts of Appeal should not lightly interfere with a discretion deliberately exercised by a lower Court; and this rule applies *a fortiori* to a revisional Court which can only interfere within the limits laid down by section 115, Civil Procedure Code. In the present case not only are we not satisfied that the lower Court in confirming the Sub-Judge's order refusing to grant the adjournment acted illegally or with material irregularity, but on the contrary we think that the Sub-Judge rightly and legally exercised a sound discretion in refusing the adjournment.

The application is, therefore, dismissed with costs.

Application dismissed.

(3) 29 B. 71; 6 Bom. L. R. 780.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 75 OF 1913.

November 24, 1914.

Present:—Mr. Justice Oldfield and Mr. Justice Tyabji.

NARASIMHA CHETTI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

VIJIAPALA NAINAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r 63—Claim petition—Adverse order, without investigation, whether conclusive, if not set aside within one year—Difference between old and new Code

Order XXI, rule 63, of the Code of Civil Procedure, 1908, is much wider in its scope than the corresponding section 283 of the Code of 1882, and unlike the latter section covers cases in which there has been no investigation. Orders made under rule 63 of Order XXI become final if not set aside within one year.

Second appeal against the decree of the District Court of North Arcot, in Appeal

NARASIMHA CHETTI v. VIJIAPALA NAINAR.

Suit No. 248 of 1912, preferred against that of the Court of the District Munsif of Ranipet in Original Suit No. 628 of 1911.

FACTS.—The plaintiffs, having on 1st December 1905 instituted a suit against the defendants Nos. 1 to 3 on a bond executed by them in favour of plaintiffs, obtained an attachment before judgment of the suit properties in January 1906. These properties had, however, been sold by defendants Nos. 1 to 3 to the 4th defendant on 20th December 1905. The plaintiffs' suit was decreed on 16th November 1906. In pursuance of the said decree the plaintiffs brought the suit properties to sale. On 7th January 1909, 4th defendant put in a claim, which however was dismissed, the order being as follows: "The attachment was made in January 1906, and the sale is coming on to-day. The claim is based on a sale-deed dated a fortnight before the attachment. I find that the claim has been unnecessarily delayed and dismiss it without investigation, Order XXI, rule 58 (1), proviso." The sale took place on 19th January 1909 and the plaintiffs became the purchasers. They then sued the defendants for possession of the properties. Both the lower Courts upheld the sale to the 4th defendant. The plaintiffs thereupon appealed to the High Court.

Mr. *N. S. Narasimhachari*, for the Appellants:—Order XXI, rule 63, makes every order passed on a claim petition conclusive against the person affected, if not set aside within one year. The fact that there was no investigation is immaterial under the new Code. The distinction between orders passed after investigation and those without it, which existed under section 283 of the Code of 1882, is not maintained in the corresponding provision of the new Code, *viz.*, Order XXI, rule 63. The change in the language of the present Article 11 of Limitation Act IX of 1908 is also significant. There has been a deliberate departure from the old law. Fourth defendant, therefore, not having sued for setting aside the adverse order against him, has lost his title to the suit properties and the plaintiffs are in consequence entitled to a decree.

Mr. *L. A. Venkataraghava Iyer*, for Mr. *L. A. Govindaraghava Iyer*, for the Respondents:—The alteration in the language of section 283 is only verbal and the old decisions still hold good. An order of dismissal passed without investigation could not be deemed an order passed against the party affected. The order clearly says that the claim was dismissed without any investigation. Further the plea of limitation was not raised in the Courts below. The bar of limitation does not apply to a defendant in possession. See *Roghoonath Doss Mohapattur* v. *Bydonath Doss Maharatha* (1), *Venkapa* v. *Chenbasapa* (2) and *Meerudin Saib* v. *Rahisa Bibi* (3).

JUDGMENT.—The appeal is argued on the ground that the rights of the contesting defendants were disallowed by Exhibit G, the order against the 4th defendant in Civil Miscellaneous Petition No. 11 of 1909 in the District Munsif's Court, Ranipet, which has not been set aside by any decree and has, therefore, become conclusive.

Contra it is argued that, as Exhibit G was not passed after investigation, a suit to set it aside is not subject to the one year's limitation, and it, therefore, has not yet become conclusive. This would, no doubt, have been well-founded under sections 278 and 283 of Act XIV of 1882. But under the latter section it was only orders under sections 280, 281 and 282, which became conclusive after one year, whilst under Order XXI, rule 63, the language is wider, "where a claim or objection is preferred, the party against whom an order is passed, etc.," and we cannot restrict it to cover only cases in which an investigation has taken place. In these circumstances the plaintiffs' contention must prevail.

The result is that the decrees of the lower Courts are set aside and the plaintiffs are given the decree asked for. The argument on which they have succeded here was not referred to before the District Munsif and it is not clear that it was put forward in the lower Appellate Court.

Each party will, therefore, bear his own costs throughout.

Appeal allowed.

(1) 14 W. R. 364.
(2) 4 B. 21.
(3) 27 M. 25.

BAYABAI SAKALKAR v. HARIDAS.

BOMBAY HIGH COURT.

ORIGINAL CIVIL SUIT No. 1045 OF 1912.

August 27, 1914.

Present:—Mr. Justice Macleod.

BAYABAI SAKALKAR—PLAINTIFF

versus

HARIDAS RANCHHORDAS AND OTHERS—DEFENDANTS.

Succession Act (X of 1865), s. 62—Bequest in favour of a person not named—Secret instructions to trustee—Admissibility of oral evidence to prove trust.

A legatee who undertakes to carry out the wishes of a testator, will be treated as a trustee and compelled to carry out the instructions of the testator.

Manuel Louis Kunha v. *Jnana Coelho*, 31 M. 187; 18 M. L. J. 158, followed.

Where a testator directed that a certain pecuniary legacy be entrusted to one *H* to be disposed of by him in accordance with instructions given by the testator to one of his trustees and that his shares in a certain Company be transferred to the person whose name will be disclosed by *H*, and the intended beneficiary (who was admittedly the person in whose favour the instructions were given) filed a suit praying that *H* might be ordered to disclose the secret trust and that the bequest might be declared to be for her benefit:

Held, (1) that parol evidence was admissible to prove the trust,

(2) that the shares must be transferred to a person whose name was given by the testator to *H*, the power given to *H* being not a general one but a special one.

Mr. *Gadgil* (with him Mr. *Munshi*), for the Plaintiff.

Mr. *Desai* (with him Mr. *Dadachanji*), for Defendants Nos. 3 and 4.

Mr. *Kanga* (with him Mr. *Dastur*), for Defendant No. 5.

Mr. *Kanga*, (with him Mr. *Taraporevala*), for Defendant No. 6.

JUDGMENT.—One Gokuldas Kanji, a *Bhatia*, died in Bombay about the 18th December 1910, leaving a widow Gangabai and a daughter Kashibai, a concubine Bayabai, plaintiff in the suit, and several illegitimate children said to be by her. By his Will he appointed defendants Nos. 1 to 5 in this suit executors and executrix. Clause 7 of the Will runs as follows:—

"In accordance with the directions I am going to give in private to trustee No. 1 out of the trustees appointed by me, my trustees should entrust to Haridas Rs. 5,000 that may be received from my life-policy and the shares of Tata & Co. also should be transferred to the person whose name will be disclosed by Haridas."

The said Gangabai filed Suit No. 24 of 1911 against the said executors and executrix, praying, *inter alia*, (*a*) that the estate of Gokuldas might be administered on the footing that he had died intestate or in the alternative on the footing of the Will, if proved to be genuine and valid; (*b*) that in so far as might be necessary the Will, if proved to be genuine, might be construed by the Court.

In paragraph No. 9 of the plaint the plaintiff contended that several clauses of the Will were void and inoperative.

The defendants did not admit this in their written statement, but were willing that the Will should be construed. In paragraph No. 9 they said that certain persons should be added as parties.

It is admitted now that Bayabai, the present plaintiff, was the person in whose favour directions were given to Haridas, but her name was not mentioned in paragraph No. 9.

The suit came on for hearing before Beaman, J., on the 20th June 1912.

The learned Judge's notes, to which I have referred, contain merely the appearances for the parties. No issues were raised, from which it seems that the parties in a friendly spirit without argument asked the learned Judge to construe the Will.

The judgment on clause 7 is as follows:—"Clause 7. Here the testator intends to create a secret trust; but having regard to the provisions of the Hindu Wills Act read with the Indian Trusts Act, it is clear that no effect can be given to it, and as no beneficial interest is given to executor No. 1 the whole of that gift fails and falls into the residue."

Bayabai, making her five children as the children of Gokuldas party-plaintiffs, filed this suit against the five executors and executrix on the 27th September 1912, praying, *inter alia*, that the defendant Haridas might be ordered to disclose the secret trust under clause 7; that the bequest in clause 7 might be declared to be for the benefit of the plaintiff; and that the defendants should be ordered to pay such maintenance including arrears to the first plaintiff for herself and her children as the Court might think fit.

BAYABAI SAKALKAR v. HARIDAS.

Defendants Nos. 3 and 4 filed their written statement. In clause 4 they refer to the judgment in Suit No. 24 of 1911 and contend that the question of clause 7 being effective was *res judicata*. They admit that they had been informed by defendant No. 1 that the person for whose benefit the provision in clause 7 was intended was the first plaintiff.

Thereafter Gangabai was made a party-defendant as well as various other parties who took benefits under the Will. Gangabai filed a written statement in which she contended that the decree in Suit No. 24 of 1911 was binding on the first plaintiff and that in any event, the first plaintiff was not entitled to be paid more than Rs. 15 a month as maintenance, which had been offered to her.

The other defendants did not appear at the hearing. After the pleadings had been read, plaintiffs' Counsel asked that plaintiffs Nos. 5 and 6 might be struck off, since they had no claim being daughters. As it was obvious there was a misjoinder of causes of action and of parties, he also asked for leave to withdraw the suit on behalf of plaintiffs Nos. 2 to 4 with liberty to file a fresh suit for maintenance, and for leave to withdraw such part of the first plaintiff's suit as referred to the claim for maintenance with liberty to file a fresh suit. I ordered that plaintiffs Nos. 5 to 6 should be struck off, and also plaintiffs Nos. 2 to 4 with liberty to file a fresh suit, while first plaintiff should be allowed to continue the suit in respect of prayers (*a*) and (*b*) of the plaint with liberty to file a fresh suit for her maintenance. The first plaintiff was directed to pay the costs of defendants Nos. 3 and 4 and defendant No. 6, incurred by them in preparing to resist the claim for maintenance unless a suit was filed in respect of that claim within three months from that date (the 6th August) in which case the same materials would be available.

If necessary, the consequential amendments, in the plaint could be made.

The following issues were then raised :—

1. Whether the claim made by the plaintiff in paragraphs Nos. 3 and 4 of the plaint with reference to the sum of Rs. 5,000 and the shares in Tata Steel Co. is not *res judicata* by reason of the decision in Suit No. 24 of 1911.

2. Whether in any event the plaintiff is entitled to the said claim.

3. Whether these defendants are not entitled to a decree on their counter-claim.

As regards issue No. 3 plaintiff's Counsel admitted he could not retain the share certificate referred to in the counter-claim.

As regards the first issue as the plaintiff was not a party to Suit No. 24 of 1911, the decision would only be binding on her if she were claiming under the executors. It was urged that executors represent the beneficiaries, but the defendants certainly did not represent Bayabai as no mention whatever was made of her name. Nor does she claim under them, as her case is founded on a contract made by Haridas with the testator. Moreover, the question I have now to decide was not raised in the suit, namely, whether if there was a trust in favour of Bayabai she could come in and prove it. I, therefore, find that she is not bound by the decision in Suit No. 24 of 1911.

The evidence of Haridas now makes it clear that the testator was desirous of making a bequest in favour of Bayabai, but was not willing for her name to appear in the Will. He, therefore, dictated clause 7 as it stands and told Haridas in private that the bequest was for the benefit of the lady at Kandewady.

Haridas knew to whom the testator referred, although he did not know her name until afterwards. On one occasion he had gone with the testator to the house in which Bayabai lived and the testator pointed her out to him. In answer to my questions Haridas said that the testator understood that witness was willing to abide by his wishes, and he was quite willing to pay the plaintiff if the legacy was paid to him.

The bequests in clause 7 are two:—

1. Rs. 5,000 to be recovered from the life-policy are to be given to Haridas to whom the testator was going to give directions in private.

2. The shares in Tata & Co. were to be transferred to the name of such person as Haridas might name.

The question arises whether the evidence of Haridas as to the private instructions given to him by the testator is admissible.

It was argued that section 68 of the Indian Succession Act, which is incorporated in the

Hindu Wills Act by section 2 of that Act, applied; but this is not a case of ambiguity or deficiency on the face of the Will.

If the testator had made no mention of his private instructions and had merely made a bequest of the Rs. 5,000 to Haridas, I do not think it can be doubted that the terms of the trust which he had undertaken could be proved.

The question was very fully gone into in *Manuel Louis Kunha* v. *Jnana Coelho* (1), where it was held that the rule of equity that a legatee who undertakes to carry out the wishes of the testator will be treated as a trustee and compelled to carry out the instructions of the testator, was made applicable to India by section 5 of the Indian Trusts Act.

But it was argued that the case is different if it appears on the face of the Will that the legatee is not intended to take any beneficial interest, because there is an ambiguity or deficiency on the face of the Will and, therefore, extrinsice vidence of the testator's intention is not admissible.

The cases of *In re Fleetwood*; *Sidgreaves* v. *Brewer* (2) and *In re Huxtable*; *Huxtable* v. *Crawford* (3) show that where there is be quest to *A* to be dealt with by him in ac cordance with directions given to him by th testator, the Courts have not considered tha there is an ambiguity or deficiency on the face of the Will so as to exclude oral evidence of the instructions given. All that is required is that the instructions were communicated to the legatee by the testator and that the legatee agreed to accept the bequest on the terms of the trust. The consent of the legatee is implied if by his silence he leads the testator to believe that he will abide by the instructions communicated to him.

In *Riordan* v. *Banon* (4) the facts were practically on all fours with the present case. The Will directed a pecuniary legacy to be disposed of by the legatee in a manner of which he alone should be cognizant. It was proved by parol evidence that before execution of the Will the testator had verbally informed the legatee that he intended to bequeath the legacy in trust for a person he then named and that the legatee had consented to accept the legacy for that purpose. The residuary legatee having claimed the benefit of the legacy, it was held that a valid trust for the person named had attached to the bequest and the Court would allow such trust to be proved by parol evidence.

In *In re Fleetwood*; *Sidgreaves* v. *Brewer* (2) Hall, V. C., said: "The same principle which led this Court, whether wisely or not, to hold that the *Statute of Frauds* and the *Statute of Wills* were not to be used as instruments of fraud, appears to me to apply to cases where the Will shows some trust was intended, as well as to those where this does not appear upon it."

In *In re Huxtable*, *Huxtable* v. *Crawford* (3) *A* bequeathed £14,000 to *C* "for the charitable purposes agreed upon between us" and it was held by the Court of Appeal that there was a gift for limited charitable purposes, and that evidence was admissible to show what the purposes agreed upon were. It was admitted for proving matters which were not defined by the Will.

I can see no reason why this rule of equity should not be applied in India, both when it appears on the face of the Will that instructions have been given to the legatee and when it does not so appear. In the latter case equity interferes to prevent a fraud by the legatee, in the former, to prevent a fraud by the residuary legatee. The objection is the same in each case, *viz.*, that the testator's intentions have not been expressed in accordance with the provisions of the law applicable to Wills.

The bequest of the shares in Tata & Co. stands on a different footing. The testator directed that his executor should transfer them to such person as Haridas might name. But for the context, those words would give Haridas a general power to name any one he pleased as the transferee. Read with the first part of clause 7 it is evident that the testator intended that the shares should be transferred to the same person in whose favour a trust had been created as regards Rs. 5,000.

It has been argued that Haridas cannot be permitted to disclose the name of the person to whom the testator told him the shares should be transferred and that, therefore,

(1) 31 M. 187; 18 M. L. J. 158.
(2) (1880) 15 Ch. D. 594 at p. 607; 49 L. J. Ch. 514; 29 W. R. 45.
(3) (1902) 2 Ch. 793; 71 L. J. Ch. 876; 87 L. T. 415; 51 W R 285
(4) (1876) 10 Ir R. Eq. 469.

the shares fall into the residue, on the ground that there is an ambiguity or deficiency on the face of the Will.

Sections 67 and 68 of the Indian Succession Act embody the canon referred to by Jarman on Wills, 6th Edition, Vol. I, at page 516: "The admission or rejection of parol evidence is commonly said to depend in all cases on the canon, which rejects it in the case of *patent* ambiguities, or those which appear upon the face of the Will, and admits it in the case of *latent* ambiguities, or those which seem certain, for anything that appears upon the face of the Will, but there is some collateral matter, out of the Will, that breeds ambiguity. And this ambiguity, being raised by parol evidence, may, it is said, be fairly removed by the same means. But upon examination the maxim proves not to be an universal guide; for, on the one hand, there are many recognized authorities for the admission of parol evidence to explain ambiguities appearing on the face of the Will, while, on the other hand, the existence of a latent ambiguity will certainly not, as appears sometimes to have been supposed, warrant the admission in all cases indiscriminately of parol evidence to show what the testator meant to have written as distinguished from what is the meaning of the words he has used.....We come, therefore, to the conclusion either that the distinction taken by the canon between latent and patent ambiguities is an unsubstantial one, or that the proposition does, in its second branch, assert the admissibility of evidence to show the testator's intention (as distinguished from the meaning of his written words); and that consequently, if true, its application must be confined to a special class of cases."

In *Colpoys* v. *Colpoys* (5), still accepted as an authority, the Master of the Rolls said at page 464 *et seq.*: "The books are full of instances sanctioned by the highest authorities both in law and equity. Where the person or the thing is designated on the face of the instrument, by terms imperfect and equivocal, admitting either of no meaning at all by themselves or of a variety of different meanings, referring tacitly or expressly for the ascertainment and completion of the meaning to extrinsic circumstances, it has never been considered an objection to the reception of the evidence of those circumstances, that the ambiguity was patent."

But the question does not arise in this case whether under similar circumstances those authorities will be followed by the Courts in India, for it seems to me that the evidence now under consideration has been adduced for the purpose of proving material facts, and not for proving what the testator meant to have written.

In *Higgins* v. *Dawson* (6) Lord Davey refers with approval to the following passage in the judgment of Rigby, L. J., in the Court below: "The first point which I think it convenient to notice is the fundamental distinction between evidence simply explanatory of the words (of the Will) themselves, and evidence sought to be applied to prove intention itself as an independent fact (Wigram, 3rd Edition, pl. 10). This distinction must never be lost sight of. The great majority of the cases of explanatory evidence consisted of the ascertainment of persons and things insufficiently explained by the Will itself:" see also Wigram, page 51; and Jarman on Wills, 6th Edition, Vol. I, at page 511 says: "Upon the same principle, of course, it is not essential to the validity of the gift, either of real or personal estate, that the person who is the intended object of the testator's bounty should be actually pointed out on the face of the Will; it is enough that the testator has provided the means of ascertaining it, according to the maxim, *id certum est quod certum reddi potest*: Nor is it material that the description makes the objects of gift to depend upon circumstances or acts of persons which are future and contingent."

That a power can be created by a Hindu Will was recognized by this Court in *Javerbai* v. *Kablibai* (7). If the words of the second part of clause 7 are read by themselves, Haridas has a general power to nominate the person to whom the shares should be transferred. He could nominate himself or any person in existence at the date of the testator's death. But read with the words in the first part of the clause, it is clear that the shares must be transferred to a person whose name was given by the testator to Haridas, and that

(5) (1822) Jac. 451; 37 Eng Rep. 921.

(6) (1902) A. C. 1; 71 L. J. Ch. 132, 50 W. R. 337 85 L. T. 768.

(7) 15 B. 326.

the power is not a general one but a special one.

I think that Haridas was bound to disclose the plaintiff's name and that the evidence is admissible either under section 62 or in accordance with the authorities above cited.

Suit decreed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 11 OF 1913-14 OF BARA BANKI DISTRICT.

July 25, 1914.

Present:—Mr. Holms, J. M.

BADAL—PLAINTIFF—APPELLANT

versus

ABDUL WAHAB—DEFENDANT—RESPONDENT.

Ex-proprietary rights, claim for—Possession, actual, of sir not retained by vendor, effect of—Waiver—Purchase at public sale and not by deed executed by vendor.

If the vendor transfers the actual possession of his *zemindari* and *sir* land to the vendee and waives, by his failure to enter into possession as a tenant, the statutory rights conferred by section 7A of the Oudh Rent Act, he cannot be deemed to be a tenant with such rights, but this principle of waiver does not probably apply to cases when the purchase is made at a public sale and not by a deed executed by the vendor.

Thakur Harihar Bakhsh v. *Gajadhar Bakhsh*, 11 Select Decision 1904, referred to.

Appeal from the decree of the Commissioner, Fyzabad, dated the 4th August 1913, upholding the order of the Assistant Commissioner, Bara Banki, dated the 21st April 1913.

Mr. *E. Manuel*, for the Appellant.

Mirza *Mohammad Fasih*, for the Respondent.

JUDGMENT.—In February 1910 Jang Bahadur bought at a public sale the proprietary rights of Abdul Wahab in the land in question along with other land, and in May 1910 Jang Bahadur leased the land in suit along with other land to Badal, the appellant. Later on, Abdul Wahab sued Jang Bahadur for a declaration as to his ex-proprietary rights, and in June 1912 Jang Bahadur agreed to compromise giving him ex-proprietary rights in the land in suit. Apparently Badal was in cultivating possession between May 1910 and June 1912, and the real question is, did Abdul Wahab by his action in not entering into possession as a tenant waive the statutory rights conferred on him by section 7A? There are rulings to the effect that if the vendor transfers the actual possession of his *zemindari* and *sir* land to the vendee and waives by his failure to enter into possession as a tenant the statutory rights conferred by section 7A, he cannot be deemed to be a tenant with such rights [*Thakur Harihar Bakhsh* v. *Gajadhar Bakhsh* (1)]. This case, however, differs to this extent that Abdul Wahab did not transfer the actual possession of the *sir* land to the vendee by any deed, and with some hesitation I hold that he did not waive his ex-proprietary rights.

The appellant urges the question of his being ejected from a part of his holding only, but in the view I take he holds the land in suit as sub-tenant under Adbul Wahab and the rest of the land given to him by lease in May 1910 as tenant-in-chief under Jang Bahadur. So the holdings are different.

I dismiss the appeal. As the litigation is largely due to respondent's negligence, parties will bear their own costs of appeal.

Appeal dismissed.

(1) 11 Select Decision 1904.

ALLAHABAD HIGH COURT.

EXECUTION FIRST APPEAL No. 261 OF 1914.

December 8, 1914.

Present:—Mr. Justice Chamier.

KALIAN SINGH AND OTHERS—DECREE-HOLDERS—APPELLANTS

versus

JAGAN PRASAD—JUDGMENT-DEBTOR—RESPONDENT.

Execution—Res judicata—Judgment-debtor not raising an objection which he ought to have raised—Objection, whether can be raised subsequently.

It is not necessary that a judgment-debtor who puts forward objections in the execution department must put forward all possible objections once and for all. If he does not do so, matters which he has omitted must not be treated as *res judicata* against him.

Execution first appeal from the decision of the Subordinate Judge of Muttra.

Mr. *Gulzari Lal*, for the Appellants.

KALIAN SINGH *v.* JAGAN PRASAD.

Mr. *Kailash Nath Katju*, for the Respondent.

JUDGMENT.—This appeal arises out of proceedings in execution of a decree passed in 1911. The decree was for Rs. 20,200 with proportionate costs and the Court also gave the plaintiffs future interest, that is, interest from the date of suit at the rate of six per cent. per annum. The first question for decision is whether the Court allowed interest on the costs awarded. It appears to me that the decree read by itself is plain enough. The expression "*sud ajenda*" is applicable to the principal sum decreed, and not to the sum awarded as costs, and if there is any doubt as to the meaning of the decree, it is set at rest by a reference to the judgment which makes the meaning quite plain. In my opinion the decree-holders were not entitled to interest on the amount of costs awarded. It appears that in 1912 an application was made to execute the decree and a report was put up which showed that a sum of Rs. 8,500 odd remained due. In November 1912, some property was sold for the sum of Rs. 8,500, or deducting the sale commission, Rs. 8,479. Soon after the sale the judgment-debtor applied to the Court for refund of Rs. 125, saying that the decree-holders had been over-paid. It does not appear how he proposed to make out this, and the Court ultimately decided that the decree-holders had not been over-paid. By the present application for execution the decree-holders seek to recover Rs. 110-3-0, as balance of the amount of the decree, Rs. 5-3-6, interest on the same from the date of the sale above-mentioned and Rs. 178-1-0, interest on the sum of Rs. 8,479, total Rs. 293-7-6. The judgment-debtor objected, saying that if accounts were taken it would be found that the decree-holders had been over-paid. On this occasion for the first time in the history of the case the judgment-debtor pointed out that all along interest had been calculated on the sum awarded as costs. According to my construction of the decree the decree-holders were not entitled to this interest. But it is contended that it is not open to the judgment-debtor to raise the question at this stage of the suit, but that he ought to have raised the question long ago and in particular he ought to have raised it in March 1913 when he alleged that the decree-holders had been over-paid. In fact it is contended that the matter is now *res judicata* against him, because he might and ought on that occasion to have raised the question which he has now raised. It has been held in several cases that a matter once decided by a Court executing a decree cannot be re-opened at a subsequent stage of the proceedings; but I am not aware that it has been held that a judgment-debtor who puts forward objections in the execution department must put forward all possible objections once and for all, and that if he does not do so, matters which he has omitted must be treated as *res judicata* against him even if he was not aware of them. In the present case there has certainly been no decision on the question now raised and in the absence of authority I am not prepared to hold that the matter is *res judicata* against the judgment-debtor, because he had a previous opportunity of raising the question but did not do so. If, as I hold, interest ought not to have been allowed on the sum awarded as costs, and the judgment-debtor is entitled to raise objection at this stage, the decree-holders are certainly not entitled to the sum of Rs. 110-3-0, or to interest thereon. In any case they are not entitled to the sum of Rs. 178-1-0. They purchased the property themselves and, therefore, they paid no money into Court at all, and even if they had paid money into Court they would not have been entitled to interest on the sum paid in by them. I am, therefore, of opinion that the Court below was right in allowing judgment-debtor's objection. I do not understand the Court below to have held that the judgment-debtor is entitled to a refund of any particular amount. All that it did was to allow his objections and to dismiss the application for execution. This appeal fails and is dismissed with costs.

Appeal dismissed.

KARUNAKARA MENON v. KRISHNA MENON.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 180 OF 1913.

January 18, 1915.

Present:—Mr. Justice Spencer and Mr. Justice Seshagiri Aiyar.

M. KARUNAKARA MENON AND ANOTHER —RESPONDENTS NOS. 2 AND 3—APPELLANTS

versus

M. KRISHNA MENON AND OTHERS— PETITIONERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 89 — Several judgment-debtors—Application by one to set aside sale—Applicant, whether entitled to claim deposit by non-applying judgment-debtors as his.

A judgment-debtor who applies to have a sale set aside under Order XXI, rule 89, of the Civil Procedure Code, 1908, cannot claim that the monies deposited by other judgment-debtors who have not joined in his application should be regarded as his.

Trimbak v. *Ramchandra*, 23 B. 723; *Kripa Nath Pal* v. *Ram Lakshmi Dasya*, 1 C. W. N. 703, followed.

Anantha Lakshmi Ammal v. *Kannanchankarath Sankaran Nair*, 18 Ind. Cas. 579, 13 M. L. T. 123; (1913) M. W. N. 101; 24 M. L. J. 205; *Vedala Lakshminarasamma* v. *Pucha Lakshmammal*, 14 Ind. Cas. 326, (1912) M. W. N. 756, distinguished.

Appeal under section 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Tyabji, in Civil Revision Petition No. 57 of 1912, reported in 22 Ind. Cas. 537, preferred against the order of the District Court of South Malabar in Civil Miscellaneous Appeal No. 23 of 1911, preferred against the order of the Court of the District Munsif of Palghat in Civil Miscellaneous Petition No. 1381 of 1911, in Original Suit No 285 of 1908.

FACTS.—The 1st counter-petitioner (plaintiff in Original Suit No. 285 of 1908 on the file of the District Munsif of Palghat) obtained a mortgage-decree against the defendants in respect of the *Jenmam* value of the plaint properties due to the Government by the assignor of the defendants. The decree directed that the items of lands in the hands of the defaulters should be sold first and if the decree remained unsatisfied, then lands in the possession of other assignee-defendants, who were not defaulters, should be sold. As among the defaulters also the decree directed that the sale of the properties in the hands of those who paid their respective decree-debts should be postponed to those of others. For the amount due by the 3rd defendant, all the properties were actually sold. The other defaulters deposited their respective portions of the decree-debt in Court before actual sale but after sale-proclamation. Items Nos. 2, 3 and 4 belonging to the 3rd defendant were sold on 20th March 1911 and the remaining items on 3rd April 1911. The 2nd and 3rd counter-petitioners were the respective purchasers at the said sales. The first sale was confirmed on 3rd April 1911 within 30 days after the second sale but after 30 days of the first sale. The present petitioners, who were some of the defendants having interest in some of the items sold, put in an application under Order XXI, rule 89, Civil Procedure Code, to set aside the sales. After deducting the amounts already deposited to the credit of the decree-debt by other defaulters, they deposited the balance in Court.

As regards the sale of items Nos. 2, 3 and 4, the District Munsif held that the petition was barred by limitation and as regards the sale of other items he dismissed the petition on the ground that the amount, as required under Order XXI, rule 89, was not deposited as the deposit by the other defendants could not be said to have been "received by the decree-holder" within the meaning of the section.

On appeal, the District Court of South Malabar confirmed this decision. Against this order a Civil Revision Petition No. 57 of 1912* was filed in the High Court. Tyabji, J., who heard this petition, concurred with the Courts below as regards the first sale, but set aside the second sale, following the decision in Civil Miscellaneous Appeal No. 82 of 1912 and distinguishing *Trimbak* v. *Ramchandra* (1) relied on by the Courts below. This Letters Patent Appeal is against the said decision of Tyabji, J.

Messrs. *J. L. Rosario* and *Sivarama Menon*, for the Appellants:—The case is not one for interference under section 115, Civil Procedure Code. Under Order XXI, rule 89, the amount mentioned in the proclamation of sale *minus* what is "*received*" by the decree-holder should be deposited before the sale could be set aside. Amounts

(1) 23 B. 723.

* *See* 22 Ind. Cas. 537.—*Ed.*

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deposited, even if to the credit of the decree-debt, cannot be said to have been "received" by the decree-holder [*Trimbak* v. *Ramchandra* (1)], though actual cash receipt may not be necessary [*Vedala Lakshminarasammah* v. *Pucha Lakshmammal* (2) and *Anantha Lakshmi Ammal* v. *Kunnanchankarath Sankaran Nair* (3)]. Further the petitioners are not interested in all the items of property.

Messrs. *T. R. Ramachandra Aiyar* and *N. A. Krishna Aiyar*, for the Respondent:—It is settled law that this Court can interfere under section 115 if jurisdiction is assumed or refused by putting a wrong construction on a section of the Civil Procedure Code or any other provision of law. See *Anantha Lakshmi Ammal* v *Kunnanchankarath Sankaran Nair* (3). If the money is entirely at the disposal of the decree-holder, it amounts to "receipt." See Civil Miscellaneous Appeal No. 82 of 1912 (per Benson and Sundara Aiyar, JJ). The previous deposits were made to the credit of the decree-debt and the decree-holder might withdraw the amount at any time. *Trimback* v. *Ramchandra* (1) is not in point. There the deposit was by the auction-purchaser, which he was entitled to withdraw if the sale was set aside. Further the decree-holder in this case does not say that he could not receive the amounts.

The Government Pleader stated that the Government were not interested in the case of either party but that he was simply watching the case on Government's behalf.

JUDGMENT.—It is with considerable hesitation that we have come to the conclusion that the learned Judge's order is wrong. It has to be noticed that the provision in Order XXI, rule 89, is in the nature of an indulgence to the judgment-debtor; before the sale takes place, he has every opportunity of avoiding it by satisfying the decree. Practically a *locus poenitentiæ* is given him after the conclusion of the sale to retain his property if he complies with certain conditions. Consequently Courts are bound to see that the provisions of law in this respect are very strictly conformed to. In this case, we are not satisfied that the judgment-debtors have complied with the requirements of the law. Under rule 89, the judgment-debtor should deposit the money due under the proclamation of sale *minus* the amount "which may, since the date of such proclamation of sale, have been received by the decree-holder." Mr. Ramachandra Aiyar argues that moneys deposited by the 14th defendant and the 1st defendant should be regarded as *moneys received* by the decree-holder. Neither of them has joined in the application to set aside the sale. If the moneys had been deposited by the applicants, themselves such moneys can be taken to supplement the deposit actually made at the time of the application to set aside the sale. But when the moneys have been paid in by another and have not been received by the decree-holder, it seems impossible to suggest that they are either a part of the deposit or that they must be deemed to have been received by the decree-holder. None of the decided cases have gone this length. *Trimbak* v. *Ramchandra* (1) is distinctly against it. So also in *Kripa Nath Pal* v. *Ram Lakshmi Dasya* (4). In the decision in Appeal against Order No. 82 of 1912 referred to by Mr. Justice Tyabji, the money in Court deposit was due to the judgment-debtor and his co-parceners who assented to the course taken by him. The learned Judges held that the non-compliance with the formality of taking it back and depositing it with the balance due under the proclamation of sale was unnecessary. *Anantha Lakshmi Ammal* v. *Kunnanchankarath Sankaran Nair* (3) only decided that where a decree-holder had agreed to give up a portion of the decree amount, he was not entitled to insist upon the deposit or payment of the full amount mentioned in the proclamation of sale. The suggestion is that what was given up must be regarded as having been received. The decision in *Vedala Lakshminarasammah* v. *Pucha Lakshmammal* (2) does not take the matter any further. In that case an agreement by the decree-holder to set off a portion of the decree amount was held to amount to payment. In the present case, the persons who made the previous deposits are not the applicants; and although we do not agree with

(2) 14 Ind. Cas. 326; (1912) M. W. N. 756.
(3) 18 Ind. Cas. 579; 13 M. L. T. 123; 24 M L. J. 205 at p. 211; (1913) M. W. N. 101.
(4) 1 C. W. N. 703.

Mr. Rosario's contention that every judgment-debtor who has separate interest in the property advertised for sale should join in applying to set aside the sale, we are of opinion that it is not open to the applicants to claim that the moneys deposited by the non-applying judgment-debtors should be regarded as theirs. We must, therefore, hold that the application of the respondents is not in accordance with Order XXI, rule 89, of the Civil Procedure Code, 1908. The decision appealed against must be set aside and that of the lower Appellate Court must be restored. The parties will bear their own costs in this appeal.

Appeal allowed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 362 OF 1909.

June 19, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

MOHENDRA NATH BISWAS AND OTHERS —PLAINTIFFS—APPELLANTS

versus

Musammat SHAMSUNNESSA KHATUN AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Jurisdiction—Conduct of party to be bound by res judicata—Previous decision, when conclusive between parties—Hindu widow, decree against, when binding on reversioners—Compromise decree—Limitation Act (IX of 1908), Sch. I, Art. 141—Adverse possession—Thak and survey map, presumption relating to.

In determining the jurisdiction of the Court, which decided the former suit, to try the subsequent suit, in order to apply the rule of *res judicata* regard should be had to the jurisdiction of that Court at the date, not of the subsequent suit, but of the former suit.

Res judicata operates against a person who took an active part in a litigation in contesting, though unsuccessfully, the claim of the then plaintiff, notwithstanding the fact that he was merely described as a *pro forma* defendant.

Puttappa v. *Timmaji*, 14 B. 176 and *Rahmubhoy* v. *Turner*, 14 B. 408; 18 I.A. 6, distinguished.

The decision regarding the operation of *res judicata* between the parties in a previous suit is conclusive as between the parties or their representatives.

Aghore Nath v. *Kamini Debi*, 6 Ind. Cas. 554; 11 C.L.J. 481; *Baij Nath* v. *Padamanand Singh*, 14 Ind. Cas. 124; 39 C. 848; 16 C. L. J. 154; 16 C. W. N. 621, *Mohanaya Prosad Singh* v. *Ramkhelawan Singh*, 15 Ind Cas. 911; 15 C.L. J. 684 and *Purna Chandra* v. *Rasik Chandra*, 9 Ind. Cas. 568; 13 C. L. J. 119, referred to.

A decree obtained upon a fair trial in a suit by or against a Hindu widow in possession of the estate of the full owner, operates as *res judicata* regarding only the questions tried in the suit.

Katama Natchiar v. *Raja of Shivaganga*, 9 M. I. A. 539 at p. 604; 2 W.R. (P.C.) 31; 19 E. R. 843; 1 Suth. P. C. J. 520, 2 Sar P. C. J. 306 and *Roy Radha Kissen* v. *Nauratan Lal*, 6 C. L. J. 490, referred to.

Where a compromise amounting to a *bona fide* settlement of disputes is made for the benefit of the estate, it binds the reversioner quite as much as a decree on contest.

The mere transfer of title does not prolong a cause of action.

Pramath Roy v. *Roolea Begum*, 7 M. I. A. 323 at p 353; 4 W. R. (P. C.) 37, 1 Suth. P. C. J. 367; 1 Sar. P. C. J 602; 19 Eng. Rep. 331, referred to.

Article 141, Schedule I, of the Limitation Act, applies when it is proved that the last full owner was in possession at the time of his death, and the fact that on his death, he was succeeded by his widow, daughter or mother, will not bar limitation in case time began to run against him on his being dispossessed.

Amrita Lal Bagchi v. *Jatindra Nath Choudhury*, 32 C. 165, referred to.

Before Act IX of 1871 came into operation the title of the reversioner ceased along with the loss of the title of the female heir by adverse possession.

Nobin Chunder v. *Isur Chunder*, 9 W. R. 505 (F.B.); B. L.R. Sup. Vol. 1008, referred to.

The presumption of genuineness of *thak* and survey maps, furnishing valuable evidence of possession and title at the time they were made, is rebuttable.

Appeal against the decree of the Subordinate Judge of Khulna, dated the 17th June 1909.

Dr. *Rash Behary Ghose* and Babu *Jadu Nath Kanjilal*, for the Appellants.

Mr. *B. Chakrabarti*, Dr. *Dwarka Nath Mitter*, Babus *Shama Charn Maitra* and *Sarat Chandra Sen*, for the Respondents.

JUDGMENT.—The subject-matter of the litigation, which has culminated in this appeal, consists of an area of 600 *bighas* of land described in two schedules attached to the plaint. The plaintiffs claim the lands as comprised within village Dhobakhali, included within *Taluk* Joar Santoshpur, appertaining to estate No. 3840 of the Backergunj Collectorate. The defendants contend that the disputed lands are comprised within village Gajalia, included in a *howla* under a *nim osuth-taluk* subordinate to an *osuth taluk* carved out of *Taluk* Titai Sardar within estate No. 3841 of the Backergunj Collectorate. The history of the title of the plaintiffs may be briefly outlined. Satyakinkar Ghosal, who owned a share of the *semindari* appertaining to *touzi* No. 3840, died on the 5th November 1833 and left two daughters, Sabitri and Sati. Before his death, he had

executed a Will on the 23rd October 1833 and had appointed his brothers, Satyaprasanna Ghosal and Satyasaran Ghosal, executors to his testament. By the Will, he left his properties to his two daughters in equal shares for their maintenance. Sabitri died in 1893 and Sati in 1896. The succession to the estate of Satyakinkar Ghosal thereupon opened out to the nearest reversioner, Satyasatya Ghosal, on whose death the estate passed into the hands of his sons. Shortly afterwards, the Court of Wards took charge of the management of the estate, and, on the 16th September 1903, executed the conveyance in favour of the plaintiffs whereupon their claim in the present suit is founded. One of the properties transferred by this deed of sale is village Dhobakhali of which the boundaries are set out in the schedule, and then is added the claus, "within these boundaries according to the *thak* and survey maps." The case for the plaintiffs is that the tract of 600 *bighas* claimed by them is included within village Dhobakhali and is consequently their property. The defendants contest the claim, on the grounds, amongst others, that it is barred by *res judicata* and limitation; they also plead that the lands are comprised in their village Gajalia and never formed part of the estate owned by the predecessors of the plaintiffs. The Subordinate Judge has pronounced no opinion upon the question of *res judicata*, but he has found against the plaintiffs on the merits as also on the plea of limitation, and in this view he has dismissed the suit. On the present appeal by the plaintiffs, three questions emerge for consideration, namely, *first*, is the claim barred by the principle of *res judicata*; *secondly*, is the claim barred by limitation, and, *thirdly*, are the disputed lands situated within village Dhobakhali in estate No. 3340?

The plea of *res judicata* is founded on the decisions in two previous litigations, which require separate consideration. In 1860 one Anjamannessa Bibi, who then owned the *nim-osuh-taluk* under which the defendants now claim, brought a suit against one Derastullah, the *putnidar* of village Dhobakhali from the Receivers to the estate of Satyakinkar Ghosal. Satyasaran Ghosal, one of the executors to the estate of Satyakinkar Ghosal, was a *pro forma* defendant to this suit, though he was not described as such, and appears to have helped Derastullah in his defence. The dispute related to a portion of the land comprised in the present litigation, and the suit was brought to set aside an order of the *thak* authorities, who had, according to the then plaintiff, erroneously held such land to be included within village Dhobakhali and not in village Gajalia. The suit was valued at Rs. 715 and was instituted in the Court of the Sudder Amin of Barisal whose pecuniary jurisdiction was limited to Rs. 1,000. The Sudder Amin dismissed the suit on the 19th November 1862. On appeal by the plaintiff, the principal Sudder Amin of Backergunj decreed the suit on the 19th December 1863. He held that the *thak* map was incorrect and that the disputed land was situated within Gajalia and not Dhobakhali. This decision was confirmed by this Court on the 10th August 1864, and it is worthy of note that the appeal to this Court had been preferred, not by the lessee alone but also, by Satyasaran Ghosal. The defendants contend that this decision operates as *res judicata*. The plaintiffs seek to meet the objection on four grounds, namely, *first*, that the suit was tried by a Sudder Amin whose pecuniary jurisdiction was limited to Rs. 1,000; *secondly*, that Satyasaran Ghosal was only a *pro forma* defendant and no relief was claimed against him; *thirdly*, that he was not a party expressly in his character as executor to the estate of Satyakinkar Ghosal; and *fourthly* that the decision in a subsequent suit between the parties in 1891, that the decree in the suit of 1860 does not operate as *res judicata* is conclusive. We are not much impressed by the first two reasons assigned by the plaintiffs, but the third and fourth must clearly prevail. As regards the first reason, it is plain that to determine, for purposes of the application of the rule of *res judicata*, whether the Court which decided the former suit had jurisdiction to try the subsequent suit, regard must be had to the jurisdiction of that Court at the date of the former suit, and not to its jurisdiction at the date of the subsequent suit; if the contrary view were adopted, decrees made by Munsifs would, in course of time, cease to be *res judicata* by reason of a gradual increase

in the value of the subject-matter of the litigation: *Gopi Nath* v. *Bhugwat Pershad*(1); *Rughunath* v. *Isgur Chunder* (2); *Kunji Amma* v. *Raman Menon* (3). As regards the second reason, the vital point is not, how the Ghosal defendant was described, but what part he took in the litigation. He not only helped the tenant-defendant with funds, but himself actively contested the claim of the then plaintiff, as is indicated by his appeal to the High Court, though he was described merely as a *pro forma* defendant. In such circumstances, he could not reasonably escape from the effect of an adverse decision which he unsuccessfully resisted. The cases of *Puttappa* v. *Timmaji* (4) and *Rahmubhoy* v. *Turner* (5) are clearly distinguishable, as there the *pro forma* defendant against whom no relief was claimed took no part in the proceedings. As regards the third reason, it is pointed out that Satyasaran Ghosal, though at that time the sole surviving executor (as his co-executor Satyaprasanna had died in 1859) had a two-fold capacity, he was himself part owner both of Dhobakhali and Gajalia. From this point of view, no doubt he could not be treated as a party necessarily in his character as executor to the estate of Satyakinkar Ghosal and the decision would not operate as *res judicata*. The fourth reason assigned also is conclusive in favour of the plaintiffs. In a suit between the predecessors of the parties in 1891, where the effect of the decree in the suit of 1860 came under consideration, the Court held, rightly or wrongly, that the decree did not operate as *res judicata*. This decision itself, even if it be assumed to have been erroneous in law, is conclusive between the parties: *Aghore Nath* v. *Kamini Debi* (6); *Baij Nath* v. *Padmanand Singh* (7); *Mohamaya Prosad Singh* v. *Ram Khelawan Singh* (8); *Purna Chandra* v. *Basik Chandra* (9). We must hold, accordingly, that it is not open to the defendants to plead in this litigation that the decree in the suit of 1860 operates as *res judicata*.

We have next to consider the effect of the decree in the suit of 1891. In 1891, Sabitri and Sati, along with the tenure-holders under them, brought a suit for recovery of possession of the lands now in dispute as against some of the present defendants and the predecessors-in-interest of the others. The then plaintiffs alleged that the lands appertained to Dhobakhali, while the defendants urged that they were comprised in Gajalia. On the 31st May 1893, the Subordinate Judge dismissed the suit. He found that the claim was barred by limitation, as neither the plaintiffs nor their predecessors had ever been in possession. He also held that the *thak* map on which the plaintiffs relied, was incorrect, and that the defendants were not bound by the proceedings of the *thak* authorities. Appeals were preferred to this Court by Sati (Sabitri had died shortly after the decision of the Subordinate Judge) as also by the lessees, plaintiffs. On the 29th August 1894, both the appeals were withdrawn by the appellants, and it was ordered, with the consent of the respondents, that each party do bear his own costs in this Court, though, in the application for withdrawal, it was stated that the respondents had agreed that each party should pay his own costs both in the original Court and in the High Court. The effect of the withdrawal of the appeals was to leave the decree of the Subordinate Judge dated the 3rd June 1893 in full operation, and, as it is admitted that the lands in dispute in the present suit are identical with the lands to which the suit of 1891 related, the question necessarily arises whether the decree of the Subordinate Judge operates as *res judicata*. The first point for consideration is, what was the status of Sabitri and Sati in relation to the estate of their father Satyakinkar Ghosal, now in the hands of the plaintiffs? This turns upon the construction of his Will, dated the 5th November 1833. The Will was construed in a suit on the original side of this Court, instituted by Sabitri and Sati for construction of the Will of their father and for the administration of his estate. Pontifex, J., held on the 7th November

(1) 10 C. 907.
(2) 11 C. 153.
(3) 15 M. 494; 2 M. L. J. 282.
(4) 14 B 176.
(5) 14 B. 408; 18 I. A. 6.
(6) 6 Ind. Cas. 554; 11 C. L. J. 461.
(7) 14 Ind. Cas. 124; 39 C. 848, 16 C L. J. 154; 16 C. W. N. 621.
(8) 15 Ind. Cas. 911; 15 C. L. J 684.
(9) 9 Ind. Cas. 588; 13 C. L. J 119.

1876 that Sabitri and Sati were entitled to the interests of Hindu daughters in the estate of the testator. The question arose again in a suit instituted in 1898 by the representatives of the reversionary heir to the estate of Satyakinkar Ghosal, after the death of Sati, for declaration that a lease executed by Sabitri was not operative after the death of herself and her sister. It was ruled by this Court (Maclean, C. J., and Fletcher, J.) on the 12th April 1907, in affirmance of the view of the primary Court, that the construction put by Pontifex, J., upon the terms of the Will was correct and that it was also conclusive between the parties. There is, in our opinion, no room for serious controversy that Sabitri and Sati took the interests of Hindu daughters in the estate of their father under the terms of his Will. The second point, accordingly arises, whether the adverse decision, pronounced in the suit instituted by them, binds the estate in the hands of the reversioner as heir. The leading decision on the question of the effect of a hostile judgment obtained against a Hindu widow or daughter in possession of the estate of the last full owner, is that of the Judicial Committee in *Katama Natchier* v. *Raja of Shivagunga* (10), where their Lordships stated their opinion in these terms: "Unless it could be shown that there had not been a fair trial of the right in that suit, or, in other words, unless that decree could have been successfully impeached on some special ground, it would have been an effectual bar to any new suit... by any person claiming in succession to her. For, assuming her to be entitled to the *zemindary* at all, the whole estate would, for the time, be vested in her, absolutely for some purposes, though, in some respects, for a qualified interest; and until her death, it could not be ascertained who would be entitled to succeed. The same principle, which has prevailed in the Courts of this country as to tenants-in-tail, representing the inheritance, would seem to apply to a Hindu widow; and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by the decree fairly and properly obtained against the widow." This exposition of the law was affirmed by the Judicial Committee in the cases of *Pertabnarain* v. *Trilokinath Singh* (11) and *Hari Nath* v. *Mothura Mohun* (12). But, as pointed out in *Roy Radha Kissen* v. *Nauratan Lal* (13), a decree obtained upon a fair trial in a suit by or against a widow operates as *res judicata* regarding only the questions tried in the suit. Now, in the case before us, the Subordinate Judge dismissed the suit by Sabitri and Sati on the two-fold ground that the claim was not established on the merits and was barred by limitation. The reversioner is bound by this decision, unless he can prove that the decree was not fairly and properly obtained against the ladies. An endeavour was made in the Court below—and the effort has been repeated here—to show that the appeal preferred to this Court by Sati was withdrawn by her in collusion with the then respondents. This attempt has wholly failed. The Subordinate Judge rightly refused to accept the story that the appeal was withdrawn by Sati for a consideration. There is, on the other hand, the significant fact that the lessees also withdrew their appeal at the same time. The theory of collusion, consequently, fails. It is there contended that the withdrawal of the appeal was in the nature of a compromise and destroyed the conclusive character of the original decree, which thereupon ceased to be operative as a contested decree. This view cannot possibly be sustained, for, as was pointed out by the Judicial Committee in *Khunni Lal* v. *Gobinda Krishna Narain* (14) and *Hiran Bibi* v. *Sohan Bibi* (15), a compromise amounting to a *bona fide* settlement of disputes will bind the reversioner quite as much as a decree on contest; in other words, that the principle laid down in *Katama Natchier* v. *Raja of Shivagunga* (10) is not limited to decrees in suits contested to the end. This rule is subject to the qualification that the compromise was made *bona fide* for the benefit of the estate and not for the personal advantage of the limited owner: *Tasini Charan* v. *John Watson* (16);

(10) 9 M. I. A. 539 at p. 604; 2 W. R. (P. C.) 31; 19 E. R. 843; 1 Suth. P. C. J. 520; 2 Sar. P. C. J. 305.

(11) 11 I. A. 197, 1 C. 186, 8 Ind. Jur. 697; 4 Sar. P. C. J. 567, Rafique & Jackson's P. C. No. 86.

(12) 20 I. A. 183, 21 C. 8.

(13) 6 C. L. J. 490.

(14) 10 Ind. Cas. 477, 38 I. A. 87; 33 A. 356. 15 C.W.N. 545 (P. C.); 8 A. L. J. 552, 13 Bom. L. R. 427; 13 C. L. J. 575, 10 M. L. T. 25; 21 M.L.J. 645; (1911) 2 M. W. N. 432.

(15) 24 Ind. Cas. 309; 27 M. L. J. 149; 1 L. W. 648 (P. C.); 18 C. W. N. 929.

(16) 12 W. R. 413; 3 B. L. R. 437.

Indro Kooer v. *Abdool Burkut* (17); *Imrit Konwar* v. *Roop Narain Singh* (18); *Upendra Narain* v. *Gopee Nath* (19): *Sambasiva Ayyar* v. *Venkateswara Ayyar* (20); *Timmaji Amma Garu* v. *Subbaraju* (21), *Rajlakshmi* v. *Katyayani* (22). The view cannot be defended on the principle thata qualified owner like a Hindu widow, daughter, or mother is bound, at her peril, to pursue a litigation in respect of the estate in her hands unremittingly to the ultimate Court of Appeal and that she cannot *bona fide* effect a settlement of the matter in controversy, even though such compromise be in the best interest of the estate. We hold accordingly that the decree of the Subordinate Judge in the suit of 1891, which has not been successfully impeached on the ground of fraud, coercion, collusion or any like reason, operates as *res judicata* between the parties to the present suit.

The plea of limitation raised by the defendants is sought to be met by the plaintiffs by reference to Article 141 of the second Schedule to the Indian Limitation Act, 1877, which provides that a suit for possession of immoveable property by a Hindu entitled to possession on the death of a Hindu female, must be brought within 12 years from the date when the female dies. As Sabitri died in 1893 and Sati in 1896, and this suit was commenced on the 7th June 1907, this seems, on a superficial view, to furnish a complete answer; but on close examination, it transpires that the plaintiffs are in inextricable difficulty. It is plain that Article 141 applies only to cases where it is proved that the last full owner was in possession at the time of his death; if he himself was dispossessed and time began to run against him, the operation of the Law of Limitation would not be arrested by the fact that, on his death, he was succeeded by his widow, daughter or mother. In the words of Lord Kingsdown in *Prannath Roy* v. *Rookea Begam* (23), a cause of action is not prolonged by mere transfer of the title: *Amrita Lal Bagchi* v. *Jotindra Nath Chowdhury* (24). Before the plaintiffs can rely upon Article 141, they must consequently prove that their predecessor, Satyakinkar Ghosal, was in possession at the time of his death on the 5th November 1833. This the plaintiffs have failed to establish, while the defendants are able to produce a *nim-osuth-taluk potta*, dated 27th August 1831, to show that the possession of their predecessors commenced at that time. There is a further difficulty which the plaintiffs have to face. There is, as the Subordinate Judge points out, evidence on the side of the defendants that they were in possession through their under-tenants at least as early as 28th June 1834. It is well-known that under the law as it stood before the Limitation Act of 1871 came into operation, adverse possession which extinguished the title of the female heir also extinguished the title of the reversioner: *Nobin Chunder* v. *Isrur Chunder* (25). Consequently, if the possession of the defendants commenced at any time anterior to 1861, the title of the plaintiffs, if any, would be extinguished before 1873, when the Limitation Act of 1871 came into operation; and, once the title was extinguished while the Limitation Act of 1859 or Regulation III of 1793 or Regulation II of 1805 was in force, it could not be revived by the introduction of the Limitation Act of 1871: *Amirtaloll* v. *Rajonee-kant* (26); *Hari Nath* v. *Mothura Mohun* (12); *Fatimatulnissa* v. *Sundar Das* (27); *Khunni Lal* v. *Gobinda Krishna* (14). Now, the proceedings in the litigation of 1860 show that the predecessors of the plaintiffs were then out of possession, while in the suit of 1891, they failed to prove that they had ever been in possession. On the other hand, the evidence on the side of the defendants indicates their possession as early as 1834 and unquestionably between the years 1853 and 1869. The position, then, is that while the plaintiffs are unable to prove that their predecessors had any subsisting title in 1873, when the Limitation Act of 1871 (with its Article 142) came into operation, defendants have given a mass of reliable evidence, documentary and oral, to prove their possession through their tenants for much longer than 12 years prior to 1873. We accordingly hold, in concurrence with the Subordinate Judge, that

(17) 14 W. R. 146. (18) 6 C. L. R. 76.
(19) 9 C 817; 12 C. L. R. 356.
(20) 31 M. 179, 3 M. L. T. 369
(21) 5 Ind Cas. 640, 33 M. 473; 7 M. L. T 340, 20 M. L. J. 204; (1910) M. W. N. 60.
(22) 12 Ind. Cas 484; 38 C. 639.
(23) 7 M. I. A 323 at p. 353, 4 W. R. (P. C) 37; 1 Suth. P. C J 367; 1 Sar. P.C.J. 692, 19 Eng. Rep. 331.
(24) 31 C. 165.
(25) 9 W. R. 506 (F. B); B. L. R Sup Vol. 1008.
(26) 2 I. A. 113; 15 B. L. R. 10; 23 W. R. 214.
(27) 27 I. A. 103; 27 C. 1004, 4 C. W. N. 565.

the claim of the plaintiff is barred by limitation, and, if their predecessors had any title to the disputed lands, such title was extinguished before the Limitation Act of 1871 came into force.

Finally, question of title of the plaintiffs is full of unexplained difficulties, of which no reasonable solution has been found. The plaintiffs claim the disputed tract as included in village Dhobakhali under *Taluk* Joar Santoshpur. It is undoubtedly an element of weakness in their case that they are not able to trace when and by whom this *taluk* was created, and what lands were comprised therein. But there is a much graver difficulty in their way. Their conveyance sets out in detail the boundaries of Dhobakhali, but it is conclusively established that the disputed tract is not situated within those boundaries. The plaintiffs are consequently driven to fall back upon the additional description inserted after the description of the boundaries, namely, "according to the *thak* and survey map." There is thus, to start with, an inconsistency between the admitted boundaries and the delineation as made on the *thak* and survey maps. The plaintiffs practically abandon the boundaries, and rely upon the *thak* and survey maps, which they contend afford valuable evidence of title and possession at the time they were made. In support of this position, reference is made to the cases of *Omirta Lall* v. *Kalee Pershad* (28), *Nobo Coomar* v. *Gobind Chunder* (29), *Syama Sundari* v. *Jogobundhu* (30), *Jarao Kumari* v. *Lalon Moni* (31), *Jagadindra Nath Roy* v. *Secretary of State* (32), *Abdul Hamid* v. *Kiran Chandra* (33), *Mirza Shamsher* v. *Kunj Behari Lal* (34), *Dunne* v. *Dharani Kant* (35), *Fazlur Rahim* v. *Nabendra Kishore Roy* (36), *Satcowri* v. *Secretary of State* (37). Now it may be conceded that *thak* and survey maps may be presumed to have correctly delineated the boundaries of villages, and thus to furnish valuable evidence of possession at the time they were made and consequently also of titles. This principle is of no assistance to the plaintiffs. Here the *thak* map was made in 1855 and was followed by the survey map in 1858; but the accuracy of these maps was promptly challenged by the predecessors of the defendants. In the suit of 1860, which was instituted expressly for the purpose of declaration that the *thak* map was incorrect, the then plaintiff was successful, and in the subsequent litigation of 1891 and 1898, in which the present plaintiffs or their predecessors were parties, the *thak* map was again found to be inaccurate. Under these circumstances, the presumption of accuracy applicable to the *thak* and survey maps upon which the plaintiffs rely, has been amply rebutted. On the other hand, an examination and comparison of the maps, as made by the Subordinate Judge and as repeated in this Court, shows that the decision in the suit of 1860 as to the inaccuracy of the *thak* map was unquestionably right. This conclusion is strengthened by the large body of evidence of possession on the side of the defendants, which effectively negatives the *thak* map as evidence of possession in 1858. We agree with the Subordinate Judge that the *thak* map is unreliable, and that it no more establishes the title of the plaintiffs than it binds the defendants.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

Appeal dismissed.

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(25) 25 W. R. 179.
(29) 9 C. L. R. 305.
(30) 16 C. 186.
(31) 17 I. A. 145; 18 C. 224.
(32) 30 I. A. 44 (P. C.), 30 C. 291; 5 Bom. L. R. 1; 7 C. W. N. 193.
(33) 7 C. W. N. 849.
(34) 12 C. W. N. 273; 7 C. L. J. 414; 3 M. L. T. 212.
(35) 35 C. 621.
(36) 15 Ind. Cas. 341; 17 C. W. N. 151.
(37) 22 C. 252.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 55 OF 1912.

December 3, 1913.

Present:—Sir George W. Shaw, KT., J. C.

NGA TI, LEGAL REPRESENTATIVE OF NGA TET, DECEASED—PLAINTIFF—APPELLANT

versus

NGA PAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Finding of lower Court objected to in appeal but not disposed of by Appellate Court, whether final.

SURAJ KISHAN *v.* AJUDHYA PRASAD SINGH.

Where an appeal is preferred against the finding of an issue, but the Appellate Court does not decide finally on that point as the appeal is disposed of on other points, it cannot be held that the finding of the lower Appellate Court is final and, therefore, the decision cannot operate as *res judicata*.

Mr. *S. Vasudevan*, for Mr. *J. C. Chatterjee*, for the Appellant.

Mr. *S. Mukerji*, for the Respondents.

JUDGMENT.—The only point for determination is whether the question of the re-union of Nga Tet and Mi Pan after divorce was *res judicata* in the present suit. It was raised and decided in a previous suit between the same parties by the Court of first instance and the lower Appellate Court, but the judgment of the lower Appellate Court was appealed against and the judgment of this Court in second appeal (Second Civil Appeal No. 228 of 1911) did not decide this point, but upheld the decision of the lower Appellate Court dismissing the plaintiff-appellant's suit on another ground, namely, that he had not proved the mortgage which he alleged.

The plaintiff-appellant had made it one ground of his appeal in his memorandum of second appeal that the decision of the lower Appellate Court in regard to the re-union was wrong, but the learned Additional Judge came to no decision on this point—the decision in regard to the proof of the mortgage being sufficient for the disposal of the case.

As an appeal was preferred and an objection taken against the finding of the lower Appellate Court on the point in question, I think it must be held that the matter of re-union was not heard and finally decided in the previous suit within the meaning of section 11 of the Code of Civil Procedure. This is in accordance with the decision of a Bench of the Calcutta High Court in *Rai Charan Ghose* v. *Kumud Mohun Dutt Chowdhry* (1), where Mr. Justice Banerji read the words "heard and finally decided by such Court" to mean "heard and finally decided by such Court either if no appeal is preferred from its judgment or if an appeal being preferred has been disposed of, and the judgment of the Appellate Court which takes the place of its judgment has decided the point."

(1) 2 C. W. N. 297; 25 C. 571.

The decree of the lower Appellate Court is, therefore, set aside and it is directed to proceed to dispose of the appeal on the merits. Costs will abide the final result.

Decree set aside; Case remanded.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 6 OF 1909.

March 15, 1910.

Present:—Mr. Chamier, J. C., and Mr. Evans, A. J. C.

Pandit SURAJ KISHAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Babu AJUDHYA PRASAD SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage, prior and subsequent—Prior mortgagee's suit decreed—Mortgaged property sold in execution and purchased in part by prior mortgagee—Subsequent mortgagee, suit by—Redemption, piecemeal and partial.

The prior mortgagee, without impleading the subsequent mortgagee, brought a suit and got a decree for sale of the properties mortgaged to him, *viz*, A, B and C. In execution some properties were purchased by the prior mortgagee himself and some by another auction-purchaser. Thereafter the subsequent mortgagee brought a suit for sale of the properties included in his mortgage, *viz*., B, C and D, making the prior mortgagee a party to his suit:

Held, that the subsequent mortgagee was entitled to a decree for sale of the properties B, C and D, conditionally on his at first redeeming B and C by paying off the proportionate amounts due on each of them on account of the prior mortgage as calculated by the respective values of B and C.

Bishesher Dial v. *Ram Sarup*, 22 A. 284; A. W. N. (1900) 50; *Shib Lal* v. *Bhawani Shankar*, 26 A. 72; A. W. N. (1903) 190; *Lakhmidas Ramdas* v *Jamnadas Shankarlal*, 22 B. 304; *Brij Kishore* v. *Madho Singh*, 28 A. 279, 3 A. L. J. 27; A. W. N. (1906) 279, *Surjiram Marwari* v *Barhamdeo Persad*, 2 C. L. J. 202; *Ganga Das Bhattar* v. *Jogendra Nath Mitter*, 5 C. L. J. 315; 11 C. W. N. 403; *Hakim Lal* v. *Ram Lal*, 6 C. L. J. 46; *Jugdeo Singh* v. *Habibullah Khan*, 6 C. L. J 612; 12 C. W. N. 107; *Jawahir Singh* v. *Baldeo Baksh Singh*, 6 C. L. J. 672; 10 C. C. 193 (P. C.); *Hara Kumari Chowdhrain* v. *Eastern Mortgage and Agency Company Limited*, 7 C. L. J. 274; *Debendra Nath Sen* v. *Mirza Abdul Samed Seroji*, 1 Ind. Cas. 264; 10 C. L. J. 150; *Mahtab Singh* v. *Misree Lall*, (1907) N. W. P. H. C. R. 88; *Hari Kissen Bhagat* v. *Veliat Hossain*, 30 C. 755; 7 C. W. N. 723; *Kedar Nath* v. *Saiyad Hafiz Ali*, 10 C. C. 356, *Saiyad Zahid Ali* v. *Budra Singh*, 5 Ind. Cas. 800; 13 C. C. 50; *Gur Parshad* v. *Sah Bindraban Das*, 3 C. C. 254; *Najju Khan* v. *Ram Bali*, 7 C. C. 330; *Goverdhan Das* v. *Veerasami Chettiar*, 26 M. 537;

SURAJ KISHAN *v.* AJUDHYA PRASAD SINGH.

Debendra Narain Roy v. *Ram Taran Banerjee*, 30 C. 599, 7 C W. N. 766 (F. B.) and *Babu Mustafa Khan* v. *Shadi Lall*, 10 O. C. 81, referred to.

Appeal from the decree of the Officiating Subordinate Judge, Fyzabad, dated 19th October 1908.

Mr. *Mumtaz Husain*, for the Appellants.

Babu *Baldeo Lal*, for Respondent No. 5.

Syed *Wasir Hasan*, for Respondent. No. 7.

Babu *Bhairon Prasad*, for Respondents Nos. 8 to 13.

Babu *Gokul Prasad*, for Respondent No. 14.

JUDGMENT.

EVANS, A. J. C.—This is an appeal by the plaintiffs against an order of the Subordinate Judge of Fyzabad. The plaintiffs sued to recover Rs. 29,540-4-6 due on a deed of mortgage, dated the 6th September 1898, under which eleven villages were mortgaged. In the shape that the case finally took there were 20 defendants. The reasons why defendant Nos. 6 to 20 have been impleaded are set forth in paragraph 8 of the plaint. The learned Subordinate Judge granted a decree in favour of the appellants for Rs. 27,132 and directed that in case of default the mortgaged property be sold subject to the prior incumbrance of defendants Nos. 5 and 8 to 13, who are admittedly prior mortgagees.

The grounds set forth in the memorandum of appeal are as below:

"1. That the learned Subordinate Judge is wrong in holding that the principle of contribution or apportionment of the prior charge of the defendants Nos. 5, 8 to 13 and defendants Nos. 6, 7, 15, 16, 17, purchasers in execution of the decree in favour of defendant No. 5, was not applicable to the case, which was one for sale and not for redemption of mortgage of the property in suit.

"2. That the contribution asked for was not in any way inconsistent with the allegations made and the relief prayed for in the plaint, nor did it in any way offend against the provisions of section 53 of the Code of Civil Procedure."

An objection has also been taken to the order of the learned Subordinate Judge by respondent No. 7, Raja Saiyid Abu Jafar, who purchased two villages out of those mortgaged to the appellants. The grounds on which this objection is taken are as below:

"1. That the plaintiffs-appellants are not entitled under the circumstances of the case to a decree for sale subject to the prior mortgage.

"2. That the appellants must redeem before bringing the property to sale."

To clear the way, it may be stated here that Mr. Mumtaz Husain, for the appellants, has intimated that his clients are prepared to submit to a decree directing them to redeem the villages mortgaged to them on payment of a proportionate amount of the mortgage-money due to the prior mortgagees. His contention now comes to this that the proportionate amount of the mortgage-money due on each specific village should be ascertained and his clients be allowed to redeem the villages separately and then enforce their mortgage. On behalf of the prior mortgagees the contention taken is that there is no authority for the proposition that a puisne mortgagee can redeem piecemeal in a case of this kind and that before they can sell the villages mortgaged to them, they must discharge the whole debt due to the prior mortgagees.

In order to decide the points in controversy between the parties it is necessary to state the following materials facts. On the 13th June 1896 Lallu Sahi, predecessor of defendants Nos. 1 to 4, mortgaged 37 villages to the Maharaja of Balrampur for Rs. 2,20,000. On the 7th February 1898 the above-named mortgagor mortgaged two villages including the village of Kator to defendants Nos. 8 to 13. Kator is not one of the 37 villages mortgaged to the Maharaja of Balrampur, but is included in the eleven villages mortgaged to the appellants. A decree was obtained by these mortgagees on this mortgage on the 11th July 1907. The present appellants were parties to that suit. There is nothing on the record to show what happened after this decree was passed, but we are informed that the village of Kator has not yet been sold. It may be noted here that Mr. Mumtaz Husain, on behalf of the appellants, has conceded that the appellants were not excluded when the prior mortgagees sought to enforce their mortgage on this village and, therefore, they cannot now in the present suit seek to enforce their mortgage on this village and that part of their claim with respect to the village of Kator need not be

considered. On the 10th March 1898 the same mortgagor executed another mortgage in favour of defendants Nos. 8 to 13 of three villages including the village of Hamzapur, which was not one of the 37 villages mortgaged to the Maharaja of Balrampur but is included in the villages mortgaged to the appellants. The mortgagees obtained a decree on this mortgage on the 16th July 1907, but the appellants were not parties to this suit. In execution of this decree the villages were sold on the 20th June 1908. On the 6th September 1898 Lallu Sahi mortgaged to the father of the appellants *nine* villages out of the 37 villages mortgaged to the Maharaja of Balrampur and the two villages noted above, Kator and Hamzapur. This is the mortgage in suit. The Maharaja brought a suit on his mortgage and obtained a decree for sale of the property mortgaged to him. This decree was made absolute on the 30th July 1904 and the amount then found due was Rs. 2,79,722-1-9. The appellants were not parties to that suit. On the 20th May 1907 the Maharaja, in execution of his decree, purchased some villages including the village of Madhoban, which is one of the villages mortgaged to the appellants' father. On the 16th July 1907 the present suit was instituted by the appellants for enforcement of their mortgage dated the 6th September 1898, subject to the prior mortgages held by the Maharaja of Balrampur and defendants Nos. 8 to 13. On the 20th July 1907 and 29th November 1907 more villages were sold in execution of the Maharaja's decree and he purchased other villages included in the appellants' mortgage. The result of these sales was that the Maharaja realized Rs. 3,37,891-7-7 and it appears that only Rs. 523-4 were due when the accounts were made up to the 16th March 1908. The nine villages covered by the mortgages held by the Maharaja and the appellants have been purchased as below:—

Four by the Maharaja; two by Raja Saiyid Abu Jafar, defendant No. 7; one by Manohar Lal, defendant No. 15; one by Datadin, defendant No. 16, and Sheo Nath Kunwar, defendant No. 17, and one by *Musammat* Kaniz Kulsum Begam, defendant No. 6.

As stated above the appellants have conceded that they are prepared to submit to a decree directing them to redeem the prior mortgages before they can bring the villages to sale under their mortgage. It is, therefore, unnecessary to consider the legal aspect of the objection taken on behalf of respondent No. 7 or to decide whether a puisne mortgagee in circumstances like the present *must* redeem the prior mortgages before he can sell the mortgaged property.

The point for decision, shortly stated, is whether the appellants are bound to redeem the prior mortgages in full or whether they can obtain a decree on payment of a sum proportionate to the value of the villages covered by their own mortgage. The contention taken on behalf of the respondents, prior mortgagees, is that there is no authority that a puisne mortgagee *as such* in circumstances like the present can redeem piecemeal. The prior mortgagees are entitled to rely on their mortgages as a shield against a puisne mortgagee and those mortgages must be redeemed in their entirety before the subsequent puisne mortgagee can enforce his claim.

The following propositions of law appear to be concluded by authority or by express provisions of the Transfer of Property Act. *First*, when a mortgagee buys at auction the equity of redemption in part of property mortgaged to himself such purchase has, in the absence of fraud, the effect of discharging and extinguishing that portion of the mortgage debt which was chargeable on the property purchased by him,—see the cases of *Bishesher Dial* v. *Ram Sarup* (1), *Shib Lal* v. *Bhawani Shankar* (2) and *Lakhmidas Ramdas* v. *Jamnadas Shankarlal* (3). *Secondly*, that a puisne mortgagee has, so far as regards redemption of the mortgaged property, the same rights against the prior mortgagee as the mortgagor has as against such prior mortgagee,—see sections 75 and 95 of the Transfer of Property Act. *Thirdly*, that a person interested in a share only of the mortgaged property is not entitled to redeem his own share on payment of a proportionate part of the amount due on the mortgage, except where a mortgagee or mortgagees has on have acquired, in whole on in part, the share of a mortgagor,—see sec-

(1) 23 A. 284; A. W. N. (1900) 59.
(2) 26 A. 72; A. W. N. (1903) 190.
(3) 22 B. 304

tion 60 of the Transfer of Property Act. As to the meaning of the person interested in mortgaged property, if we turn to section 91, clause (*a*), of the Act, it is clear that a person interested in the mortgaged property includes a puisne mortgagee. The authorities for this proposition are to be found in Gour's Commentary on the Transfer of Property Act, Third Edition, page 1005. I understand this proposition is not disputed. The main contention taken on behalf of the prior mortgagees is that the appellants cannot be placed in a better position than they would have occupied if they had been made parties to the suit instituted by the prior mortgagees, and in that case the only remedy left to them would have been to redeem the prior mortgages in their entirety before they could enforce their own mortgage. This may be correct, but the position of affairs has been altered by the action taken by the prior mortgagees. The mortgaged property has been sold and distributed amongst a number of persons including the prior mortgagee, the Maharaja of Balrampur himself. The Maharaja has practically obtained the whole amount due to him under his mortgage decree and if the puisne mortgagees are compelled to pay up a second time the whole amount due to the prior mortgagees because they are entitled to hold their mortgages as a shield against the claims of the puisne mortgagees, it would have the effect of altogether preventing the subsequent mortgagees from realising the sum due to them under their mortgages, because the amount due even to the Maharaja of Balrampur alone is so enormous that no one could be expected to pay this amount in order to realise a comparatively small amount due upon a portion of the mortgaged property. It is true that if the appellants obtained a decree for sale on their mortgage subject to redemption of the prior mortgages and the mortgaged property were sold in execution of this decree, the auction-purchaser, on payment of the total amount due under the prior mortgages, would, in accordance with the provisions of section 82 of the Transfer of Property Act, be entitled to recover a proportionate amount from the purchasers of the villages not included in the appellants' mortgage, but this would have the effect of starting a number of fresh cases and litigation which would extend over many years to come. This is a result which we should avoid if possible. Looking, therefore, solely at the equities of the case it appears most desirable that the appellants should be called upon to redeem the prior mortgages on payment of a sum of money proportionate to the value of the villages covered by their mortgage. As to the authorities on the subject we have been referred to the following decisions of the Allahabad High Court:—*Shib Lal* v. *Bhawani Shankar* (2), and *Brij Kishore* v. *Madho Singh* (4): and there are also a number of rulings to be found in the Calcutta Law Journal, as set forth in our order dated the 10th January 1910 as below:

Surjiram Marwari v. *Barhamdeo Persad* (5); *Ganga Das Bhattar* v. *Jogendra Nath Mitter* (6); *Hakim Lal* v. *Ram Lal* (7); *Jugdeo Singh* v. *Habibullah Khan* (8); *Jawahir Singh* v. *Baldeo Baksh Singh* (9); *Hara Kumari Chowdhurani* v. *Eastern Mortgage and Agency Company Limited* (10); *Debendra Nath Sen* v. *Mirza Abdul Samed Sevji* (11).

The facts in *Shib Lal* v. *Bhawani Shankar* (2) are as below:

Five separate properties were mortgaged to one set of mortgagees and subsequently four out of the five properties were mortgaged to a second set of mortgagees. The prior mortgagees brought a suit for sale without making the puisne mortgagees parties and obtained a decree and in execution thereof caused three properties to be sold. They purchased two themselves and one was purchased by one Shib Lal. The puisne mortgagees then brought a suit for sale on their mortgage without joining the prior mortgagees as parties and obtained a decree for sale which was purchased by Shib Lal. This Shib Lal stood in the shoes of the puisne mortgagees. The prior mortgagees caused the remaining two pieces of

(4) 28 A. 279; 3 A. L. J. 27, A. W. N (1905) 279.
(5) 2 C L. J 202.
(6) 5 C. L. J. 315; 11 C W. N. 403.
(7) 6 C L J. 46.
(8) 6 C L. J 612; 12 C W N. 107
(9) 6 C. L. J 672, 10 C. C. 193 (P. C.).
(10) 7 C L J. 274
(11) 1 Ind, Cas 264, 10 C, L. J. 150.

property to be put up for sale as the proceeds of the first sale were insufficient. Shib Lal obtained a declaration that these properties could not be sold without giving him an opportunity to redeem. The prior mortgagees then brought a suit against Shib Lal to recover payment of the amount remaining due to them under their decree for sale of the pieces of property which had not been sold. It was held that the integrity of the mortgage had been broken, that the prior mortgagees were entitled to recover by sale of the property unsold a rateable portion of the mortgage debt proportionate to the value of that property when the prior mortgage was executed and that Shib Lal, as representative of the puisne mortgagee, could not redeem the whole of the mortgaged property. This case is not on all fours with the present case, because it appears that the puisne mortgagee in that case for some reason wanted to redeem the whole property but the principle involved can be applied to this case. The proposition of law as laid down by Morgan, C. J., in the case of *Mahtab Singh* v. *Misree Lall* (12) was approved. That proposition is that a mortgage is indivisible so long as the mortgagee has not acquired by purchase a part of the mortgagor's rights and interests. But when he has so acquired a portion, he is not entitled to throw the whole burden of the mortgage debt on the remaining portion of the equity of redemption. The position of Shib Lal in that case was that of a puisne mortgagee and similarly in the present case, it being admitted that the appellants are entitled to a decree upon their mortgage, they are entitled to redeem such portion of the prior mortgages as is proportionate to the share of the mortgaged property in which they are interested. Amongst the cases decided by the Calcutta High Court, I may refer to the cases reported as *Ganga Das Bhattar* v. *Jogendra Nath Mitter* (6) and *Debendra Nath Sen* v. *Mirza Abdul Samed Seroji* (11). The case in *Ganga Das Bhattar* v. *Jogendra Nath Mitter* (6) was similar to a certain extent to the present case. The plaintiff represented the prior mortgagees, who had obtained a decree without impleading the subsequent mortgagees. The subsequent mortgagees also obtained a decree without impleading the prior mortgagees. The subsequent mortgagees were interested in a portion of the property mortgaged to the prior mortgagees. In a suit between the contending sets of mortgagees for possession of the mortgaged property, several questions arose as to the principle upon which the conflicting rights of the parties were to be adjusted. It is only necessary to refer to the third point in dispute, which was whether the subsequent mortgagees should be called upon to redeem the entire mortgage. The decision of Mookerji, J., upon this point is based upon the decisions in *Surjiram Marwari* v. *Barhamdeo Persad* (5) and *Hari Kissen Bhagat* v. *Veliat Hossain* (13). He held that as the plaintiffs had purchased the equity of redemption the defendants were clearly entitled to claim partial redemption. The case in *Surjiram Marwari* v. *Barhamdeo Persad* (5) was decided by the same learned Judge and Harington, J., and although there appears to have been an agreement as to partial redemption the rule laid down was that when a mortgagee acquired in whole or in part the share of the mortgagor partial redemption might be allowed.

The last case that I wish to refer to is that of *Debendra Nath Sen* v. *Mirza Abdul Samed Seroji* (11). The facts of the case are extremely complicated, but for the purposes of this appeal the following facts are sufficient. The plaintiff was a mortgagee and the contending defendant had purchased a portion of the mortgaged property in execution of a money decree, and he contended that he was only liable to contribute rateably for the satisfaction of the plaintiff's claim. The law laid down was that "the mortgage security is entire and indivisible and unless there are exceptional circumstances, the mortgagee cannot be compelled to break up the security." The exceptional circumstances recognised are such as would have the effect of creating a severance of the security and in such cases an apportionment should be directed, where it would be for the benefit of any one who has taken a part of the property

(12) (1867) N. W. P. H. C. R. 88.

(13) 30 C. 755; 7 C. W. N. 723.

under necessity or where the mortgagee himself became the owner of a part of the equity of redemption, and it was held that the *test* to be applied was whether there had been a severance of the security at the instance or with the consent of the mortgagee and an apportionment would only be enforced upon the mortgagee where special equitable considerations are established. In the case before the Calcutta High Court it was held that such special equitable considerations did not exist. But in the case before this Court I have set forth reasons why I hold that certain equities exist in favour of the present appellants, as it may be taken to be an established proposition of law that a puisne mortgagee has an interest in the mortgaged property within the meaning of section 60 of the Transfer of Property Act. I would hold that, although none of the rulings cited above are exactly on all fours with the present case, the appellants are entitled to a decree for sale of the mortgaged property upon payment to the prior mortgagees or their representatives, the purchasers of the different villages, of a portion of the two prior mortgage debts proportionate to the value of the villages in which they (the appellants) are interested. As to the method of calculation, I would hold that an account should be taken of what was due to the Maharaja, defendant No. 1, under his mortgage of the 13th June 1896 up to the date fixed for redemption in the decree obtained by him dated the 30th July 1904. This amount should be distributed between the different villages according to their value. The amount to be paid by the appellants in respect of each village will be the proportionate amount so found due *plus* interest at Rs. 6 per cent. per annum up to the date of the confirmation of the sale of each village. The same course should be taken with respect to the village of Hamzapur included in the mortgage in favour of defendants Nos. 8 to 13, dated the 10th March 1898. The calculation, made as directed above, will show the different amounts payable on account of each of these villages and should prevent further litigation. but the appellants will have to pay in one lump sum the whole amount due for the villages covered by their mortgage. The amount will be deposited in Court for distribution to the purchasers concerned. On payment of the amount the appellants will be entitled to sell the villages covered by their mortgage in satisfaction of their decree.

The above order will dispose both of the appellants' appeal and the objection taken by respondent No. 7, Raja Saiyid Abu Jafar.

CHAMIER, J. C.—I concur with the conclusions stated in the judgment which my learned colleague has prepared, but in view of the importance of the case I propose to state briefly my reasons for the view which we have taken. A short summary of the facts will be sufficient.

On June 13th 1896 Lallu Sahi mortgaged 37 villages, including nine villages called, Karomi, 2 Argupur, 3 Bilwari, 4 Gopalpur, 5 Kabra, 6 Maopur - Barjoli, 7 Katra Chhangapur, 8 Madhoban, 9 Masuran, to respondent No. 5, the Maharaja of Balrampur, for Rs. 2,20,000. On March 10th 1898 Lallu Sahi mortgaged three other villages, including a village called Hamzapur, to respondents Nos. 8 to 13. On September 6th 1898 Lallu Sahi mortgaged to the father of the appellants the ten villages named above and a village called Kator, which for the reasons stated by my learned colleague may be disregarded. Respondent No. 5 obtained a decree for sale on his mortgage in execution of which he himself purchased several villages including Karomi, Argupur, Gopalpur and Madhoban, respondent No. 6 purchased Bilwari, respondent No. 7 purchased Kabra and Masuran, respondent No. 14 purchased Katra Chhangapur and respondents Nos. 15 and 16 purchased Maopur Barjoli. Respondents Nos. 8 to 13 obtained a decree for sale on their mortgage, in execution of which they themselves purchased Hamzapur.

The appellants were not parties to the suits brought by respondent No. 5 and respondents Nos. 8 to 13, and it is admitted that the appellants are not affected by the decrees obtained therein or by the sales held in execution of those decrees. They have now sued for sale of the property mortgaged to them. The Court below has given them a decree for sale of the eleven villages subject to the mortgages of June

13th 1896 and March 10th 1898. The appellants contend that a sale of the villages subject to the prior mortgages will result in only nominal prices being obtained, inasmuch as purchasers of the villages will have to face complicated suits for contribution against the holders of villages not included in the mortgage to the appellants. The appellants contend that as the securities formerly held by respondent No. 5 and respondents Nos. 8 to 13 have been split up by the purchase of villages by those respondents, they should be allowed to redeem the villages mortgaged to them (the appellants) upon payment of so much of the sum due on the prior mortgages as is proportionate to the value of those villages. Respondent No. 7 on the other hand contends that the appellants should be required to redeem both the prior mortgages before bringing any of the property to sale. This contention is advanced in order to prevent the appellants from obtaining relief. Respondent No. 7 is aware no doubt that the appellants cannot find the large sum of over three lacs of rupees, which they would be required to pay on account of the prior mortgages.

It has been held for many years by this Court and by several High Courts that a puisne mortgagee is entitled to bring property mortgaged to him to sale subject to prior mortgages, if any, *i. e.*, without redeeming those mortgages, and this view has now been affirmed by the Legislature in Order XXXIV of the Code of Civil Procedure.

A first mortgagee who has purchased or by other means acquired his mortgagor's rights in the property may pay off a second mortgage if he pleases [*Kedar Nath* v. *Saiyad Hafiz Ali* (14) and *Saiyad Zahid Ali* v. *Rudra Singh* (15)], but there has been a great conflict of opinion as to whether when a first mortgagee has obtained a decree on his mortgage behind the back of a puisne mortgagee and has acquired the property by purchase or foreclosure in execution of that decree, he can require a puisne mortgagee to redeem the first mortgage before bringing the property to sale,—see *Gur Parshad* v. *Sah Bindraban Das* (16), *Najju Khan* v. *Ram Bali* (17), *Govardhan Das* v. *Veerasami Chettiar* (18) and *Debendra Narain Roy* v. *Ram Taran Banerjee* (19). It is, however, unnecessary to decide this question in the present case, because we have come to the conclusion that in the circumstances of the present case the appellants are entitled to redeem the villages mortgaged to them by paying so much of the amount due on the prior mortgages as is proportionate to the value of those villages and this is what the appellants wish to do.

Ordinarily a person who is interested in part only of mortgaged property may insist upon redeeming the whole of the property and may be compelled to do so, but the rule is subject to exceptions. For example, when the mortgagee defendant has acquired part of the mortgaged property, the person seeking to redeem may redeem his own interest only and the mortgagee may insist upon redemption being limited to that interest [section 60, Act IV of 1882, *Babu Mustafa Khan* v. *Shadi Lall* (20) and *Debendra Nath Sen* v. *Mirza Abdul Samed Seroji* (11)]. This exception rests upon the view that the mortgagee has, by his own action, broken up the security and can no longer insist that his security is indivisible. He breaks up the security by purchasing part of the mortgaged property, because by his purchase he is deemed to have discharged that portion of the mortgage debt which was chargeable upon the property purchased by him, see *Mahtab Singh* v. *Misree Lall* (12), *Bisheshur Dial* v. *Ram Sarup* (1), *Shib Lal* v. *Bhawani Shankar* (2) and *Lakkmidas Ramdas* v. *Jamnadas Shankarlal* (3). The rule appears to be the same whether the person seeking to redeem is a mortgagee of part of property already mortgaged to another person or a person who has bought part of the interest of the mortgagor. Respondents Nos. 5 and 8 to 13 must be held by their action to have lost their right to insist upon the indivisibility of their securities. The other respondents who have purchased

(14) 10 O. C. 356.
(15) 5 Ind. Cas. 900, 13 O. C. 50.
(16) 3 O. C. 254.
(17) 7 O. C. 330.
(18) 26 M. 537
(19) 30 C. 599; 7 C. W. N. 766 (F. B.).
(20) 10 O. C. 81.

NGA PO KAN v. NGA SHWE DAT.

villages included in the appellants' mortgage have no concern with the indivisibility of the security held by respondent No. 5. Whether the property is sold subject to the prior mortgage or the sale takes place after the prior mortgage has been redeemed, the result will be the same. They will only get their rateable share of the amount due on the prior mortgage. In the peculiar circumstances of this case I think we may allow the appellants to bring the villages mortgaged to them to sale if they pay to the holders of those villages their rateable share of the amount due on the prior mortgages. But for the reasons stated elsewhere no decree will be made for the sale of the village Kator.

BY THE COURT.—The order of the Court is that the case is remanded to the Court below for a finding on the following issues:

1. What is the amount due to the prior mortgagee, the Maharaja of Balrampur, or his respresentatives, as calculated in accordance with the directions above given with respect to the villages noted below:

1. Karomi.
2. Argupur.
3. Bilwari.
4. Gopalpur.
5. Kabra.
6. Maopur Barjoli.
7. Katra Chhangapur.
8. Madhoban.
9. Masuran ?

2. What is the amount due to the prior mortgagees, defendants Nos. 8 to 13, with respect to the village of Hamzapur calculated in accordance with the directions given above ?

The lower Court is authorised to add any necessary parties in order to arrive at a proper decision on these issues and it is also authorised to take such additional evidence as is necessary. The finding should be returned to this Court within three months from this date and fifteen days will be allowed for objections from the date of the finding of the Court below.

Issues remitted.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION PETITION No. 91 of 1912.

January 19, 1914.

Present:—Mr. McColl, A. J. C.

NGA PO KAN—PLAINTIFF—APPLICANT

versus

NGA SHWE DAT—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), s. 5—Appeal—Admission of appeal presented after time—Discretion of Court—Discretion must be legal and regular—Presentation of appeal to wrong Court, whether sufficient cause.

Discretion when applied to a Court of Law means discretion guided by law. It must not be arbitrary, vague and fanciful but legal and regular.

The presentation of an appeal to a wrong Court through a mistake in ignorance of law is not a sufficient cause for admitting an appeal after time.

In an appeal filed after time the appellant should state in his memorandum of appeal the grounds on which he asks the Court to admit it after time.

Mr. *J. N. Basu*, for the Applicant.

Mr. *E. Ba Din*, for the Respondent.

JUDGMENT.—The plaintiff-applicant sued the defendant-respondent, alleging that he had stood surety for his deceased brother on a sale of goods, and obtained a decree in the Township Court. The decree is dated 1st November 1911. On the 6th November the defendant-respondent applied for a copy of the Township Court's judgment and decree. He was told next day what stamps to produce and he produced them on the 8th. He was told that copies would be ready on the 20th and they were delivered to him on that day, so that the time required for obtaining these copies was 14 days.

Then instead of appealing against the decree he filed a regular suit in the Sub-Divisional Court for accounts. It is difficult to understand what he wanted, as he referred only to transactions which had been dealt with in the suit in the Township Court. This suit for accounts was filed on the 28th November and on the 15th December the Sub-Divisional Judge held that the suit was not maintainable and that the defendant-respondent's remedy was to appeal against the Township Court's decree. Instead of doing so at once, he waited for eight days and then on the 23rd December applied for and obtained a copy of the Sub-Divisional Judge's judgment, though this was in no way necessary for the purpose of appeal,

The Courts were after that closed for the Christmas holidays. Again he did not appeal on the first day on which the Courts were opened, but on the 4th January he filed a miscellaneous application in which he asked for permission to appeal, though the time for appealing had elapsed. It is not clear from the proceedings whether he filed his memorandum of appeal at the same time or not. In the appellate record, the appeal is stated to have been presented on the 3rd February. That was the date on which the District Judge passed orders on the miscellaneous application, and as the memorandum of appeal is dated the 3rd January 1912 it is possible that it was filed at the same time as the application. The District Judge heard the application *ex parte* and passed orders admitting the appeal. Notice was then issued to the plaintiff-applicant and the appeal was disposed of on the merits, the question of limitation not being considered again. The Township Court's decree was reversed and the suit dismissed.

The plaintiff-applicant has now applied for revision on various grounds, but the preliminary point of limitation has been argued first.

The procedure followed in the District Court was wrong. The defendant-respondent should have filed his memorandum of appeal and in it stated the grounds on which he asked it to be admitted after time. After hearing him or his Advocate the District Judge might have admitted the appeal provisionally, and then at the hearing gone into the question of limitation and heard what the other side had to say on the point.

It is argued for the defendant-respondent that the admission of an appeal after time is a matter of discretion and that the discretion of the lower Appellate Court should not be interfered with on second appeal. It has been said that discretion when applied to a Court of Law means discretion guided by law. It must be governed by rule and not by humour. It must not be arbitrary, vague and fanciful but legal and regular. The reasons given by the learned District Judge for admitting the appeal after time are given in the following words: "It is explained on behalf of the applicant that he did not understand the law and thought the proper Court to apply to was the Sub-Divisional Court. The Sub-Divisional Court indicated to him his error. Excluding the time between the date of institution in the Sub-Divisional Court (28th November 1911) and the date the copy of the Sub-Divisional Court's judgment was obtained (15th December) (*sic*)—and I think in the circumstances this period should be excluded—the appeal would appear to be within time."

The learned District Judge apparently had in mind section 14, Limitation Act. This section does not apply to appeals, but I have no doubt that the circumstances contemplated in that section would generally be held to be sufficient cause within the meaning of section 5. But the District Judge omitted to consider whether the ground on which the Sub-Divisional Court was unable to entertain the defendant-respondent's suit was of a like nature as defect of jurisdiction. The High Court of Allahabad has held that the presentation of an appeal to the wrong Court through a mistake in ignorance of law is not a sufficient cause. The High Courts are however not agreed upon this point. But in this case the defendant-respondent made a worse mistake than appealing to the wrong Court. He did not attack the decree at all but filed a fresh suit. Again, the learned District Judge omitted to consider whether the proceeding which the defendant-respondent prosecuted in the Sub-Divisional Court was prosecuted with good faith, *i. e.*, with due care and attention. Had he exercised even the most ordinary care, would he not have discovered that his remedy was to appeal to the District Court?

Again, the learned District Judge failed to consider whether the defendant-respondent had been guilty of any laches after he had been informed of his proper remedy by the Sub-Divisional Court. As it took 14 days to obtain copies of the Township Court's judgment and decree, the time for appealing expired on the 15th December *i. e.* the day on which the Sub-Divisional Judge informed the defendant-respondent of his proper remedy. Had the defendant-

respondent acted promptly then, his appeal would have been only a few days out of time, but instead of doing so he did nothing until the last day before the holidays commenced and then he applied for a copy of the Sub-Divisional Judge's judgment which was not required. Even after that he was guilty of further laches in that he did not file his appeal on the first day on which the Courts opened.

As the learned District Judge passed orders without going into any of these matters, it cannot be said that the discretion which he exercised was a judicial discretion and I think interference is justified.

Furthermore the District Judge acted under a mistake of fact. He says that if the period occupied in prosecuting the suit in the Sub-Divisional Court be excluded, the period allowed for appealing would have expired on the 6th January, but that is not correct.

In the passage from the District Judge's order quoted above he says: "Excluding the time between the date of the institution in the Sub-Divisional Court and the date the copy of the Sub-Divisional Court's judgment was obtained." But as this last date is given as the 15th December, which was the date on which the Sub-Divisional Judge's judgment was passed, a copy being supplied on the 23rd, I think the period the District Judge intended to deduct was the period between the date of institution and the date of judgment; obviously under no circumstances could defendant-respondent be allowed to deduct the time between the date of judgment and the date on which he thought fit to apply for a copy of it. Thus allowing 18 days for the time spent in the Sub-Divisional Court and 14 days for obtaining copies of the Township Court's judgment and decree and the usual 30 days, we have a total of 62 days and even if the one day necessary for obtaining a copy of the Sub-Divisional Court's judgment, though that copy was not required, be added, the total becomes 63 days and the last day for filing the appeal would be the 3rd January 1912, whereas the application for permission to appeal was filed on the 4th January 1912. Had the District Judge not made a mistake in his calculation, I hardly think that he would have admitted the appeal.

The decree of the lower Appellate Court is set aside and that of the Township Court restored with all costs.

Decree set aside.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 327 OF 1912.

March 7, 1914.

Present:—Mr. Hallifax, A. J. C.

SADASHIV—JUDGMENT-DEBTOR—APPELLANT

versus

Musammat RUKHMABAI AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 48, Sch. III, Para 11 (3), retrospective effect of—Mortgage-decree passed before the coming into force of the Code—Execution—Limitation.

Section 48 of the Civil Procedure Code, 1908, has retrospective effect and limits the period for the execution even of mortgage decrees passed before the new Code came into force.

Where an application was made in 1911 for execution of a decree for sale under a mortgage made absolute in 1898 and it appeared that before then several applications had been made each within the prescribed period from the last step taken in aid of execution and that during the interval the property had been in the hands of the Collector for about 6 years:

Held, that the decree-holder could not take any benefit from paragraph 11 (3) of Schedule III of the Civil Procedure Code and that his last application for execution was barred by time under section 48 of the Code.

Appeal against the decree of the Divisional Judge, Nagpur Division, dated the 8th May 1912, confirming that of the Subordinate Judge, Wardha, dated the 3rd February 1912.

Mr. *J. Mitra*, for the Appellant.

Mr. *D. P. Tiwari*, for Respondent No. 1.

Mr. *Raghunath Rao Baldeo*, for Respondent No. 2.

JUDGMENT.—A preliminary decree for sale under a mortgage was passed against the appellant on the 31st of October 1896, and was made absolute on the 27th of September 1898. The property of which sale was ordered was a house and two absolute occupancy fields with a well and a tamarind tree in one of them. The house was sold in the

year 1900. Several applications for execution have since been made, and each of them was within the prescribed period from the last step taken in aid of execution. The property was in the hands of the Collector for sale from the 30th of November 1901 to the 30th of October 1905, and again from the 27th of November 1908 to the 10th of January 1911, a total period of six years and fourteen days. On each occasion nothing was realised and the property was released from attachment. The last application for execution was made on the 25th of April 1911, or two days short of twelve years and seven months from the date of the final decree for sale. It has been held in both the Courts below, that of the Subordinate Judge of Wardha and that of the Divisional Judge of Nagpur, that section 230 of the old Civil Procedure Code (Act XIV of 1882) did not apply to mortgage decrees, that section 48 of the Civil Procedure Code now in force (Act V of 1908) does not apply to decrees passed before it came into force, and that, therefore, there is no limit at all to the period within which this decree can be executed. The Divisional Judge also held that even if the twelve years rule did apply, the decree-holder is entitled to deduct the period of six years and fourteen days during which the decree was in the hands of the Collector, under the last paragraph of section 325A of the old Code or paragraph 11 (3) of Schedule III of the new, which are identical. Against this decision the judgment-debtor has appealed, urging that execution of the decree is barred by time.

In regard to section 230 of the old Code, the view accepted in the High Courts of Calcutta and Allahabad is that that section did not apply to mortgage decrees, which could, therefore, be executed up to the end of all time. The Calcutta view is set out in *Fasil Howladar* v. *Krishna Bundhoo Roy* (1), which was followed in *Kartick Nath Pandey* v. *Juggernath Ram* (2), though certain learned Judges of the same Court showed a distinct inclination to the opposite view in the earlier cases of *Hart* v. *Tara Prasanna Mukherji* (3) and *Jogemaya Dassi* v. *Thackomoni Dassi* (4). In the Allahabad High Court the point is discussed in *Ram Charan Bhagat* v. *Sheobarat Rai* (5). In the other two cases mentioned by the learned Divisional Judge, *Pahalwan Singh* v. *Narain Das* (6) and *Jadu Nath Prasad* v. *Jagmohan Das* (7), there is no discussion of the matter. It is taken for granted that section 230 applies only to decrees other than mortgage decrees. The opposite view was taken in Madras in *Kommachi Kather* v. *Pakker* (8) and in *Vaidhinadasamy* v. *Somasundram* (9) by the Full Bench. There are apparently no published rulings of the High Court of Bombay or of this Court on the point. I am distinctly inclined to accept the interpretation put upon the words of section 230 by the Madras High Court, especially in view of the meaning assigned to very similar words in the second Schedule of the Limitation Act by their Lordships of the Privy Council in the well-known case of *Vasudeva Mudaliar* v. *Srinivasa Pillai* (10). But it is not necessary to express any definite opinion on this point, because I am quite clear that section 48 of the Code of 1908 applies to all decrees, whether passed before or after that Code came into force.

The authority for the opposite view on which both the Courts below have relied is the Allahabad ruling in *Konsilla* v. *Ishri Singh* (11). It was there held that the right to enforce execution of a decree like the present is a substantive right, which, under section 6 of Act X of 1897 (the General Clauses Act), cannot be taken away by an Act passed after its accrual, unless an intention to take it away appears, expressly or by necessary implication, in the new Act, and no such intention appears in the Civil Procedure Code of 1908. The Calcutta High Court (Jenkins, C. J., and Mullick, J.), however, in the later case of *Bisseswar Sonamut* v. *Jasoda Lal Chowdhry* (12) was unable to

(1) 25 C. 580; 2 C. W. N. 118.
(2) 27 C. 285.
(3) 11 C. 718.
(4) 24 C. 473.
(5) 16 A. 418; A. W. N. (1894) 142.
(6) 22 A. 401; A. W. N. (1900) 131.
(7) 25 A. 541; A. W. N. (1903) 98.
(8) 7 M. L. J. 66; 20 M. 107.
(9) 28 M. 473; 15 M. L. J. 126.
(10) 30 M. 426; 17 M. L. J. 444, 11 C. W. N. 1005; 4 A. L. J. 625; 6 C. L. J. 379; 2 M. L. T. 333; 9 Bom. L. R. 1104. (P. C.); 34 I. A. 187.
(11) 6 Ind. Cas. 188; 32 A. 490; 7 A. L. J. 420.
(12) 19 Ind. Cas. 391, 40 C. 704; 17 C. W. N. 622,

accept this decision as correct. In regard it to the learned Chief Justice said: "I must confess that I feel some difficulty as to the decision in that case. When it was put to the learned Vakil for the respondent in this case whether he was making his application under the Code of 1908 or the repealed Code of 1882, he had to concede that it was the new Code of 1908. If so, then section 48 is an integral part of that Code, and no application under that Code, as it appears to me, can be made in disregard of its express conditions, I say that bearing in mind the provisions of section 6 of the General Clauses Act. In this connection it is important to observe that the Legislature evidently considered this Code might and would interfere with rights, for there is an express provision in section 154 that 'nothing in this Code shall affect any present right of appeal which shall have accrued to any party at its commencement,' a provision that would have been unnecessary unless the Code, as framed, would affect existing rights under the old Code. It has been urged before us that this view would involve hardship, that rights would be imperilled, if not confiscated; but this overlooks the provision which prescribed that, though the Code was passed in March 1908, it should not come into operation until January 1909. That provision afforded ample opportunity to all persons having rights under the old Code to enforce them before the new Code came into operation."

The common sense of these arguments seems to me convincing. I would add to them three short passages from Story's Conflict of Laws, quoted with approval by their Lordships of the Privy Council in 1851 in *Her Highness Buckmaboye* v. *Lulloobhoy Mottichund* (13): "The law of prescription * * * forms no part of the contract itself, but merely acts upon it *ex post facto* in case of a suit; it cannot properly be deemed a right stipulated for, or included in the contract." Later, the learned author says: "Considered in their true light, Statutes of Limitation or prescription are ordinarily simple regulations of suits and not of rights. They regulate the times in which rights may be asserted in Courts of Justice, and do not purport to act upon those rights." And again, "In regard to Statutes of Limitation or prescription of suits, there is no doubt that they are strictly questions affecting the remedy, and not questions upon the merits. They go *ad litis ordinationem*, and not *ad litis decisionem*, in a just juridical sense."

This seems to rob the decision in *Konsilla* v. *Ishri Singh* (11) of its very basis, which is the proposition that the right which the holders of mortgage decrees passed before 1909 had under the Code of 1882 to execute those decrees without any limit of time, was a substantive right. It is hard to see how there can be a vested interest in a mere matter of procedure. If the Court-fee payable on an application for execution were raised, could the holders of decrees passed before the change claim to put in their applications on the old Court-fee? Or if a Court is moved from one town to another, would the inhabitants of the first town who held decrees passed by that Court before the move, have a right to have the decrees executed in that town? Limitation is no less a matter of procedure than these matters, and the right to obtain relief by following certain procedure within a fixed time seems to me no different from the right to do so at a fixed place or a fixed price. Even, therefore, assuming that section 48 of the Code of 1908 did not merely explain and make more certain the law as it stood under section 230 of the Code of 1882 but amended it, a view which I am unable to take, I hold that the new section has retrospective effect and limits the period for the execution even of mortgage decrees passed before the new Code came into force.

It remains to examine the contention that execution of the decree is not yet barred, because of the provisions of paragraph 11 (3) of Schedule III of the Procedure Code of 1908, which reproduces the third paragraph of section 230 of the old Code. This contention the learned Divisional Judge has accepted as sound on the authority of *Keshavlal Bechar* v. *Pitamberdas Tribhuvandas* (14) and *Girdhar Das* v. *Har Shankar Prasad* (15). Neither

(13) 5 M. I. A. 234 at pp. 265, 266, 267, 8 Moo. P. C. 4; 1 Sar. P. C. J. 423, 18 E. R. 884; 14 Eng. Rep. 2.

(14) 19 B. 261

(15) 20 A. 383; A. W. N. (1898) 82.

ruling decides the matter now before us. In the former case the objection of the bar under section 230 was not seriously pressed and was not discussed. It was held that the Collector's management of the property, which began within a year of the passing of the decree and still continued, was merely a continuation of the proceedings originally instituted, and that each of the annual payments made by the Collector to the decree-holder was a partial step in aid of execution of the decree. In the second case the decree-holder, who was not the creditor on whose attachment the property had been put in the hands of the Collector, had applied to the Collector to have his decree satisfied and this application had been refused. Clearly, therefore, he was deprived, during the management of the Collector, of all remedy against the property in the Collector's hands and was entitled to exclude that period in calculating limitation, though, as the learned Judges were careful to explain, that was only in respect of the property in the Collector's hands. He had not been deprived of any remedy in respect of his debtor's other property, and execution of his decree against that other property was barred by time.

Here we have the converse case. The decree-holder was not deprived of any remedy against the property in the hands of the Collector. He certainly was deprived of his remedy against his debtor's other property by the second paragraph of section 325A of the old Code and paragraph 11 (2) of Schedule III of the new Code, and if his decree were capable of execution against that other property, which it is not, it would not be barred by time to that extent. It is urged on behalf of the decree-holder that he was deprived of his remedy of being able to force the sale of the property, unless the whole amount of his decree was paid at once, by the power given to the Collector to lease out the land and pay him in instalments. This, however, is incorrect. Under sections 321 and 322 of the old Code and paragraphs 1 and 2 of Schedule III of the new Code in executing a decree for sale on a mortgage, the Collector could not satisfy the decree by instalments. He was bound to sell the property or to satisfy the decree in full by a lease or mortgage for the full amount to be paid at once. I am aware that at one time some misconception did exist on this point, and that it was thought that a Collector might pay off by instalments a decree ordering sale on a mortgage. That was set right long before November 1901, when the Collector first took charge of this property, but anyhow we have to consider to what extent the creditor has been deprived of a remedy by the actual powers specially given to the Collector, not by any popular delusion as to those powers. Here his remedy was rather enlarged by the property being put in the hands of the Collector, because in addition to giving the debtor time to raise the money under sections 321 (*a*) and 305 of the old Code [and paragraph 1 (*a*) of Schedule III, and Order XXI, rule 83, of the new], which the Court also could do, the Collector could himself make arrangements to mortgage or lease the property under section 321 (*b*) of the old Code [and paragraph 1 (*b*) of Schedule III of the new] which the Court could not.

I hold, therefore, that the decree-holder cannot, in this case, get any benefit from paragraph 11 (3) of Schedule III of the Civil Procedure Code, and that his last application for execution is barred by time under section 48 of the Code. The orders of both the Courts below allowing execution are accordingly set aside. The decree-holder will pay all the costs of both parties in all three Courts.

Appeal accepted.

CALCUTTA HIGH COURT.

CIVIL REFERENCE No. 1 OF 1914.

August 3, 1914.

Present:—Mr. Justice Holmwood and Mr. Justice Chapman.

Srimati PARAMESWARI—PLAINTIFF

versus

JAGAT CHANDRA DAS AND OTHERS—RESPONDENTS.

Jurisdiction—Small Cause Court—Suit registered as ordinary suit—Tried as Small Cause Court suit—Civil Procedure Code (Act V of 1908), O. XLVI, r. 7—Reference to High Court—Discretion—Decision on merits.

PARAMESWARI v. JAGAT CHANDRA DAS.

A suit valued at Rs 90 was instituted in the Court of a Munsif having Small Cause Court power only up to Rs. 50. It was registered as an ordinary suit but was tried subsequently as a Small Cause Court suit by the successor of the former Munsif who had Small Cause Court power up to Rs. 100:

Held, considering the merits of the case, that it was not a fit case to direct that the suit be re-heard in the regular form, on the ground that the Court of Small Causes had erroneously held the suit to be cognizable by it.

Held, further, that the High Court had full power in such a case to consider the matter on the merits, so as to do substantial justice without putting the parties to the expense of a fresh suit.

A Court of Small Causes cannot be expected to consider whether the suit before it is one which it has jurisdiction to entertain independently of whether an actual plea is not taken to that effect.

Mahima Chandra Sirdar v. *Kali Mondal*, 12 C W. N. 167, not followed.

Hari Kamayya v. *Hari Venkayya*, 20 M. 212 and *Shambhu Dhanaji* v. *Ram Vithu Sarang*, 28 B. 244, 5 Bom. L. R. 1008, referred to.

Suresh Chander Maitra v. *Kristo Rangini Dasi*, 21 C. 249 and *Ram Lal* v. *Kabul Singh*, 25 A 135, A. W. N. (1902) 219, followed.

Civil reference by the District Judge of Chittagong.

Babu *Khitish Chandra Sen*, for the Plaintiff.

Babu *Chandra Sekhar Sen*, for the Respondents.

JUDGMENT.—This is a reference made to us by the learned District Judge of Chittagong under Order XLVI, rule 7, Civil Procedure Code. It appears that a suit for recovery of ornaments (or their value, 90 rupees) placed in deposit with defendant was instituted in the Court of the Munsif having Small Cause Court power only up to Rs. 50 and was registered as an ordinary suit. Before the case came on for hearing, the first Munsif was succeeded by another Munsif who had Small Cause Court power up to Rs. 100. He tried the suit as a Small Cause Court suit and dismissed it on a very strong finding of fact that no such deposit had ever been made. The evidence of deposit is quite unsatisfactory and unreliable. He goes into the evidence in detail, analyses it, and as far as we can see has come to a just and proper conclusion.

It is urged on the authority of the case of *Mahima Chandra Sirdar* v. *Kali Mondal* (1) that this Court is bound to act upon the reference by the learned District Judge and to direct that the suit be re-heard in the regular form. In support of this contention the Full Bench case of Madras, *Hari Kamayya* v. *Hari Venkayya* (2), and the decision of the Bombay Court in *Shambhu Dhanaji* v. *Ram Vithu Sarang* (3) are cited. But those were cases where the same officer had been subsequently vested with enhanced powers, and the learned Chief Justice points out in his judgment that in the previous Bombay case, *Balchand* v. *Balaram* (4), the Judges had held contrary views upon the special circumstances of that case, and we find that the Allahabad Court in the case of *Ram Lal* v. *Kabul Singh* (5) has held that where no question as to the Court's jurisdiction was raised by either party and the Court of Small Causes proceeded to judgment as if the case was properly cognizable by it, the High Court would refuse to interfere upon a reference made by the District Judge upon the ground that the Court of Small Causes had erroneously held the suit to be, or not to be, cognizable by it. It was moreover cogently laid down in that case that the Court of Small Causes could not be expected to consider whether the suit before it was one which it had jurisdiction to entertain independently of whether an actual plea was or was not taken to that effect. What took place in that case and also in this case is very evident. The defendant lost his case and then for the first time had it suggested to him that there was a plea which he might have raised before a Court of Small Causes with effect, and thereupon tried to get the decision reversed by an application to the District Judge. The Judges say: "We are not in favour of assisting parties to set aside decrees upon points which they did not raise before the Court which tried the matters in issue, and of which they gave no notice to the opposite party." To a similar effect is the rule of this Court in the case of *Suresh Chunder*

(1) 12 C. W. N. 167.
(2) 20 M. 212.
(3) 28 B. 244, 5 Bom. L. R. 1008.
(4) 5 Bom. L. R. 398.
(5) 25 A. 135 A. W. N. (1902) 219.

Maitra v. *Kristo Rangini Dasi* (6), which was the converse case to the present, where the case had been tried by the regular procedure when it ought to have been tried by the Small Cause Court procedure, and it was pointed out that section 16 of the Small Cause Court Act was in conflict with the new rule introduced in the Code of Civil Procedure by section 646B, the present Order XLVI, rule 7, and that there being this conflict, section 646B as also rule 7 distinctly stated that the High Court may make such order in the case as it thinks fit; so it is clear that it was intended that the High Court should have full power to consider the matter on the merits, so as to do substantial justice without putting the parties to the expense of a fresh suit.

This question of the discretion of this Court under the rule was not adverted to in the case which we have cited in 12 Calcutta Weekly Notes and in the Bombay case, the Chief Justice based his decision on the desirability of having an uniform procedure in these cases. With all respect to that great authority it is impossible, in our opinion, to have an uniform procedure where the matter is one which is left entirely to the discretion of this Court to be weighed on the merits in each case; and this case appears to us to be so peculiarly without merits that it would be impossible for us to direct that the parties should be put to the expense of a fresh trial in such a petty matter.

We, therefore, decline to interfere in the matter, though we recognize that the learned Judge had no choice but to refer the matter to us. The result is that the reference is discharged and the order of the Small Cause Court will be upheld.

There will be no order for costs in this matter.

Reference discharged.

(6) 21 C. 249.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 72 OF 1912-13 OF SULTANPUR DISTRICT.

November 13, 1914.

Present:—Mr. Holms, J. M.

Syed MUHAMMAD BAQAR—PLAINTIFF—APPELLANT

versus

SHEO MOHAN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Oudh Rent Act (XXII of 1886), ss. 3 (3), 107 B (b) and 107 G—"Land" includes fallow plots—Rent-free land liable to pay rent as provided by settlement decree—Proprietor of grove, not necessarily owner of land as well—Grove, character of—Assessment of rent, suit for, landlord's rights as to—Undivided holding, effect of.

"Land," as defined in the Oudh Rent Act, includes plots remaining fallow

Land held rent-free but liable to pay rent on breach of a condition annexed to it, as provided by the settlement decree, is not land held rent-free under a judicial decision as contemplated by section 107B (b) of the Oudh Rent Act.

A person recorded as proprietor of a grove is not necessarily a proprietor or under-proprietor of the land covered by the grove.

A land is not grove if only a portion of it remains grove.

Thakur Janki Baksh Singh v. *Mahabir Singh*, 1 Selected Decision 1910, referred to.

A landlord has no right to sue for assessment of rent some only of the co-sharers in an undivided holding.

Appeal from the decree of the Officiating Commissioner, Fyzabad, dated 26th May 1913, reversing that of the Deputy Commissioner, Sultanpur, dated 28th September 1912, modifying that of the Assistant Collector, Sultanpur, dated 17th January 1912.

FACTS.—The facts of the case appear clearly from the following Order of the Commissioner :—

"This case is one of a very unusual kind and I have found some difficulty in coming to a correct decision. The facts are as follows. At the first Regular Settlement the predecessors of the appellants obtained a decree for certain rent-free *sir* and claimed to hold certain other land as rent-free *sir*. This latter claim was not admitted, but a decree was passed with respect to some 24 *bighas* 14 *biswas* 10 *biswansis* of the other land declaring the holders to be entitled to be recorded as proprietors of the lands, which were described as groves, the conditions attached being that the lands were

to be held in subordination to the superior proprietor and that if any revenue were assessed on the lands, the holders should be responsible for it and if the groves were cut down, whether assessed to revenue or not, the holders were to pay a rent based on the rate payable by the best land in the village. In 1907 the superior proprietor brought a suit for assessment of rent under the Resumption Chapter of the Oudh Rent Act, claiming rent for 19 *bighas* 12 *biswas* from Onkar Singh who was alleged to be then holder. The Assistant Commissioner dismissed the suit, holding that the Resumption Chapter did not apply. His order was reversed by the Deputy Commissioner and after litigation up to the Board of Revenue a rent of Rs. 152-4-7 was fixed on an area of 20 *bighas* 1 *biswa* 10 *biswansis*. Onkar Singh refused to pay up the rent and was sued for arrears. He then contested the suit on the ground that he only held a half share in the holding, and his nephews, the present appellants, were made parties to the suit. After further litigation which went up to the Judicial Commissioner's Court, the landlord obtained a decree for half the rent against Onkar Singh, the appellants being exempted on the ground that they were not a party to the original suit for assessment. This decision necessitated a fresh suit for assessment of rent under the Resumption Chapter against the appellants and this second appeal has been filed against the order of the Deputy Commissioner by which he has assessed the appellants to a rent of Rs. 69 on an undivided half share of an area of 15 *bighas* 14 *biswas* 3 *biswansis* out of the original area of 20 *bighas* 1 *biswa* 10 *biswansis* for which rent was claimed. On behalf of the appellants I am asked to differ entirely from the views held by the various Courts in the previous litigation with Onkar Singh, on the ground that the appellants are not bound by the previous litigation. There can be no doubt and it is not denied that the appellants are not bound by the previous litigation and it is equally clear that the existing orders, *viz.*, the assessment to rent of Onkar Singh at Rs. 76-2-3 for a half share of an undivided holding of 20 *bighas* 1 *biswa* 10 *biswansis* and the assessment to rent of the appellants at Rs. 69 for a half share of an undivided area of 15 *bighas* 14 *biswas* 3 *biswansis* out of that holding are an anomaly. The respondent is to blame for suing Onkar Singh alone under the Resumption Chapter when Onkar Singh and the appellants were recorded in the under-proprietary *khewat* as joint co-sharers of the land, and Onkar Singh ought certainly to have raised his objection then and not during the suit for arrears of rent. The interpretation of the whole of the decree does not appear to have been raised before the Board of Revenue in the litigation against Onkar Singh, as will be seen from a copy of the order dated 26th April 1909, which shows that the only point raised before the Board was the claim that the land was not liable to assessment of rent under the decree unless and until the groves were cut down as a whole. The decree was undoubtedly very loosely worded and I find the same difficulty as the present Deputy Commissioner has had in interpreting it to justify assessment of rent, at the rate payable for the best land in the village, of areas which, from the time of the decree until now, have been occupied by houses or water or have lain waste and in whose condition there has been no change. Reading the decree in conjunction with the judgment it appears to me that the Settlement Officer intended to decree to the holders of these lands an under-proprietary right, not rent-free like the *sir* lands he refers to, but subject to the payment of revenue if any were assessed on the holding and subject to the payment of rent at the rate payable for the best land in the village for all lands then occupied by trees, which might subsequently be rendered capable of cultivation by the cutting down of trees.

"No revenue was payable by the superior proprietor at the time of the decree for these lands and there is nothing to show that any revenue has since been imposed. But the holders were declared liable to payment of the revenue at least and so were not rent free under proprietors, but true under-proprietors to whom the provisions of section 79 of the Land Revenue Act apply. It seems to me, therefore, that the original Revenue Court who dealt with the original application of the respondent to assess Onkar Singh under the Resumption Chapter was correct and the Resumption Chapter does not apply,—*Vide* the proviso to section 107B

To hold that it does not apply has resulted in rent being fixed under the terms of the decree and not under section 107G or section 107H, the only two sections under which rent could be assessed, and in Onkar Singh and the appellants being deprived of the under-proprietary rights decreed to them. But apart from this question, I do not see how it is possible for me to uphold a decree passed against only three out of four co-sharers in an undivided holding. It is true that the learned Judge, in his appellate judgment in the arrears of rent case, says that there is evidence that Onkar Singh is in possession of half the land, but I can find nothing in the evidence recorded by the lower Court in that case to bear this out. All that this evidence shows is that Onkar Singh had a half share in the holding and the present Deputy Commissioner's order bears this out. It seems to me that if the learned Judicial Commissioner had been aware of the correct facts, he would have decreed the whole claim for the arrears against Onkar Singh and this subsequent litigation would have been unnecessary, holding him to be jointly and severally responsible for the rent assessed on the whole holding. As, however, in my opinion, the Resumption Chapter of the Oudh Rent Act does not apply to these decree-holders and the suit against the appellants is bad, now that the whole facts are disclosed, I set aside the order of the lower Courts and dismiss the respondent's suit with costs, including Pleader's fees in all Courts."

Syed *Zahur Ahmad*, for the Appellant.

Pandit *Banni Dhar Misra*, for the Respondents.

JUDGMENT.—(*July 24th*, 1914.)—The facts have been clearly stated by the Commissioner. Apart from the difficulty he raises as to passing a separate decree assessing rent on three out of four co-sharers in an undivided holding, a further difficulty occurs. Mr. Rafiq, the District Judge, in his judgment, dated 24th March 1911, has held that the present respondents are not liable for rent for their portion of the holding, as no rent has been assessed. The result is that the remedy in the shape of a suit for arrears of rent in accordance with the terms of the settlement decree is not open to the appellant. He has now had resource to the alternative remedy,—a suit under the Resumption Chapter for assessment of rent. Now if the Resumption Chapter applies at all and section 107G is made use of, the rent must be determined under the provisions of that section, and not according to the terms of the settlement decree. Appellant urges that section 108 (5A) is wide enough to cover a suit for assessment of rent according to the settlement decree, although such a suit would not fall under any other section of the Oudh Rent Act. I feel considerable doubt as to this contention and on the next day of hearing appellant will let me have his rulings in support of it.

The respondent urges that, as only two plots out of the ten plots assessed are cultivated, the other plots, remaining fallow, do not fall in the definition of land in the Oudh Rent Act. There is nothing to be said for this view, apart from any question as to lands occupied by dwelling-houses.

He next urges that the land is held rent-free under the settlement decree under section 107B (*b*). The settlement decree distinctly states that the land will not necessarily be held rent-free, but that, when the groves are cut down, it will be liable to pay rent determined in a special way. Land which is liable to pay rent under a judicial decision can hardly be said to be held rent-free under it.

It is also contended by the respondent that the land which is recorded as under-proprietary land should now be held to be under-proprietary land. There is not much in the settlement decree to justify this contention. Reference is made in the settlement decree to Shankar Singh being proprietor of the groves, but this is not the same thing as his being proprietor or under-proprietor.

Respondent has further contended that the land assessed is still grove, because there is grove on the remaining portions of certain numbers. *Thakur Janki Baksh Singh* v. *Mahabir Singh* (1) is against this contention.

Adjourned to a date to be fixed later.

(1) 1 Selected Decision 1910.

GANAJI *v.* DHANSINGH.

(*November 13th*, 1914).—This is a complicated case and several troublesome points have arisen. The previous suit, which was settled finally by the appellate judgment of the Board dated the 16th November 1909, was under the Resumption Chapter in which the appellant sued Onkar Singh only for assessment of rent. A decree was given, which apparently was under section 107G, although the rent determined was not apparently determined under that section but according to the settlement decree of 1st August 1872. In my previous order of the 24th July I raised the question as to whether the present suit can lie under section 108 (5A). No objection, however, was taken on this point before the Commissioner nor according to his judgment urged before him, and, as this suit is similar to the suit in which the Board gave a decree without objection on this point, I will not raise it. The Commissioner says that it appears to him that the Settlement Officer intended to decree to the holders of these lands an under-proprietary right. Onkar Singh apparently raised no definite claim to under-proprietary rights in the previous litigation and the question was not discussed in the Board's judgment. It is by no means clear what rights were conferred by the settlement decree of 1872. Subsequent entries in the Settlement papers and *patwari's* records are only partially on record. In the *khetauni* of the First Settlement, Shankar Singh was recorded under the column for proprietor and the note in the margin on which respondent relies is not clear as to what land it refers. The respondent has not produced the last Settlement *khewat* and the entry in the last Settlement *khasra* may be disregarded. The Judicial Commissioner in his decision of the 21st December 1906 discussed the meaning of the settlement decree and holds that no under-proprietary right in land was created, but this was against Onkar Singh only and does not bind the respondents. The wording of the settlement decree certainly is such as to admit of two interpretations. If the grove lands were not to be held as under-proprietary lands, the words "plaintiff should hold these grove lands as he does his *sir*" would seem to be superfluous. On the other hand, the rent payable after the groves have been cut down is greater than would ordinarily be paid by an under-proprietor.

The action of the appellant in proceeding separately against the sharers in an undivided holding would, if the present suit were allowed, possibly result in a grave anomaly, Onkar Singh being apparently treated as a statutory tenant under the litigation ending in 1909, while the other co-sharers raise the question of their rights to an under-proprietary tenure. Without, however, coming to the decision of this claim I will settle the appeal from another point of view.

The appellant has himself entirely to blame for the difficulties in which he finds himself. He sued originally only one of the recorded sharers for assessment of rent in an undivided holding. He has wasted the time of a number of Courts, and on the whole I think he must be left to suffer the result of his own inconsiderate action. I, therefore, dismiss the appeal on the ground that the appellant has no right to sue for assessment of rent some only of the co-sharers in an undivided holding.

Appeal dismissed with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 88B OF 1913.

January 26, 1914.

Present:—Mr. Mittra, Offg. A. J. C.

GANAJI—DEFENDANT—APPELLANT

versus

DHANSINGH—PLAINTIFF—RESPONDENT.

Possession—Evidence of title—Suit on ground of dispossession

Possession is a good title against all persons except the true owner.

In a suit for possession on the ground of dispossession, the plaintiff must show that there was no discontinuance of possession before the defendant's entry.

Appeal against the decree of the District Judge, West Berar, dated the 12th November 1912, reversing that of the Junior Munsif, Akola, dated the 1st December 1911.

Mr. *F. W. Dillon*, for the Appellant.

Mr. *H. S. Gour*, for the Respondent.

JUDGMENT.—This is a suit for possession of a site in a *gadhi* which has been found to belong to the Government. In 1899 the plaintiff, the defendant and other persons applied for permission to build within the *gadhi*. The Tahsildar permitted the applicants to do so, provided they owned the sites. This, it is conceded, did not create a title binding on the Government. But the Government is not a party to the suit and, so far as can be made out from the record, has not supported the claim of either party. The lower Appellate Court has found that the plaintiff, in pursuance of this permission, built on the site in dispute in the famine year, that is, 1900. The plaintiff's case is that he was dispossessed by the defendant in 1907. The plaintiff had brought a suit under section 9 of the Specific Relief Act, which was dismissed. This is admitted, though there is no copy of the judgment or proceedings filed. The plaintiff has now instituted this regular suit and has been given a decree for possession by the lower Appellate Court on the ground of the plaintiff's prior possession.

The defendant-appellant's first contention is that the plaintiff, having brought a suit on his title as owner, should not have been given a decree on his prior possession, as the defendant had not sufficient notice of such a claim being advanced. But the plaintiff clearly stated that he had obtained the site from Government and built a shed thereon and was in peaceful possession of it for a number of years, when he was dispossessed by the defendant. It is obvious that the defendant, who holds a neighbouring plot under the same order of the Tahsildar, was in no way misled as to the nature of the plaintiff's claim.

The second question for decision is whether the plaintiff can be given a decree for possession on the ground of his mere prior possession. It is settled law that possession is a good title against all persons except the true owner. The authorities in support of this view are cited in *Nand Ram* v. *Narbad* (1). The so-called permission granted by the Tahsildar did not create a valid title as against the Government, but it does not follow that the defendant is at liberty to disturb the plaintiff's possession. As against the latter the plaintiff's prior possession was a good title. It is urged that the decree of the lower Appellate Court is bad, as there is no finding that the defendant did not enter into possession peaceably, and in support of this argument Counsel cites the following passage in the judgment of Batten, A. J. C., in *Sawanji* v. *Musammat Chinki* (2): "If the party sued entered into possession peaceably, then his possession is just as good as that of the plaintiff." What the learned Judge meant to lay down was that the plaintiff's possession must continue till the entry by the defendant, to entitle the plaintiff to recover possession from the latter. In other words, there must have been no discontinuance of possession before the defendant's entry. The facts of the case before me show that this is a case of dispossession, and it does not matter whether this was forcible or peaceable.

The last ground is that the plaintiff, by reason of the dismissal of the suit under section 9 of the Specific Relief Act, is precluded from recovering on the ground of mere previous possession in the absence of title. Now the point on which the former suit under section 9 could be *res judicata* is as to whether the plaintiff was dispossessed within six months of that suit. Anything else said by the Judge as to title or as to possession prior to six months will be *obiter*. The dismissal of the former suit is, therefore, not inconsistent with the finding that the plaintiff, before he was ousted by the defendant, was in juridical possession for some time. Reliance is placed on the second paragraph of section 9 of the Specific Relief Act which is to the following effect: "Nothing in this section shall bar any person from suing to establish his *title* to such property and to recover possession." The argument that the plaintiff having failed in the former suit can only recover on his title, overlooks that peaceful possession is good title as against the defendant, and the decree in the regular suit may be based on such possessory title.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 2 C. P. L. R. 59.

(2) 12 Ind. Cas. 25; 5 N. L. R. 88.

MI NGWE HMON v. MI PWA SU.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 136 OF 1913.

December 11, 1913.

Present:—Mr. McColl, A. J. C.

MI NGWE HMON—DEFENDANT—APPELLANT

versus

MI PWA SU—PLAINTIFF—RESPONDENT.

Slander—Repetition of rumour, whether actionable—Suit for damages for slander—Law applicable—Defence—Truth of slander.

The repetition of slanders heard from others is actionable unless privileged.

In a civil suit for damages for slander, the criminal law of defamation has no application. The suit must be decided according to justice, equity and good conscience.

The proof of the truth of the slander is a complete defence in a civil suit for damages

Mr. *A. C. Mukerjee*, for the Appellant.

Mr. *Ba Din*, for Mr. *San Wa*, for the Respondent.

JUDGMENT.—The plaintiff-respondent, a married woman, sued the defendant-appellant for damages for slander, alleging that the latter had spread a rumour in the village that she had had sexual intercourse with one Pyaw Bwe. Her first witness stated that the defendant-appellant had told her that the plaintiff-respondent and Pyaw Bwe had been seen sleeping twisted together like snakes. The Township Judge appears to have believed this witness, but he held that the evidence showed that plaintiff-respondent's relations with Pyaw Bwe were suspicious and that they were the subject of talk in the village and that the defendant-appellant had only repeated what she had heard and was, therefore, not liable.

On appeal the learned Additional Judge of the lower Additional Court found that defendant-appellant had exaggerated what she had heard and had thus caused strained relations between plaintiff-respondent and her husband and that whether what defendant-appellant said was true or not, she was liable for damages as none of the exceptions contained in section 499, Indian Penal Code, applied. He gave plaintiff-respondent a decree for Rs. 60.

The defendant-appellant has now appealed to this Court.

Both of the Courts below have erred in law. If slanderous words used by one man are actionable, the repeating of them by another is also actionable unless privileged, and the Township Court erred in supposing that the defendant-appellant was not liable simply because she had only repeated what she had heard from others.

The lower Appellate Court was wrong in supposing that the criminal law of defamation had any application. The suit had to be decided according to justice, equity and good conscience and in such matters the Common Law of England, though not binding, is generally looked to for guidance.

According to the Common Law of England slanderous words imputing unchastity to a woman are not actionable without proof of special damage. This rule, however, has not been imported into the law in India and now even in England under the Slander of Woman Act such words are actionable *per se*. Another rule which has been generally recognised in India is that proof of the truth of the slander is a complete defence in a civil suit for damages for slander or libel, "because the law will not permit a man to recover damages in respect of an injury to character which he either does not or ought not to possess." It is possible that there might be a case in which the application of this rule would not be in accordance with justice, equity and good conscience, but this is not such a case. If the defendant-appellant used the words complained of, they were certainly actionable, but proof of their truth would be a complete defence.

It has been urged that there is not sufficient proof that defendant-appellant did use the words complained of, that the plaintiff-respondent's witness Ma E Nge is deaf and Ma Tha I; who was admittedly present and in a better position to hear, did not hear them. But Ma Tha I stated that after the defendant-appellant had made a remark against the plaintiff-respondent she moved a head—they were all three walking along the road in single file—and did not hear what further conversation defendant-appellant and Ma E Nge had. Besides there is evidence that the defendant-appellant made similar slanderous remarks to others.

Next, it is contended that plaintiff-respondent's conduct was such as to disentitle her to any damages, that during her husband's

absence Pyaw Bwe constantly visited her, that they were seen sleeping on the same mat and that plaintiff-respondent's mother-in-law actually requested Pyaw Bwe's father to forbid him to visit the house. The evidence was recorded in English by a Burmese Magistrate and I have no doubt that he has translated the word * * as 'sleep' and that what the witness Pyaw Bwe really said was that he had been lying on the same mat with the plaintiff-respondent, which corresponds with what one of the witnesses for the defence stated, *viz.*, that she had seen Pyaw Bwe and the plaintiff-respondent lying facing each other and talking. This, no doubt, implies intimacy and I do not disagree with the Township Judge's finding that the plaintiff-respondent's conduct was improper. If the defendant-appellant had merely told others of these proved improprieties she would not have been liable. But she stated in effect that plaintiff-respondent and Pyaw Bwe had had sexual intercourse and she stated this not as an inference from their proved intimacy, but as an independent fact and she failed to prove anything more than impropriety.

I am of opinion, therefore, that she has rightly been held liable and I do not consider the damages awarded, Rs. 60, excessive.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1070 OF 1914.

February 2, 1915.

Present:—Mr. Justice Scott-Smith.

THUMAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

Musammat BASANTI—PLAINTIFF—RESPONDENT.

Procedure—District Judge adopting finding of Divisional Judge in another case on custom, legality of.

Where a District Judge affirms a decree in favour of the plaintiff, following a finding as to custom arrived at by the Divisional Judge in another case relating to houses in the *abadi* of the village, he does not apply his mind to the point and his procedure is irregular.

Second appeal from the decree of the District Judge, Amballa, dated the 16th February 1914, affirming that of the Munsif, first Class, Amballa, dated the 1st May 1913, decreeing the claim.

Mr. *Nand Lal*, for the Appellant.

Rai Bahadur Pandit *Sheo Narain*, for the Respondent.

JUDGMENT.—This was a suit by *Musammat* Basanti, plaintiff-respondent, for possession of a shop sold to her by Ganpat, a non-proprietor in Bahyal village. Defendant-appellant is a proprietor who took possession of the house. The main question at issue was as to the right of the proprietors to object to alienations by non-proprietors. The case was heard along with two others in which the appeals lay to the Divisional Judge. In those cases the proprietors were the plaintiffs and their suits were dismissed by the first Court. The learned Divisional Judge on appeal found against the proprietors, on the ground that they had acquiesced in the defendants' possession. He also recorded certain findings as to the customs prevalent in the village, one being that proprietors can object to future alienations by original non-proprietors, but not to those by non-proprietors who have derived their title by sale and have been lulled into a sense of security of title.

In the case out of which the present appeal arises the appeal lay to the District Judge, who accepted the finding of the Divisional Judge as to the above custom, and holding after a remand that Ganpat was not an original non-proprietor but had derived his title by purchase, dismissed the appeal of the proprietors, the first Court having decreed plaintiff's claim.

In second appeal it is urged that the lower Appellate Court should have decided the question of custom independently.

Pandit Sheo Narain for respondent says the District Judge was entitled to adopt the finding of a superior Court. Perhaps he might have been entitled to do this and I am not sure that I should have interfered had I been satisfied that he had applied his mind to the point and to the reasoning of the Divisional Judge. But there is nothing in his judgment to show that he had done this. Another objection to the procedure adopted by the lower Appellate

Court is that there was no necessity for the Divisional Judge to come to any finding on the question of custom, and his finding was a mere *obiter dictum* and under the circumstances not of very much value.

Pandit Sheo Narain also argues that as Ganpat was in possession for more than 12 years after the sale to him, he acquired an absolute title and could transfer the shop to any one he liked without the consent of the proprietors.

This argument appears to be quite a new one. Plaintiff never urged that Ganpat had acquired an absolute title by adverse possession. He may have been a full owner according to the custom of the village, but if the custom is against him, I do not see how his position could be better than that of any other non-proprietors.

The appeal is accepted and the order of the lower Appellate Court being set aside, the case is remanded to the Senior Subordinate Judge for re-decision of the appeal. Stamp in this Court to be refunded and other costs to be costs in the case.

Appeal accepted.

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 24 OF 1913.

February 26, 1914.

Present:—Mr. McColl, A. J. C.

NGA PO AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

NGA SO PE—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch I, Art. 142—Possession within 12 years of suit—Undisturbed possession—Discontinuance of possession.

In a suit for ejectment of a trespasser from certain land allowed to remain fallow for many years by the owner, the defendant pleaded that the land had been waste land for 40 years and he cleared the jungle with the permission of the Thugyi and was in occupation:

Held, that the suit was governed by Article 142 of the first Schedule of the Limitation Act and the plaintiffs must prove that they were the rightful owners and were in possession at some time within 12 years before the suit.

Discontinuance of possession means an abandonment of possession by one person followed by the actual possession of another person.

Mr. *C. G. S. Pillay*, for the Appellants.

JUDGMENT.—The plaintiffs-appellants sued for possession of some land, alleging that they had allowed it to remain fallow for many years, that in 1271 the defendant-respondent entered upon it without their permission and worked it, that they protested, whereupon he promised to pay rent, that that year he only offered one basket of paddy as rent though they demanded five, that the next year he refused to pay any rent at all, that the lease was then determined and that in 1273 the defendant-respondent again entered upon the land without their permission and refused to give it up.

The defendant-respondent pleaded that the land had been waste land for 40 years, when he entered upon it and cleared the jungle with the permission of the Thugyi. He denied having attorned to the plaintiff-appellant.

The Courts below having held that the suit was time-barred under Article 142 of the first Schedule of the Limitation Act, the plaintiffs-appellants have come up to this Court in second appeal.

The first Court relied on *Mg. Nyun* v. *Ma Nyein Zan* (1), but as the facts of that case are not very fully set out it is difficult to say how far it is a parallel case and I think Mr. Burgess' dictum, "if the land was left unworked for 41 years the plaintiffs or their predecessors presumably relinquished possession," is open to question. A landowner is under no obligation to cultivate his land, though of course if he allows it to remain uncultivated more than a certain number of years he is liable to be assessed to revenue at full rates instead of at fallow rates. The suit no doubt was governed by Article 142, but the appellants alleged dispossession in 1271 and again in 1273. What they had to prove, therefore, to show that the suit was within time was that they were in possession in 1271. Now the rule is that when no one exercises active dominion over land the possession remains with the rightful owner: *Rajah Leelanund Singh* v. *Musammat Basheeroonissa* (2), so that if the plaintiffs-appellants showed that they were the rightful owners and they had once been in possession, it would be presumed that that

(1) U. B. R. (1892-96) II, 375.
(2) 16 W. R. 102.

possession continued right down to 1271 if it appeared that their possession had not been interrupted till then. It was of course open to the defendant-respondent to prove that the plaintiffs-appellants' possession had been interrupted and then the presumption that they were in possession in 1271 would have been rebutted, but no such evidence was given. The evidence given by the defendant-respondent's witnesses was to the effect that the land had been lying waste since the annexation. In view of the defence set up and the absence of rebutting evidence, I consider that the evidence of the 2nd plaintiff-appellant and that of the witness Mg. Kaw, together with an entry in a revenue map, is sufficient evidence that the plaintiffs-appellants are the rightful owners and the evidence of the witness Mg. Swe to the effect that he worked the land as plaintiffs-appellants' tenant for two years about the time of the annexation of Upper Burma is sufficient evidence that the plaintiffs-appellants were in possession then, and they must be held to have continued in possession until they were dispossessed by the defendant-respondent. There was no discontinuance of possession. "Discontinuance means an abandonment of possession by one person followed by the actual possession of another person." Starling's Indian Limitation Act, 5th Edition, p. 402.

The decrees of the Courts below are set aside and the plaintiffs-appellants will be given a decree for possession with all costs.

Appeal allowed.

CALCUTTA HIGH COURT.

FIRST CIVIL APPEAL No. 343 OF 1911.

July 20, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

CHOTA BAHIRA SAHEBA—DEFENDANT No. 1—APPELLANT

versus

PURNA CHUNDER CHAUDHURI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Pachete Raj—Family custom—Maintenance grant, nature of—Impartible estate, alienability of—Equitable interest, value of—Putnindar *under grantor of maintenance—Grantor, right of, against grantee—Transfer of Property Act (IV of* 1882), *s.* 43, *scope of.*

According to the family custom in the Pachete Raj, a maintenance grant to the members of the Raj is not absolute in its nature like gift, but lasts only for the life-time of the grantee, and it is entirely optional with the successor of the grantor to resume or confirm the grant.

It is only where a custom in restraint of alienation is not proved that an impartible estate is alienable.

Udaya v. *Jadub*, 8 C. 109; 8 I. A. 248; 4 Sar. P. C. J. 260; 5 Ind. Jur. 552, *Sartaj* v. *Deoraj*, 10 A. 272; 15 I. A. 51, 5 Sar P. C. J. 139; 12 Ind. Jur 213 and *Venkata Surya Mahipati Rama Krishna Rao* v. *The Court of Wards*, 22 M. 383; 26 I. A. 83; 3 C. W. N. 415; 9 M. L. J. Sup. p. 1, referred to.

If the transferor himself has once become entitled to a valid estate in the land, the transferee's equity would attach upon it in the hands of all persons claiming under the transferor otherwise than for a legal interest by purchase for value without notice.

The holder of the Pachete Raj, after having granted certain villages to the defendant for her maintenance, created a *putni* in favour of the predecessor of the plaintiff on the allegation that the grant had been resumed. The maintenance grant, after the death of the grantor, was not resumed by his successor. The plaintiff filed a suit for ejectment of the defendant on the ground of trespass:

Held, that the suit was not maintainable for want of title, and that section 43 of the Transfer of Property Act was not applicable, inasmuch as the section recognised the doctrine of title by estoppel and applied only where a person erroneously represented that he was authorised to transfer certain immoveable property.

Appeal against the decree of the Subordinate Judge of Manbhum, dated the 26th June 1912.

Dr. *Rash Behary Ghose* and Babu *Lalit Mohan Ghose*, for the Appellant.

Babus *Dwarka Nath Chakravarti*, *Mohini Mohan Chatterjee* and *Hem Chunder Mookerjee*, for the Respondents.

JUDGMENT.—The subject-matter of the litigation, which has culminated in this appeal, consists of eight villages included in the Pachete Raj in the District of Manbhum. In or about the year 1855, Nilmani Singh, the then holder of the Raj, granted these villages to his paternal aunt, Puncham Kumari, the first defendant in this suit, for her maintenance. On the 6th December 1878, Nilmani Singh granted a *putni* of the same villages to Jaychandra Chaudhuri, now represented by the plaintiffs, on the allegation that the maintenance grant had been resumed. The *putnidar* was unable to obtain possession, as the villages had not in fact been resumed, and the first defendant was still in occupation. The *putnidar* in 1879 sued to eject the first defendant and persons who had derived title from her, on the allegation that the maintenance grant had lapsed. The Raja who had granted the *putni* was also joined as a *pro*

forma defendant. The suit was dismissed by the Subordinate Judge on the 1st October 1880, on the ground that the grant was not resumable by the grantor during the life-time of the grantee. This decision was confirmed on appeal by the Judicial Commissioner on the 30th May 1881. But, although the *putnidar* was thus defeated in his attempt to obtain possession of the lands comprised in the *putni*, the Raja proceeded to realise the *putni* rent by recourse to the summary procedure laid down in the Putni Regulation. The *putnidar* was constrained to deposit the *putni* rent under protest, and on the 21st April 1887, he instituted a suit to obtain a refund of the amount deposited under compulsion of process of law and also to obtain an injunction to restrain the Raja from recourse in future to the provisions of the Putni Regulation for summary realisation of the *putni* rent. The suit was decreed by the Subordinate Judge on the 20th March 1888. On appeal to this Court, the decree of the Subordinate Judge for refund of the amount deposited was confirmed on the 22nd January 1889, but the order for injunction was withdrawn, as it had not been properly framed and was also considered needless for the protection of the plaintiff. Since the date of this decision, the *putnidar* has not paid rent to the holder of the Raj, as he has not been able to obtain possession of the villages comprised in the *putni*. Raja Nilmoni Singh, the grantor of the *putni*, died in August 1898 and was succeeded by his son, Raja Harinarayan Singh, who died in or about January 1903 and was succeeded by his son, Raja Jyotiprosad Singh. The plaintiffs, who are the representatives-in-interest of the original *putnidar*, commenced this suit on the 22nd July 1910, to eject the first defendant as also persons who had derived title from her on the ground that they were trespassers, as the maintenance grant had lapsed on the death of the grantor, Raja Nilmoni Singh, in August 1898. The claim is founded on the allegation of the existence of an immemorial family custom in the Pachete Raj that the eldest son of the Raja succeeds to the Raj, that the other sons and relations of the Raja receive maintenance according to their rank and position, and that on the death of the grantor or grantee, the maintenance property is resumed. The Raja repudiated the claim of the plaintiffs and asserted that, according to custom, the Raja was at liberty to resume or confirm a maintenance grant made by his predecessor, that it was entirely optional with him and was in no way obligatory. He added that his father had not resumed the grant made to the first defendant, and that he himself had no intention to resume the grant. The first defendant also resisted the claim on the ground, amongst others, that according to family custom, maintenance grants were not resumable during the life-time of the persons entitled to maintenance. The Subordinate Judge has held that the maintenance grant in favour of the first defendant came to an end on the death of the grantor, that his successor became entitled to resume the grant although the grantee was alive, and that the plaintiffs, as *putnidars* from the grantor, were vested with the right of resumption. In this view, the Subordinate Judge has decreed the suit. The first defendant has appealed to this Court, and on her behalf the decision of the Subordinate Judge has been challenged on three grounds, namely, *first*, that the question of the nature of the title acquired by the first defendant under the maintenance grant is *res judicata*; *secondly*, that the alleged custom, whereby a maintenance grant comes to an end on the death of the grantor, has not been proved; and, *thirdly*, that the plaintiffs have not acquired a title under this *putni* to obtain possession of the villages during the life-time of the first defendant.

The determination of the first question depends upon the scope of the controversy in the litigation of 1879 and of the actual decision therein. At that time, the grantor and grantee were both alive. The issue raised was, whether the maintenance grant of the villages in suit was or was not resumable by the grantor during the life of the grantee. The question thus put in issue was answered in the negative, against the contention of the then plaintiff. The question now in controversy, namely, whether after the death of the grantor the maintenance grant may be resumed by his successor during the life of the grantee, did not and could not arise in the previous suit; such a question could arise only after the death of the grantor. The Subordinate Judge expressed the opinion that a grant

of lands for the maintenance of any person continues presumably for the life of the grantee, and that the then plaintiff had failed to discharge the onus which lay upon him to prove that the grant was resumable at pleasure. The Judicial Commissioner held that there was no proof of a custom of resumption by the grantor during the life-time of the grantee. It is plain, consequently, that the decision in the suit of 1879 was rested on the ground that the grantor himself was not competent to resume the grant during the life of the grantee. This does not conclude in any way the decision of the question raised in this suit.

The determination of the second question depends upon the evidence of family custom on the record. The plaintiffs have examined one of themselves as the solitary witness in support of their claim. This person, who gives his age as thirty-seven years, asserts that the family custom of the Raja of Pachete is that maintenance grants are resumed on the death of the grantor or grantee. This statement does not prove that every maintenance grant made in the Pachete Raj comes to an end on the death of the grantor. But it is plain that the evidence of this witness is otherwise valueless. He is in no way connected with the family, and, when cross-examined as to the source of his knowledge of the alleged custom, he stated that he had heard of the family custom from assertions made by Raja Harinarayan Singh in several suits brought by him for *khorposh* (*i.e.*, for resumption of maintenance grants). No foundation, however, has been laid for the reception of secondary evidence of statements made by Raja Harinarayan Singh; and the pleadings or depositions in which the alleged statements were made should have been produced. Apart from this, the statements of the witness are so vague and indefinite that no reliance can be placed thereon. He is unable to state with regard to different suits for resumption, whether there were any written grants in those cases, or even the decisions given by the Courts. The testimony of this witness is wholly insufficient to establish the alleged custom. Reference, however, has been made to two suits relating to maintenance grants in the Pachete Raj, decided by the Sadar Dewany Adalat in 1837 and 1840: *Punchum Koomaree* v. *Gurunarain Deo* (1) and *Gurunarain Deo* v. *Unund Lal Singh* (2). The litigation in the second case was ultimately taken up to the Judicial Committee of the Privy Council: *Anund Lal Singh* v. *Gurrood Narayun Deo* (3). In the first of these cases, the suit was brought for the recovery of a maintenance grant made by a Raja of Pachete in favour of his daughter, the plaintiff. The Court of first instance held that the allowance to daughters was usually discontinued on their marriage, unless their husband should prove unable to support them, and that consequently the plaintiff, who had been married to the son of the Raja of Nagpur, had no claim for maintenance on the Pachete Raj. On appeal, the Sadar Dewany Adalat confirmed this view, and added the following observation:

"The estate of the Raja of Pachete is one of those of the nature adverted to in Regulation X of 1800, which devolves entirely on the next heir of the reigning Raja, who, moreover, according to the family usage as established by evidence, has the power of revoking and cancelling all grants made by his predecessor, the power of making such grants being restricted, in regard to the period of the grant, to the life-time of the grantor."

In the second case, the suit for resumption of the maintenance grant was brought by a successor of the grantor against the representative of the grantee; the grantor and grantee were both dead at the date of the institution of the suit; consequently, no question could arise as to any family custom which might entitle the successor of the grantor to resume a maintenance grant from the grantee during the life-time of the latter. The suit was brought by Gurnarain Deo, who had succeeded to the Pachete Raj, to recover *khorposh* from Anandalal Singh Deo. The property had been granted by Manilal, a predecessor of the plaintiff, to Kanchanlal, a predecessor of the defendant on the 26th July 1775. One of the questions in controversy

(1) (1837) 6 Mac. Sel. Rep. 100; 7 Ind. Dec. (o. s.) 791.

(2) (1840) 6 Mac. Sel. Rep. 354; 7 Ind. Dec. (o. s.) 932.

(3) 5 M. I. A. 82; 1 Sar. P. C. J. 390; 18 Eng. Rep. 826.

between the parties was whether the grant was absolute or was only for purposes of maintenance. The Court of first instance found in favour of the defendant and dismissed the suit. Upon appeal, the Sudder Court (Mr. Rattray) confirmed the decree of the Provincial Court. An application for review was granted, and the appeal re-heard, with the result that Mr. Rattray, the Judge, who had heard the appeal in the first instance, decreed that his former decision should be reversed, while his colleague, Mr. Dick, held that the original decree was correct and should be affirmed. The third Judge, Mr. Lee-Warner, to whom the appeal was referred, held that the second decision of Mr. Rattray was correct. The consequence was that the first decision of Mr. Rattray stood cancelled and the suit and appeal were decreed. The defendant preferred an appeal to the Judicial Committee, which was dismissed on the ground that the grant was not absolute but for maintenance and had lapsed after the death of the grantee. There was no adjudication—in fact, there was no occasion for any investigation of the question—that the successor of the grantor of a maintenance grant was entitled to resume it on the death of the grantor during the life-time of the grantee. Stress, however, is laid upon the following passage from the second judgment of Mr. Rattray: "It is placed beyond doubt that by the ancient custom of this family, the reigning Raja is succeeded by his eldest son and that the other sons as well as the minor branches of the family receive merely an allowance for their subsistence; and further that the successor to the Raj has full power to annul, cancel, alter, modify, or confirm the arrangements of his predecessor, as to him may seem fit." This statement is entitled to weight, subject to the important qualification that the matter in controversy between the parties did not raise directly or indirectly the question of the right of the successor of the grantor to cancel, modify or confirm a maintenance grant during the life-time of the grantee. When the case was taken to the Judicial Committee, Lord Langdale observed that the appellant, who claimed under the grant, had admitted that a grant for maintenance ceased with the life of the grantor; consequently, if the grant was not absolute but for maintenance, the appellant had no title. It cannot be disputed that the fact that both the grantor and the grantee were dead at the date of the institution of the suit, takes away from the value of the decision for our present purposes. It cannot be treated as a judicial determination of the existence of the custom in a case in which the question arose directly for investigation. At any rate, the decision of Mr. Rattray does not show that a maintenance grant necessarily lapses upon the death of the grantor. Consequently the two litigations, on which reliance is placed, do not really carry the case of the plaintiffs beyond the oral testimony of the solitary witness cited by them; these cases show at most that a grant for maintenance may, after the death of the grantor, be resumed or confirmed at the choice of his successor; but it is entirely optional with him to resume or confirm the grant; there is no evidence to show that it is obligatory upon the successor of the grantor to resume the maintenance grant. This view is supported by the evidence of Khudu Lal Singh, the paternal cousin of Raja Nilmoni Singh. This witness has been examined on behalf of the defendants, and describes the family custom of the Pachete Raj family in the following terms: "*Khorposh* granted to junior members of the family are enjoyed by the grantee till her life, but if the grantor dies, his successor can resume the *khorposh* if he likes; he has the option of resuming the *khorposh*, or allowing the *khorposhdar* to enjoy the *khorposh* property till his or her death." In cross-examination, he states that the *khorposh* grant is liable to resumption on the death of the grantor or grantee. He then proceeds to enumerate instances of *khorposh* grants which had been resumed on the death of the grantor, and also of grants, which were not so resumed. In our opinion, the plaintiffs have failed to establish that by custom a *khorposh* grant under the Pachete Raj lapses upon the death of the grantor, and the lands revert forthwith to the Raj; on the other hand, the evidence indicates that such maintenance grants continue during the life-time of the grantees, but that if meanwhile the grantor dies, they are liable to be resumed at the choice of his successor; it is entirely optional with him to resume the grant or to allow the grantee to continue to enjoy the property during his or her life-time. Reliance, however,

has been placed upon the decisions in *Beni Pershad Koeri v. Dudhnath Roy* (4), *Ram Chandra* v. *Jogendra Nath* (5) and *Jagannadha* v. *Pedda Pakir* (6) to show that a grant for maintenance *prima facie* ceases with the life of the grantor. These cases are of no assistance to the plaintiffs, who set up a special family custom and can succeed in their claim only upon proof of such custom. On the evidence, they have failed to prove the alleged custom, while there is good ground for the view that a maintenance grant in the Pachete Raj is for the life of the grantee, but is liable to be resumed by the successor of the grantor, should the latter die during the life-time of the grantee. In the present instance, Raja Harinarayan Singh, who succeeded to the Raj after the death of the grantor, never resumed the villages, while his successor, the present Raja, has expressly stated that he has not resumed and does not intend to resume the *khorposh* villages. In these circumstances, the plaintiffs cannot succeed on the hypothesis that the first defendant became a trespasser the very moment the grantor died.

The determination of the third question involves the solution of the problem, whether the plaintiffs have acquired a title to eject the defendants under the *putni* granted to them by Raja Nilmani Singh Deo on the 6th December 1878. For this purpose, it is assumed that the *putni* was validly created, on the principle that an impartible estate is not inalienable, unless a custom in restraint of alienation is proved: *Udaya* v. *Jadub* (7), *Sartaj* v. *Deoraj* (8), *Venkata Surya Mahipati Rama Krishna Rao* v. *The Court of Wards* (9). The plaintiffs then rely in substance upon the doctrine of title by estoppel, recognised in section 43 of the Transfer of Property Act. That section enacts as follows: "Where a person erroneously represents that he is authorised to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest, which the transferor may acquire in such property at any time during which the contract of transfer subsists." It is plain that this section, construed according to its terms, does not assist the plaintiffs. Nilmani Singh did not erroneously represent that he was authorised to grant the *putni*; he was competent to grant the *putni*, subject to the interest of the maintenance-holder, which could not continue in any event beyond her life-time. But when he granted the *putni* he stated what was not true, namely, that the maintenance grant had been resumed; as a matter of law, he was not competent to resume the maintenance grant unless he survived the grantee; as a matter of fact, he had not resumed the grant. The condition mentioned in the first portion of section 43 is thus not fulfilled. The second part of the section provides that the transfer operates on such interest as the transferor may acquire in the property at any time during which the contract of transfer subsists. This condition, also, is not fulfilled, because the rights of Nilmani Singh in the property remained what they were before the grant of the *putni*, they were not enlarged at any time after the grant of the *putni* and before his death. It is conceivable that if his rights had been enlarged, say, by the death of the grantee of the maintenance right, the *putnidar* might have been entitled to the benefit, not only against him but also against his heir, though there is authority to the contrary. Lord St. Leonards in his treatise on Vendors and Purchasers (1862, page 335, Chapter IX, section 2, paragraph 31) observes as follows: "If a man sell an estate to which he has no title, and after the conveyance acquires the title, he will be compelled to convey it to the purchaser: *Carne* v. *Mitchel* (10). But this is said to be a personal equity attaching on the conscience of the party and not descending with the land; and, therefore, if the vendor do not in his life-time confirm the title, and the estate descend to the heir-at-law, he will not be bound by his ancestor's contract: *Morse* v. *Faulkner* (11); *Carleton* v. *Leighton* (12); *Bensley* v. *Burdon* (13); *Murrell* v. *Goodyear* (14). This opinion, however, deserves great consideration." It is worthy

(4) 27 C. 156; 26 I. A. 216, 4 C. W. N. 274.
(5) 4 C. L. J. 399.
(6) 4 M. 371.
(7) 8 I. A. 248, 8 C. 199 (P. C.); 4 Sar. P. C. J. 290, 5 Ind. Jur. 552.
(8) 15 I. A. 51; 10 A. 272; 5 Sar. P. C. J. 139, 12 Ind. Jur. 213.
(9) 26 I. A. 83; 22 M. 383; 3 C. W. N. 415; 9 M. L. J. Sup. p. 1.
(10) (1842) 10 Jur. 909 at p. 912; 15 L. J. Ch. 287.
(11) (1792) 1 Anst. 11; 3 Swan. 429*n*; 36 Eng. Rep. 936.
(12) (1805). 3 Mer. 667; 36 E. R. 225.
(13) (1826) 2 Sim. & Stu. 519, 4 C. J. (o. s.) Ch. 164; 25 R. R. 258; 57 E. R. 444.
(14) 1859) 2 Giff. 51; 6 Jur. (N. S.) 91, 96 E. R. 22.

of note that the decision in *Morse* v. *Faulkner* (11) had been doubted by Sir Edward Sugden himself, when he was Lord Chancellor of Ireland, in *Jones* v. *Kearney* (15), where he observed that no good reason could be given why a contract should be binding upon the ancestor and not upon the heir. In that case, the seller had acquired the title after the conveyance, but he died before the conveyance could be perfected. The contract could have been enforced against the seller, and yet it was doubted, whether the remedy was available against the heir, although Sir Edward Sugden did not share the doubt. See *Trevivan* v. *Lawrence* (16). The distinction, for which Sir Edward Sugden could see no good reason, may be regarded as unsound on principle, for as Bigelow observes, (Estoppel, 6th Ed., pages 459 and 479) the heir of the transferor in such a case is rightly bound by the same estoppel as the transferor himself, because he takes without value and no injustice is done to him; he is bound as a privy because he gets the estate without cost, and it is right, therefore, that he should stand in the situation of his ancestor. The true rule may accordingly be taken to be that if the transferor himself has once become entitled to a valid estate in the land, the transferee's equity would attach upon it in the hands of all persons claiming under the transferor otherwise than for a legal interest by purchase for value without notice [*cf.* Specific Relief Act, sections 18 and 27, *Smith* v. *Osborne* (17): *Bridgwater's Settlement, In re*; *Partridge* v. *Ward* (18); *Taylor* v. *Wheeler* (19); *Jennings* v. *Moore* (20); *Martin* v. *Seamore* (21); *Holroyd* v. *Marshall* (22); *Tailby* v. *Official Receiver* (23)]. To avoid misapplication of this principle, it is useful to bear in mind the successive steps of the process of reasoning by which the result is reached; *first*, a contract by *X*, for valuable consideration to assign property to be acquired by him, whether it is expressed as a contract or whether it takes the form of an immediate assignment, merely binds *X* personally until the property comes into existence; *secondly*, when *X* acquires property which comes within the scope of the contract, that property is bound; *X* becomes a trustee of it for the assignee, who acquires an equitable interest therein; and it is not necessary that any fresh act should be done by *X* to perfect such equitable interest of the assignee; *thirdly*, the interest acquired by the assignee in after acquired property when it is acquired, is an equitable interest; as such it is not available against a purchaser, for value without notice of a legal interest in the property. This analysis shows that the rule has no application to the present case. Here, the grantor of the *putni* never acquired the right to resume the maintenance villages; consequently, the position is not precisely what it would have been, if the right had accrued to him and the *putnidar* had sought to obtain the benefit thereof as against the heir. The right to resume the maintenance villages accrued for the first time to Harinarayan Singh who succeeded to the Raj on the death of Nilmani Singh. On what principle, can it be held that he was bound to exercise his option for the benefit of the *putnidar*? To affirm the proposition that he was so bound is to hold that the Raja for the time being may take away the option of his successor and determine that his choice is to be exercised in a particular mode. We are of opinion that the reasonable view of the rights of the parties is to hold that the successor is free to exercise his option and to dertermine whether he will or will not resume the maintenance lands; if he resumes, the *putnidar* obtains the benefit: if he does not, the *putnidar* has to await the termination of the maintenance grant by the death of the grantee. The plaintiffs have contended that this conclusion places them at an unfair disadvantage; but we are not satisfied that they have any real grievance. They sued the Raja and obtained an order for suspension of the rent, so long as they are not placed in possession. No doubt, they paid a premium for the *putni*, for which they have not yet obtained any corresponding

(15) (1841) 1 Dr. & War. 134 at p. 159; 1 Con. & L. 34; 4 Ir. Eq R. 74, 58 R. R. 240.
(16) (1705) 1 Salk. 276, 6 Mod. 258, 87 E. R. 1003.
(17) (1857) 6 H. L. C. 375; 3 Jur. (N. S.) 1181; 6 W. R. 21; 10 E. R. 1340, 108 R. R. 161.
(18) (1910) 2 Ch. 342, 79 L. J. Ch. 746, 103 L. T. 421.
(19) (1706) 2 Vern. 565; 23 E. R. 968.
(20) (1706) 2 Vern. 609, 23 E. R. 996.
(21) (1670) 1 Ch. Cas. 170.
(22) (1862) 10 H. L. C. 191; 33 L. J. Ch. 193, 9 Jur. (N. S.) 213, 7 L. T. 172; 11 W. R. 171; 138 R. R. 108; 11 E. R. 909.
(23) (1888) 13 A. C. 523; 58 L. J. Q. B. 75; 60 L. T. 162; 37 W. R. 513.

benefit; but when they found they could not get possession, they might have sued either for suspension of rent till they could get possession or for cancellation of the lease and for refund of the premium; they deliberately chose the smaller measure of relief and were content with temporary suspension of rent. In our opinion, the suit is premature, as the title of the first defendant had not terminated at the date of its institution.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and the suit dismissed with costs in both the Courts.

Appeal decreed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 7B OF 1913.

December 6, 1913.

Present:—Mr. Hallifax, A. J. C., and Mr. Mittra, Offg. A. J. C.

SHRIRAM AND OTHERS—PLAINTIFFS—APPELLANTS

versus

CHUNNI LAL—DEFENDANT—RESPONDENT.

Partnership suit—Court competent to pass decree for amount exceeding its pecuniary jurisdiction—Incompetency to order amendment of valuation according to amount found due after preliminary decree—Course of appeal to be determined by amended valuation.

In a partnership suit the fact that the amount found due exceeds the pecuniary jurisdiction of the Court does not prevent it from passing a decree for the full amount.

After a preliminary decree under section 215 of the Civil Procedure Code, 1882, and an appellate decree confirming it has been passed, the plaint as such may well be regarded as merged in the decree, and the Court is incompetent to order amendment of the valuation of the plaint in accordance with its finding as to the amount due and then to return the plaint for presentation to the Court having jurisdiction over the suit thus valued.

If the order for amendment is complied with by the plaintiff, the course of appeal will be determined by the valuation of the amended plaint.

Miscellaneous appeal against the order of the Subordinate Judge, Khamgaon, dated the 16th September 1912.

Mr. *F. W. Dillon*, for the Appellants.

Dr. *H. S. Gour*, for the Respondent.

JUDGMENT.—This is an appeal against an order returning a plaint for presentation to the proper Court. The suit was filed on the 3rd September 1902 in the Court of the Civil Judge, Akola. A preliminary decree under section 215 of the Civil Procedure Code was passed on the 10th February 1903 by Mr. Dandekar, Civil Judge, Akola, declaring the partnership dissolved from the 3rd September 1903 and directing accounts to be taken. The suit was valued at rupees five thousand. Against this preliminary decree, an appeal was filed (being Civil Appeal No. 66 of 1903) in the Court of the Judicial Commissioner, Hyderabad Assigned Districts. The Appellate Court modified in some minor points the directions of the first Court regarding the sale of the partnership property, namely, a ginning factory. On the 7th September 1905 the case was transferred to the Court of the Subordinate Judge, Khamgaon, who had jurisdiction, under the Berar Civil Courts Act, to try the suit as it was valued (as we have already mentioned) at rupees five thousand. On the 12th November 1911 the Subordinate Judge recorded his findings on certain issues. Against these findings an appeal was filed to the Court of the District Judge, being the Civil Appeal No. 7 of 1911; the then District Judge dismissed the appeal on the ground that there was no final decree passed up to that time. Accounts were taken and on the 16th September 1912 the Subordinate Judge found that Rs. 11,926-9-3 were due to the plaintiffs. On this day the Subordinate Judge ordered the plaintiffs to amend the plaint, and the plaint was accordingly amended and the amount claimed in the plaint was shown to be Rs. 11,926-9-3 instead of rupees five thousand. The Subordinate Judge then returned the plaint for presentation to the proper Court. Against this order, an appeal was filed before the District Judge. The District Judge was of opinion that the memorandum of appeal should have been presented to this Court and he accordingly returned it for presentation here. The plaintiffs have presented the memorandum of appeal, in obedience to the order of the District Judge, to this Court.

The first question for determination is whether the appeal against the order of the Subordinate Judge, dated the 16th September 1912, lies to this Court, or to the District Court. There is no doubt that if

the plaintiffs' Pleader had not amended the plaint as ordered by the Subordinate Judge, the proper appellate *forum* would have been the District Court, on the principle laid down in *Olpherts* v. *Arjundas* (1). But here, rightly or wrongly, the plaintiffs' Pleader amended the plaint, as directed by the Subordinate Judge, and on the face of the plaint so amended the appeal must lie to this Court, inasmuch as the claim is now apparently one for more than five thousand rupees.

The next question for decision is whether the order of the Subordinate Judge, dated the 16th September 1912, is a correct order. At the time when he passed the order, the ruling of this Court, already referred to, in *Olpherts* v. *Arjundas* (1), had not been given. It scarcely admits of any doubt that the suit, if it had been instituted in the Subordinate Judge's Court with the valuation originally put in the plaint, would have been within his competence to try. It could be and was duly transferred to his file in 1905. In our opinion, there would be no difference in point of law as to the Subordinate Judge's jurisdiction to try the suit, whether it was duly instituted in his Court or was duly transferred to his Court, at a time when the amount due on the accounts was yet unascertained. He was certainly competent to go on with the trial of the suit. Would the fact that he afterwards found that the amount due exceeded the pecuniary jurisdiction of his Court, prevent him from passing a decree for the full amount? We think not. We need not discuss this further, as the case of *Olpherts* v. *Arjundas* (1) seems to be conclusive on the point.

There remains for us to consider whether the amendment of the plaint ordered by the Subordinate Judge was *ultra vires* or not. We have already pointed out that there was in this case a preliminary decree under section 215 of the Civil Procedure Code and an appellate decree confirming, and in some minor points modifying it. The plaint as such may well be regarded as merged in the decree. There remained nothing for the Trial Court but to carry out the directions given in that decree, as modified by the appellate decree. We think it was not under these circumstances competent to the Subordinate Judge to order an amendment of the plaint and a re-trial, ignoring his predecessor's decree as well as the decree of the Judicial Commissioner, Hyderabad Assigned Districts.

The result is that the appeal succeeds.

The orders of the Subordinate Judge ordering amendment of the plaint and returning the plaint for presentation to the proper Court are set aside and the Subordinate Judge is directed to dispose of the case according to law. The attention of the lower Court is drawn to the provisions of section 11 of the Court Fees Act. The costs of the appeal will follow the result We fix rupees fifty as legal practitioner's fee.

Appeal allowed.

(1) 22 Ind. Cas. 928; 9 N. L. R. 112.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 2512 AND 2547 OF 1912.

January 8, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Hannay.

IN S. A. NO. 2512 OF 1912

THEKKEMANNENGATH RAMAN *alias* KUNCHU PODUVAL AND OTHERS—1ST DEFENDANT'S LEGAL REPRESENTATIVES—APPELLANTS

versus

KAKKESSERI PAZHIYOT MANAKKAL, KARNAVAN AND MANAGER, RAMAN BHATTATHRIPAD AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 2 TO 82—RESPONDENTS

AND

IN S. A. NO. 2547 OF 1912

KAKKESSERI POZHIYOT MANAKKAL, KARNAVAN AND MANAGER, RAMAN BHATTATHRIPAD—PLAINTIFF—APPELLANT

versus

MALLIYIL VEERAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Malabar Law—Redemption of kanom *mortgage, suit for—Previous suit against mortgagor and mortgagee deciding title to property—Res judicata—Estoppel—Covenant for title, breach of—Damages, measure of—Transfer of Property Act (IV of 1882), s. 72 (c)—Expenses incurred in supporting title of mortgagor, reimbursement for—Compensation for trees of spontaneous*

THEKKEMANNENGATH RAMAN v. KAKKESSERI PARHIYOT MANAKKAL.

growth—Malabar Tenants Improvements Act (I of 1900), ss. 5 (11), 10.

Where in a suit for redemption of a *kanom* mortgage by a *jenmi* who had paid off a previous mortgagee with compensation for improvements, it appeared that the title to the property had been decided against the plaintiff in a previous suit brought in the District Munsif's Court by a third party against himself and the mortgagor

Held, (1) that the matter was *res judicata* though the former suit was brought in a Court which had no jurisdiction over the present suit.

Pathuma v. *Salimamma*, 8 M. 83 and *Ranganathan Chetty* v. *Lakshmu Ammal*, 21 Ind Cas. 15, 25 M. L. J. 379; (1913) M. W. N. 600, 14 M. L. T. 189, followed;

(2) that even if it was not *res judicata* the defendant and the plaintiff in the present suit having been parties to the former suit, the plaintiff was equitably estopped by reason of the finding in the previous suit from raising the contention that the properties disputed in that suit belonged to him.

Nallappa Reddi v. *Vridhachala Reddi*, 25 Ind. Cas. 858; 37 M. 270, followed

(3) that as the plaintiff included the disputed lands in his demise to the defendant, he must be deemed to have given a covenant for title,

(4) that the defendant's statutory right given by the breach of covenant could not be taken away except by an express release of such rights by him or by acquiescence of such a very long duration that a release could be safely presumed;

(5) that no question of limitation arises as between the mortgagors and mortgagees when accounts are taken at the time of redemption;

(6) that the damages which the defendant sustained by being unable to get possession of those lands should be calculated on the basis of the present *pattom* income *minus* a reasonable interest on the sum which he would have had to pay for the improvements;

(7) that the defendant could not claim any reimbursement for expenses incurred in supporting the title of the mortgagor, as it is only "in the absence of a contract to the contrary" that such a claim can be successfully brought;

(8) that the defendant was entitled to compensation for improvements under sections 5 (11) and 10 of the Malabar Tenants Improvements Act. The compensation due to the defendant's predecessor in the *kanom* right now vested in and was claimable by him irrespective of the fact that under the old law no compensation was payable for trees of spontaneous growth and the defendant was not obliged to pay anything to the prior *kanomdars* for those trees.

Second appeals against the decree of the District Court of South Malabar, in Appeal Suit No. 45 of 1909, preferred against that of the Subordinate Judge of South Malabar at Palghat.

In No. 2512 of 1912

Messrs. *T. R. Ramachandra Aiyar*, *A. Nilakanta Aiyar* and *B. Sitarama Row*, for the Appellants.

Messrs. *C. V. Ananthakrishna Aiyar* and *K. P. Govinda Menon*, for the Respondent.

In No. 2547 of 1912

Messrs. *C. V. Ananthakrishna Aiyar*, *K. P. M. Menon*, for the Appellant.

Messrs. *T. R. Ramachandra Aiyar*, *K. P. Govinda Menon* and *Sitarama Row*, for the Respondents.

These second appeals coming on for hearing on the 3rd and 4th November 1914, and having stood over for consideration till 16th November 1914, the Court delivered the following

JUDGMENT.

Sadasiva Aiyar, J.—These two second appeals have arisen out of a suit brought by the *jenmi* mortgagor to redeem *Kanom* mortgage. Various complicated questions chiefly relating (*a*) to the details of the properties mortgaged, (*b*) to the *michavaram* payable by the mortgagee-tenant, (*c*) to the damages, if any, due to the mortgagee on account of the mortgagee's inability to get possession of some of the mortgaged properties and (*d*) to the compensation, if any, payable from trees of spontaneous growth to the mortgagee have to be dealt with in these two second appeals, one of which is by the plaintiff and the other by the 1st defendant's legal representatives. These questions might be thus stated in detail :

1. (*a*) Was the tank situated in the item No. 7 marked in the Commissioner's plan (and described in the mortgage document, Exhibit A, as the boundary mark between items Nos. 6 and 7 of that deed) included in the mortgage demise ?

(*b*) Has the lower Appellate Court wrongly given a decree for the redemption of that tank also, while deciding that the tank site is not included in the demise ?

2. (*a*) Do those portions of the plaint mortgaged properties which were decided in the former Suit No. 147 of 1890 to belong to a rival *jenmi* (38th defendant in that suit) and which are now enjoyed by the defendants Nos. 13, 32, 33, 44, 50 and 92, who claim to be sub-lessees of that rival *jenmi*, really belong to the plaintiff ?

(*b*) Is that question *res judicata* against the plaintiff by the decision in that former suit ?

(*c*) Is the plaintiff estopped in any other manner from claiming redemption of those properties ?

3. (*a*) Did the plaintiff by including those properties in the plaint demise of 1888 covenant with the 1st defendant that he had title to those properties ?

(*b*) In case it is found that the plaintiff had no title to those properties, is the 1st defendant entitled to claim damages from the plaintiff on account of the breach of the plaintiff's said covenant ?

(*c*) Had the 1st defendant knowledge on the date of Exhibit A of all the facts and was there in consequence no right in him to rely in his defence on any such covenant of title ?

(*d*) Is the 1st defendant precluded by acquiescence or waiver from claiming such damages ?

(*e*) Is the 1st defendant's claim for damages barred by limitation ? If it is not so barred, what is the amount of damages to which he is entitled ?

4. (*a*) Whether the 1st defendant has, at the instance of the plaintiff, been spending 16 *paras* of paddy a year at the annual festival in the temple of the plaintiff called Perkurukkikavu, on the understanding that the 16 *paras* should be credited towards the *michavaram* due to the plaintiff ?

(*b*) Is the 1st defendant entitled to credit for the said 16 *paras* ?

5. (*a*) The yearly *michavaram* agreed upon under the plaint demise of 1888, Exhibit A, being for the first two years only, the old *michavaram* of 168 *paras* and Rs. 2 worth of areca nuts, did the 1st defendant agree to an enhancement of the *michavaram* by 43 *paras* 8 *narayams* and 4 *nazhis* of paddy for the remaining years of the term agreed upon by the 1st defendant, as the 1st defendant expected the other properties which he litigated for in No. 147 of 1890 to be reduced to his possession ?

(*b*) Is the 1st defendant, therefore, not liable to pay the said additional *michavaram* as he was unable to so reduce the other properties into his possession ?

6. Is the 1st defendant entitled to add to his *kanom* amount the costs which he incurred in the litigation in the former Suit No. 147 of 1890 ?

(*b*) Is he precluded from so claiming the said costs by any contract to the contrary found in the *kanom* document, Exhibit A ?

7. (*a*) Is the 1st defendant entitled to claim compensation under the Malabar Compensation Act for the value of the trees of spontaneous growth ?

(*b*) Is the said claim *res judicata* by the decree in Original Suit No. 147 of 1890 ?

8. Are the plots N3, N4 and N5 in the Commissioner's plan included in the properties demised under Exhibit A and is the lower Appellate Court in error in having held otherwise ?

(I have formulated only those questions which were argued before us, and not all the numerous questions formulated in the 46 grounds stated in the two memoranda of appeals taken together.)

Questions 1 (*a*) and (*b*). The lower Appellate Court has given good grounds for its conclusion that the tank situated in item 7 was not included in the mortgage demise. As it is, however, not clear that its decree, which modifies the Subordinate Judge's decree by disallowing among other reliefs the compensation claimed for the tank, makes a corresponding modification in the said Subordinate Judge's decree so as to exclude that tank from the properties to be redeemed by the plaintiff, I would direct that the matter be made clear by mentioning in the decree to be prepared in this Court that the said tank is excluded from the properties of which redemption is decreed to the plaintiff. I need hardly say that the question of the ownership and possession of that tank is left undecided in this suit.

Second question. This relates to the title to the properties which the 1st defendant sought to recover as part of the properties demised to him by the plaintiff under Exhibit A in the former Suit No. 147 of 1890 on the file of the Valluvanad District Munsif's Court. To that suit the present plaintiff was a party. There can be no doubt that that suit was conducted *bona fide* by the present 1st defendant (as plaintiff) in the interests of both himself and the present plaintiff, who was the 37th defendant in that suit. The title to those properties was decided against the present plaintiff and the present 1st defendant in favour of the 38th defendant in that suit. So far as those properties were concerned, therefore, the matter is clearly *res judicata* according to the decision in

Pathuma v. *Salimamma* (1) (decided by Sir Charles Turner, C. J., and Mr. Justice Muthusami Iyer) though that Suit No. 147 of 1890 was brought in the Valluvanad District Munsif's Court which had no jurisdiction over the present suit whose value is over Rs. 2,500. In *Pathuma* v. *Salimamma* (1) the learned Chief Justice and Muthusami Iyer, J., draw a distinction between the competency of a Court to decide *on the subject-matter directly in issue* and the competency of the same Court to decide finally *all the questions of fact and law* which have to be decided in order to arrive at the decision on the *title to the subject-matter*. The decisions on such questions of fact and law will not be *res judicata* if the subject-matter of the subsequent suit was beyond the jurisdiction of the Court which decided the first suit.

But it is argued by the plaintiff's learned Vakil, Mr. C. V. Ananthakrishna, Aiyar that the decision in *Pathuma* v. *Salimamma* (1) must be held to have been overruled impliedly by the observations of their Lordships of the Privy Council in *Gokul Mandar* v. *Pudmanund Singh* (2). Their Lordships' *dictum*, though *obiter*, (as their Lordships expressly say that it was "not necessary for their Lordships to decide the plea of *res judicata*") is, of course, binding on us if it is really against the ratio of the decision in *Pathuma* v. *Salimamma* (1). But as I understand their Lordships' decision, it only criticises an objection raised by the respondent's Counsel that the finding of a Revenue Officer in a revenue suit on the status of the appellant was *res judicata* in the subsequent suit which was not within the jurisdiction of the Revenue Officer; and their Lordships point out the difference between the wording of section 13 of the Civil Procedure Code of 1877 and the wording of section 13 of the Civil Procedure Code of 1882, which latter introduced for the first time the words "competent to try such subsequent suit, etc." It must, no doubt, be admitted that the Calcutta High Court in *Shibo Raut* v. *Baban Raut* (3) has interpreted the observation of their Lordships in *Gokul Mandar* v. *Pudmanund Singh* (2) as deciding that even the decree in the former suit as regards the title to the subject-matter of that suit is not *res judicata* in the subsequent suit, provided that the subsequent suit related not only to the subject-matter of the former suit, but also to other matters so as to make the total value of all the subject-matters in the subsequent suit to exceed the jurisdiction of the Court which tried the first suit. But this Court has consistently followed *Pathuma* v. *Salimamma* (1), one of the latest cases on this point being *Ranganatham Chetty* v. *Lakshmu Ammal* (4) decided by Arnold White, C. J., and Oldfield, J. As the learned Chief Justice puts it "although taking all the causes of action together, the second suit may be said to be outside the jurisdiction of the original Court, still if the specific question be within the jurisdiction of the original Court and was determined by the original Court, it is no answer to say that the whole suit was beyond the jurisdiction" (of the Court which tried the first suit). I, therefore, hold on question 2 (*b*) that the decision in the former suit on the title to the subject-matter of that suit is *res judicata* by the decision in that former suit given against the present plaintiff and against the 1st defendant. Even if the question is not *res judicata*, the 1st defendant and the plaintiff having been both parties to the suit No. 147 of 1890, the plaintiff is equitably estopped by reason of the finding in the previous suit from raising the contention that the properties disputed in that suit belong to him. The principle on which this equitable estoppel is raised has been clearly indicated in the decision of Sundara Aiyar, J., and Philips, J., in *Nallappa Reddi* v. *Vridhachala Reddi* (5). I would, therefore, answer question 2 (*c*) also in the affirmative.

Having thus answered questions 2 (*b*) and 2 (*c*) against the plaintiffs, it becomes unnecessary to consider question 2 (*a*).

Coming to the third question with its subdivisions (*a*) to (*e*), the principal point is whether there was a covenant for title given by the plaintiff as to the properties claimed by the rival *jenmi*. Section 65, clause (*a*), of the Transfer of Property Act clearly says that "in the absence of a contract to the contrary, the

(1) 8 M. 83.
(2) 29 C. 707 at p. 715; 4 Bom. L. R. 793; 6 C. W. N. 825; 29 I A 196 (P. C.).
(3) 36 C. 353; 12 C. W. N. 359, 7 C. L J. 470.
(4) 21 Ind 15, 25 M. L. J. 379; (1913) M. W. N. 690, 14 M. L. T. 180.
(5) 25 Ind. Cas 888; 37 M. 270.

mortgagor should be deemed to contract with the mortgagee that the interest which the mortgagor professes to transfer to the mortgagee subsists, and that the mortgagor has power to transfer the same." As the plaintiff included the disputed lands in his demise to the 1st defendant, he must be deemed to have contracted that he was the *jenmi* of these disputed lands also. The question of the knowledge of the mortgagee as to the defect of title in the mortgagor is irrelevant, as has been held in two recent cases in this Court in the analogous questions between vendor and purchaser [See *Ragava Iyengar* v. *Samachariar* (6), *Subbaraya Reddiar* v. *Rajagopala Reddiar* (7) and *Arunachala Aiyar* v. *Ramasami Aiyar* (8)].

The sub-question 3 (*c*) need not, therefore, be answered.

As regards the question of acquiescence or waiver, question 3 (*d*), their Lordships of the Privy Council have doubtless held in *Partab Bahadur Singh* v. *Gajadhar Bakhsh Singh* (9) that a mortgagee whose mortgage was created in 1851 and who lost portions of the mortgaged properties in 1853, 1858 and 1864 by acts beyond the mortgagor's control, cannot claim compensation after having acquiesced for 30 years in the diminution of his security. But the mortgage in that case was executed before the Transfer of Property Act came into force and that fact might make some difference as is suggested in the later case, *Abdullah Khan* v. *Basharat Hussain* (10), decided by their Lordships of the Privy Council. I think that the 1st defendant's statutory right given by the breach of the covenant attached to the mortgage transaction under section 65 of Act IV of 1882 cannot be taken away, except by an express release of such rights by the 1st defendant or by acquiescence of such a very long duration that a release can be safely presumed. In this case, the 1st defendant's former unsuccessful litigation of 1890 in respect of the disputed lands came to a close only in 1897. (See Exhibit X.) This suit was brought in 1905 and the 1st defendant, who has paid nothing for *michavaram* after 1895 except the 16 *paras* of paddy annually spent for the temple festival, cannot be said to have by his conduct released his claim for compensation for the breach of the covenant given by the mortgagor as to his title to the disputed lands. In the case of *M. V. Seethihutti* v. *M. Kunhamtty* (11) quoted on his side by the plaintiff's Vakil I find that the mortgage document sought to be redeemed was dated in 1871, long before the Transfer of Property Act came into force, and hence I do not feel pressed by that decision.

As to whether the 1st defendant's claim for damages is barred by limitation [part of question 3 (*e*)] I do not think that any question of limitation arises as between mortgagors and mortgagees when accounts are taken at the time of redemption. [See *Parasurama Pattar* v. *Venkatachalam Pattar* (12), decided by Benson and Sundara Aiyar, JJ.]

The only sub-question remaining under this head is, what is the amount of damages to which the 1st defendant is entitled on account of the breach of the covenant [part of question 3 (*e*)], and this is connected with questions Nos. 4 and 5. They may, therefore, all be considered together.

The 1st defendant practically admits in paragraph No. 15 of his written statement that the agreement to pay the additional *michavaram* of 43 *paras* 8 *narayams* and 4 *nazhis* of paddy per year after the expiry of the first two years of the lease term was based on his expectation that he would be able to obtain possession of the disposed properties also at or about the end of those two years. In other words, it is practically admitted that the old *michavaram* of 168 and odd *paras* of paddy (and Rs. 2 worth of areca nuts) which were being paid by the former *kanomdars* (the Melappat Tarwad people), was the fair amount of *michavaram* which

(6) 22 Ind. Cas. 42; (1914) M. W. N. 57; 1 L. W. 8.
(7) 28 Ind. Cas. 570, (1914) M. W. N. 876, 15 M. L. T. 240
(8) 25 Ind. Cas. 618; 27 M. L. J. 517; 16 M. L. T. 397; 1 L. W. 849.
(9) 24 A. 521, 29 I. A. 148 (P. C.), 7 C. W. N. 97.
(10) 17 Ind. Cas. 787; 35 A. 48 at p. 57; 17 C. W. N. 233; 13 M. L. T. 182; (1913) M. W. N. 181; 17 C. L. J. 312; 15 Bom. L. R. 452, 25 M. L. J. 91; 40 I. A. 31 (P. C.).

(11) S. A. No. 259 of 1914
(12) 21 Ind. Cas. 701, 25 M. L. J. 561, (1914) M. W. N. 196.

would have to be paid if the mortgaged lands other than the disputed lands had alone been given on demise to the 1st defendant. This, to my mind, clearly indicates that the reasonable compensation which the 1st defendant could claim for the breach of the plaintiff's covenant to secure title to the disputed lands was only his being released from the obligation to pay this additional *michavaram*, of 43 and odd *paras* annually. I do not think it necessary in this view to point out in detail some of the fallacies underlying the reasons given by the learned Subordinate Judge (the Court of first instance) for holding that the 1st defendant is entitled, not only to pay nothing as *michavaram* but even to get compensation in addition from the plaintiff. One point, however, might be noted, namely, that the learned Sub-Judge takes the present *pattom* of these disputed lands as the basis of his calculation for the ascertainment of damages, ignoring the fact that at present higher *pattom* is obtainable owing to the large improvements effected on those lands by the former mortgagees, that the 1st defendant could not have recovered those lands for the enjoyment of the said higher income (assuming that those lands belonged to the plaintiff) without paying large sums as compensation for the improvements and that the damages which the 1st defendant sustained by being unable to get possession of those lands should, therefore, be calculated on the basis of the present *pattom* income *minus* the reasonable interest on the sums which he would have had to pay for the improvements.

I see no sufficient ground why the 16 *paras* which the Subordinate Judge finds to have been spent yearly by the 1st defendant at the plaintiff's request, on the understanding that it should be credited towards the *michavaram*, should not be so credited towards the 168 and odd *paras* which I have found as above to be the *michavaram* payable by the 1st defendant to the plaintiff throughout. This disposes of the questions of damages and *michavaram* referred to above.

The sixth question relates to the costs of the litigation in Suit No. 147 of 1890. In Exhibit A, the 1st defendant clearly says that he himself will meet all the expenses to be named for recovering the properties mentioned in Exhibit A. Section 72, clause (*o*), of the Transfer of Property Act, no doubt, allows the mortgagee to spend as much money as is necessary for supporting the title of the mortgagor to the mortgaged property, but it proceeds to say that it is only "in the absence of a contract to the contrary" that the mortgagee could add such money to the principal of the mortgage money. There is found in Exhibit A such a clear contract to the contrary. But it is argued for the 1st defendant that the litigation whose expenses the first defendant took upon himself to bear was only the litigation with the former *kanomdars* on the questions of improvements, *michavaram*, etc., and not a litigation in which he was obliged to fight a rival *jenmi* also. I do not think that the contract to the contrary found in Exhibit A was restricted to litigation in which the *jenmi's* title to any portion of the property would not be put in dispute. The document generally mentions "all expenses necessary for recovering the properties." Whether the properties had to be recovered through one kind of litigation or another, it does not, in my opinion, matter. I, therefore, agree with the lower Courts that the 6th question must be decided against the 1st defendant.

The 7th question relates to the claim for compensation for trees of spontaneous growth allowed to the 1st defendant by the lower Courts. Madras Act I of 1900, section 5, clause (1), says that every tenant ["tenant" including "mortgagee" under section 3, clause (1)] shall be entitled to compensation for improvements which have been made by him or his predecessor-in-interest and for which compensation has not been already paid. Section 10 says (as I understand it) that trees and plants of spontaneous growth during the period of the tenancy must also be considered as improvements made by the tenant, though the compensation is to be awarded only on a lower scale than for other improvements. Mr. Ananthakrishna Aiyar ingeniously argued that as section 10 allows the award of compensation only for trees and plants spontaneously grown *during the period of the tenancy*, the 1st defendant is not entitled to compensation for trees which had begun to grow before 1888 when his tenancy commenced. Though the language of sections 5 and 10 of the Act is not very happy, I have no doubt that the

compensation due to the 1st defendant's predecessor in the *kanom* right now vested in the first defendant is claimable by the first defendant. In *Thupran* v. *Mamad Kasim Sait* (13) Sundara Aiyar, J., and myself state as follows: —"It is immaterial whether the improvements were made by the 2nd defendant himself or *by any other person in possession before him.* It is quite sufficient that the improvements are on the land even if they were made by some previous occupant, and it was not the case of either party that anybody except the 2nd defendant was in occupation at the time of the suit." Further, if the construction contended for by Mr. Ananthakrishna Aiyar be accepted, the result would be that a *melkanomdar* who is obliged to pay after 1900 the compensation for spontaneously grown trees to the prior *kanomdar* cannot claim that money when he is himself sought to be redeemed by the *jenmi* afterwards. Further, apart from section 10 of the Malabar Tenants' Improvements and Compensation Act, the subsequent mortgagee who pays a prior mortgagee acquires all the rights and powers of the prior mortgagee under section 74 of the Transfer of Property Act. The plaintiff's suit, though it is worded as a suit to redeem the *kanom* in favour of the 1st defendant, is in the eye of the law a suit to redeem the prior *kanom* also, the rights under which have passed to the 1st defendant by his redemption of the said 1st mortgage. Now if the plaintiff sued to redeem the first mortgagee (that is, the Melapatt Tarwad, assuming that they had continued in possession of the mortgaged property till the date of this suit) the plaintiff would be obliged to pay compensation for the trees of spontaneous growth under section 10, and it follows that he is bound to pay the 1st defendant also compensation for those trees. The fact that under the old law, no compensation was payable for trees of spontaneous growth and that the 1st defendant was, therefore, not obliged to pay anything to the prior *kanomdars* for those trees is irrelevant. The question is what, *on the date of this suit*, was payable as compensation for improvements, and not what was payable when the Suit No. 147 of 1890 was brought. The decision in Suit No. 147 of 1890 as to what the 1st defendant had to pay to redeem the prior mortgagees is, therefore, not *res judicata* on the question what on the date of the redemption in this suit the plaintiff has to pay to the 1st defendant to redeem all the mortgage rights vested in the 1st defendant. I would, therefor, confirm the decision of the lower Courts on this question.

Lastly we have got the 8th question referring to the plots N3, N4 and N5 in the Commissioner's plan. The boundaries mentioned in Exhibit A for item No. 14 may possibly include these plots also. The 1st defendant states that he did not get possession of them, and as a question of fact it must be taken as found by both the lower Courts that these plots belong to the Vallapuzha *jenmi* and are held by the 73rd defendant under that *jenmi*.

In the result, the lower Appellate Court's decree will be modified in a few respects, namely, that there should be no decree for redemption of tank item No. 7, that the *michavaram* should be calculated throughout on the basis that only the original rate of 168 *paras* 1 *narayam* and 2 *nazhis* of paddy and two rupees worth of areca nut is payable per year to the plaintiff and that credit should be given to the defendant for 16 *paras* per year as paid towards *michavaram* besides the sums already allowed by the lower Court. In other respects, the lower Court's decree will stand confirmed. The above conclusion implies that Second Appeal No. 2547 of 1912 has totally failed and it must be dismissed with costs.

SECOND APPEAL No. 2512 OF 1912:—In this the parties will have proportionate costs. There will be also proportionate costs in Appeal Suit No. 45 of 1909 on the file of the District Court, the proportion being calculated on the result of the litigation as decided in this Suit Appeal No. 2512 of 1912.

HANNAY, J.—I concur.

These second appeals having been posted to be spoken to this day the Court delivered the following

JUDGMENT.—(1) Six months' time will be allowed from this day to the plaintiff to pay up the additional amount. That additional sum will carry interest awarded to the defendants under our decree at six per cent. per annum from when the plaintiff

(13) 17 Ind. Cas. 433.

obtained possession in execution of the lower Court's decree.

(2) Interest on arrears of *michavaram* will run at Rs. 2 per cent.

(3) The value of the tank need not be taken into calculation in fixing the costs.

Appeal No. 2547 *dismissed*;
Appeal No. 2512 *partly allowed.*

MADRAS HIGH COURT.

FIRST CIVIL APPEALS NOS. 141 TO 144 OF 1908.

August 20, 1914.

Present:—Sir John Edward Power Wallis, Offg. Chief Justice, and Mr. Justice Hannay.

IN A. S. No. 141 OF 1908

BHATHEY SUNDARARAYAN AND OTHERS—DEFENDANTS—APPELLANTS

IN A. S. No. 142 OF 1908

LAGUDUVA RAMUDU—DEFENDANT—APPELLANT

IN A. S. No. 143 OF 1908

AIYALLY BALAIEN—DEFENDANT—APPELLANT

IN A. S. No. 144 OF 1908

MUGANTHU SEETHARAMIEN—DEFENDANT—APPELLANT

versus

A. A. KUPPUSAMI IYER AND ANOTHER—PLAINTIFFS—RESPONDENTS IN ALL.

Inventions and Designs Act (V of 1888), ss. 20, 29 (4)—Infringement—Defence—Want of subject-matter—Want of novelty—Difference between Acts of 1888 and 1911—English and Indian Law—Patents and Designs Act (II of 1911).

Under the Inventions and Designs Act of 1888 a defendant in an action for infringement is allowed to set up by way of defence all the grounds on which the grant of the patent could be opposed, grounds which are to be found in section 20 of the Act. A defendant is not allowed to set up the defence that the invention was not new, unless the defendant or some person through whom he claims has, before the date of the delivery of the application for leave to file the specification, publicly or actually used in some parts of British India or of the United Kingdom the invention with respect to which the privilege is alleged to have been infringed.

The Indian Acts do not intend, as in England, that there should be any separate defence to the grant of a patent on the ground of want of subject-matter as distinguished from want of novelty.

The defendant cannot raise the defence of want of subject-matter as distinguished from want of novelty and the restrictions imposed by section 29 (4) are binding in both cases. All the statutory grounds for opposing the grant of a patent, which can be pleaded in answer to an action for infringement of a patent under the Act of 1911, cannot be pleaded in a suit instituted before the Act, as it is not applicable.

Appeals against the decrees of the District Court of Madura, in Original Suits Nos. 2, 3, 4 and 5 of 1906, respectively.

Mr. *C. V. Ananthakrishna Iyer*, for the Appellants.

Mr. *T. Rangachari*, for the Respondents.

JUDGMENT.

WALLIS, OFFG. C. J.—These are appeals from the judgment of the District Court of Madura in several connected cases in which the plaintiffs sued for an infringement of a patent taken out by the first plaintiff in the year 1902 for the "Ampthill Patent Loom." The District Judge has found that the infringement has been proved and has given judgment for the plaintiffs.

Under the Patent Act of 1888 ("The Inventions and Designs Act V of 1888") a defendant in an action for infringement is allowed to set up by way of defence all the grounds on which the grant of the patent could be opposed, grounds which are to be found in section 20 of the Act. One of these grounds is that the invention was not a new invention. Under section 29 (4) a defendant is not allowed to set up the defence that the invention was not new, "unless the defendant, or some person through whom he claims, has, before the date of the delivery * * * of the application for leave to file the specification, publicly or actually used in some parts of British India or of the United Kingdom the invention * * * * with respect to which the exclusive privilege is alleged to have been infringed."

Now, it has been sought, in the argument before us, to escape from the operation of this section on two grounds. It has been contended for the appellants that the defendant is not precluded from pleading that the alleged invention was not the proper subject-matter of a patent, or that there was no subject-matter for the patent. It is quite true that in English patent cases it has been the custom to plead, not only that the alleged invention was not new, but also that it was not the proper subject-matter for a patent, and accordingly in any text-books this matter is treated as distinct from the question whether the invention is new, whereas other text-book writers analysing the matter have pointed

out that there is no real distinction. This objection was taken before me sitting on the original side last year (in Original Suit No. 173 of 1911) and I disallowed it. It is quite clear from a perusal of the Patent Act of 1888, and the same conclusion follows from a perusal of the present Patent Act, the Indian Patents and Designs Act II of 1911, that the framers of these Acts did not intend that there should be any separate defence to the grant of a patent on the ground of want of subject-matter as distinguished from want of novelty. The grounds upon which the grant of a patent may be opposed are set out in section 20 of the Act of 1888, and they contain no mention of any defence of want of subject-matter. The Legislature, if I may say so, I think rightly took the view that any defence which had been raised under that head might appropriately be brought under the head of want of novelty. Consequently, we are of opinion that it is not open to the appellants in these cases to raise any defence of want of subject-matter as distinguished from want of novelty, and if they wish to rely upon want of novelty, then, of course, they are bound by the restrictions in section 29 (4).

A second attempt was made to escape these embarrassing provisions. It was pointed out that there is no such restriction on the defendants under the Act of 1911. Under that Act, as in England, any of the statutory grounds for opposing the grant of the patent may be pleaded in answer to an action for an infringement of a patent. It was argued that, although this provision was not in force at the time that this suit was tried and decided in the lower Court, we were a Court not only of appeal but that of rehearing also and that we ought to apply the law as it at present exists - to apply the Statute of 1911 rather than the Statute of 1888, and we were referred to a case in *Gorakala Kanakaiya* v. *Janardhan Padhai* (1). That decision of the Full Bench is not authority for any such extensive proposition; that decision is entirely limited to the construction of the word 'final' in a certain section of the Madras Estates Land Act (Mad. Act I of 1908). Even as to that, the learned Chief Justice who presided entertained some doubt as to the correctness of the ruling, but in any case that decision is no authority for any broad proposition as to the retrospective operation of Statutes.

However, it is unnecessary to deal with this question on grounds of general principle, because it is most clearly dealt with in one of the provisions of the General Clauses Act (X of 1897) which deals with cases "where . . any Act of the Governor-General. ..made after the commencement of this Act, repeals any enactment hitherto made." The Act II of 1911 has repealed the Act V of 1888 and, therefore, it is a clear case for the application of the section. Now, section 6 (*c*) provides that "unless a different intention appears, the repeal shall not affect any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid." And the words "legal proceeding" are sufficiently wide to cover a suit for infringement. It is, however, expressly provided that any such legal proceeding or remedy may be continued or enforced as if the repealing Act had not been passed. It is, therefore, clear that this objection also must be overruled. It only remains then to see whether the District Judge has arrived at a correct conclusion with regard to the limited defence to which the defendants are restricted so far as regards want of novelty.

Under section 29 (4) it is for the defendant to show that either he or some person through whom he claims, before the date of the delivery or receipt of the application, has publicly or actually used the invention. The District Judge has found that none of the defendants in these appeals has discharged that burden and as regards all but one of them the learned Vakil for the appellants, has been unable to contend even that they have discharged it, because they have failed to produce any evidence of prior user on their part or on the part of those through whom they claim and, therefore, those appeals must fail. As regards one of the appeals (No. 143) the defendant in the lower Court has adduced some evidence, but the District Judge has found that he has not discharged the burden. In this connection the District Judge has called attention to the provisions of section 37 of the Act which require that both the plaintiff and the defendant should deliver "a

(1) 8 Ind. Cas 730; 9 M. L. T. 64; 21 M. L J. 31; (1910) 1 M. W. N. 841; 36 M. 489.

written statement of the particulars of the grounds, if any, upon which he means to contend that the plaintiff is not entitled to an exclusive privilege..." There is a further provision that no evidence at the trial shall be allowed to be given in proof of any breach of the conclusive privilege, or of any ground impeaching the validity of that privilege, or of any objection or ground affecting such a privilege, unless such breach or other matter as aforesaid has been stated in the particulars delivered under this section. Now, in his written statement this defendant did not give any particulars—and he does not seem to have been called upon to give any particulars—it was only at the trial it was discovered that he ought to have been called upon to deliver particulars. He was, however, a party to an affidavit which was put in at an early stage of the case on behalf of himself and the other defendants (Exhibit T7) and I think this affidavit may be treated as particulars. That affidavit says that "Obala Munisami Iyer started this loom 15 years ago and worked it through Jambu Ramaswami Manika Hanumantha's son, Alagirisawmi, and others." At the trial this defendant did not even attempt to prove this, and it was disproved. Obala Munisami was called as the 14th witness and he said he was a weaver and purchased goods from others, but he denied he had started this system. He said he got some of these cloths with borders with animal patterns, the first of them in 1900. It is not necessary to pursue this part of the case further, because it is not the case on which this defendant relied at the trial. Assuming that he was at liberty to go into it—if he was to be allowed to go into it—the particulars ought to have been amended as provided in the Act. His defence was that he learnt the process from one Ghose Krishnien of Tanjore, the 26th witness. We agree with the learned Judge that this story is not satisfactory and cannot be accepted. Ghose Krishnien says he learnt this system from Benares but, as the District Judge points out, no one was called who could speak with any authority as to whether such a system was known in Benares at all. On the other hand, there is evidence that such knowledge as this man Krishnien had of this system, he acquired in Madura and apparently through the instrumentality of this defendant, so that it was this defendant who taught Krishnien rather than Krishnien taught this defendant, and after the date of the application, Exhibit 35 (d) (page 176 of the printed papers), is an entry in Krishnien's account showing the expenses incurred in going to Madura to work '*adipet*.' Exhibit Y of the 18th June 1901 is another entry in the accounts of the 13th witness, T. K. Venkatarama Iyer, a cloth merchant in Madura, showing that he paid Balian, that is to say, this defendant, remuneration for preparing an *adipet* border on Ghose Krishnien's account, so that in 1901—after this patent had been applied for—we find Krishnien going to Madura to learn to work '*adipet*' and getting an *adipet* harness prepared—a phrase which covers the plaintiff's invention. All this evidence points to Krishnien first becoming acquainted with process of this kind in 1901, so that he cannot have taught it to the defendant in 1897 as alleged in the defendant's evidence. As pointed out by the District Judge there is another part of the evidence which discredits Krishnien's story.

According to his own evidence he first met Babiah at the house of the 13th witness, T. K. Venkatarama Iyer, and the 13th witness then mentioned that this defendant, Babiah, was about to work for him. Exhibit 28 which is the agreement under which Babiah, the defendant, worked for the 13th witness is dated the 26th of May 1900, so that the first meeting between Krishnien and Babiah would be in 1900. That again disproves the story that the defendant Babiah learnt the process from Krishnien in 1897. Now, it is not the present defendant's case, and there is no evidence, that he learnt this process in any other way. Nor is there any stisfactory evidence that he used it before the date of the plaintiff's application.

In argument in appeal, reliance was placed on Exhibit 28; it is dated 26th May 1900. This is the agreement that I have just referred to. All that this agreement says is "we shall bring you what we have weaved newly." There is no express reference to weaving by "*adipet*". Assuming that the defendant in June 1900 was producing borders with animal patterns, it does not follow that he was doing so by the plaintiff's process or anything like it. In June 1900 he is found purchasing *vulties* in considerable quantities. *Vulties*, as explained in the judgment of the District Judge, are the reeds which were used

before the plaintiff's invention and which under the plaintiff's invention were discarded in favour of twines. His evidence is that he would not use *vulties* when working in the *adipet* system. Therefore, the only inference is that the *vulties* which he bought in June 1900 were to be used on something very like the old system, and there is further evidence, which the District Judge has accepted, that it was possible with this *vulty* system to produce animal patterns though it was a much more troublesome thing than under the plaintiff's system. The evidence goes to show that the plaintiff's invention was complete in 1900 and that in that year he showed it to Mr. Chatterton, the Director of Industries, when he visited Madura; and it was only natural that it should have, at any rate in a general sort of way, got known to the weaving community in Madura and it may well be that attempts were made to copy it, even at that very early stage.

There is a rather suggestive piece of evidence in this respect which was put in by the defendants, Exhibit 10 series. That shows that there was a suit brought by a cloth merchant against a weaver who had obtained an advance from him on a promise to make an *adipet* machine and had failed to do so. Then we have Exhibit 32 which is dated 2nd March 1901—that is, after the application. That is a post card to the present defendant, Babiah, from his cousin in which the cousin asks, "can the *adipet* you are now using be used for the border only or for the whole cloth"? This may show that the defendant had got wind of the plaintiff's invention and was using something of the same sort, but it certainly does not show that the defendant had been using this particular process before the date of the plaintiff's application. The meaning of this post card would have been much clearer if the letter to which it is a reply had been produced, and it is very significant that it has not been produced.

As regards the evidence not directly connected with the present defendant, the District Judge observes, and the evidence appears to bear him out, that there is no satisfactory evidence of the manufacture of these animal borders in Madura before 1900, before the time when the plaintiff was making this invention, but it is not necessary to go into the general aspects of the invention, and it is undesirable to do so because they are the subject-matter of an application for revocation which will have to be dealt with on the original side of this Court. For the purpose of disposing of these appeals, it is sufficient to say that in our opinion, the District Judge was right in holding that the defendant had failed to discharge the burden of showing, that this process was used either by the defendant himself or by those through whom he claims before the date of the plaintiff's application.

The result is that the appeals fail and are dismissed with costs.

HANNAY, J.—I agree.

Appeals dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 1 OF 1912.

August 27, 1914.

Present:—Mr. Fawcett, J. C., and Mr. Crouch, A. J. C.

GOBIND RAM AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SABGHATULLAH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11, Ex. IV—Suit for recovery of water rate—Subsequent suit for injunction restraining defendant from tapping water-course—Res judicata—*Enjoyment of water-course—Right of person in possession*—Jus tertii.

The plaintiffs sued the defendants' father for recovery of water rate and obtained an *ex parte* decree. The defendants having again threatened to draw water, the plaintiffs sued for an injunction restraining the defendants from tapping the plaintiffs' water-course:

Held, (1) that the allegation that the water-course belonged to the Government and not to the plaintiffs was a matter which might and ought to have been made a ground of defence in the former suit within the meaning of Explanation IV to section 11 of the Civil Procedure Code and that the judgment in that suit operated as *res judicata*, as it held that the water-course was the plaintiffs' and hat the defendants had no right to take water from it.

(2) that even assuming that the plaintiffs were trespassers and had been in enjoyment of the disputed portion of the water-course for less than the statutory period sufficient to give them an easement by prescription, still they were entitled to protection in their enjoyment of the water-course against all

persons except the true owner, and the plea of *jus tertii* was not sufficient to disentitle them to the injunction sought.

Kondapa v. *Devarakonda*, 6 Ind. Cas. 266; 34 M. 173; (1910) M. W. N. 117; 7 M. L. T 352; 20 M. L J. 803, followed.

Second appeal against the decision of the Joint Judge, Sukkur-Larkana.

Mr. *Rupchand Bilaram*, for the Appellants.

Mr. *G. A. Kikla*, for the Respondents.

JUDGMENT.—In this case the plaintiffs sued in the Shikarpur Sub-Court for an injunction, alleging that a water-course called Sonawahi was their exclusive property and had been cleared by them, but that the defendants Nos. 1 and 2 with the help of the other defendants were threatening to enter upon it and do its clearance.

The Sub-Judge of Shikarpur granted plaintiffs the injunction sought for with regard to a portion of the water-course. He held, however, that the portion of the Sonawahi from the canal called Sind Wah to Survey No. 441, *dah* Jano, was not, really speaking, Sonawahi at all and was the property of Government, and that consequently plaintiffs were not entitled to any relief regarding that portion.

The Joint Judge, Sukkur-Larkana, confirmed this decision on appeal and plaintiffs now appeal on the grounds mentioned below.

The first is that the decision in a suit between the same parties, No. 623 of 1907, operates as *res judicata* on the question raised as to plaintiffs' right to the whole of the water-course in question. In that suit plaintiffs claimed *hak ab* (water rate) for Survey Nos. 431, 433, 440, 442 and 443, alleging that the water-course called Sonawahi belonged to them and that the defendant had irrigated those numbers from it. The suit was tried *ex parte* and a decree passed for the recovery of *hak ab* by plaintiffs, for Nos. 431, 433, 442 and 443. The judgment, Exhibit 92, shows that the Sub-Judge held that the water-course in question was admittedly plaintiffs' and that defendant had no right to take water free from it. The survey map produced in this case shows that Nos. 442 and 443 abut on the portion of the water-course now in dispute, and not on the portion which has been held by the lower Courts to belong to plaintiffs. The Sub-Judge says the papers, do not show from what point of the water-course these numbers are irrigated. But in the absence of any evidence to the contrary, the presumption would, I think, be that they were irrigated from the portion in dispute, which is the nearest to them. If so, the allegation that this portion does not belong to plaintiffs but to Government was certainly a matter which might and ought to have been made a ground of defence in the former suit within the meaning of Explanation IV to section 11 of the Civil Procedure Code. The Sub-Judge is also not correct in saying that the right of ownership in the water-course was not raised and decided in that suit; the judgment shows the contrary. I am, therefore, inclined to hold that the question of plaintiffs' ownership of the whole water-course (including the part beyond Survey No. 430) is *res judicata* and cannot be re-opened in this suit. The cases of *Shyama Charan Banerji* v. *Marinmayi Debi* (1) and *Raj Kumar Roy Chowdhury* v. *Alimuddi* (2) show (if authority on the point is needed) that an *ex parte* decree in a case like this can operate as *res judicata*.

It is not, however, necessary to give a definite finding on the point, in view of the conclusion on the second ground of appeal. This is that the lower Courts erred in refusing to grant an injunction in respect of the portion of the water-course in dispute, because (as held by them) it is on Government land and plaintiffs have established no title to it. Mr. Rupchand has shown reasonable grounds for supposing that plaintiffs may have laid their water-course over this land with the permission of Government. But even assuming that they are trespassers, this plea of *jus tertii* is not sufficient to disentitle the plaintiffs to the injunction sought. A case which is almost exactly in point is that of *Kondapa* v. *Devarakonda* (3). As there held, even assuming that plaintiffs are trespassers and have been in enjoyment of the disputed portion of the water-course for less than the statutory period sufficient to give them an easement by prescription, still they are entitled to protection in their enjoyment of the water-course against all persons except the true owner. The same principle was

(1) 31 C. 79.
(2) 16 Ind. Cas. 911; 17 C. W. N. 627.
(3) 6 Ind. Cas. 266; 34 M. 173; (1910) M. W. N. 117; 7 M. L. T. 352; 20 M. L. J. 803.

approved and applied by the Privy Council in *Ismail Ariff* v. *Mahomed Ghous* (4).

The decrees of the lower Courts so far as they refuse plaintiffs the relief claimed in regard to the portion of the water-course between Sind Wah and Survey No. 430 are, therefore, reversed, and plaintiffs are granted an injunction restraining defendants from interfering in the clearance of that portion of it also. Defendants-respondents must (in lieu of the lower Courts' orders as to costs) pay appellants' costs throughout.

Appeal accepted.

(4) 20 C. 834; 20 I. A. 99.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1481 OF 1912.

July 29, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

BHIMAVARAPU BUCHI REDDI AND OTHERS—DEFENDANTS NOS. 1 TO 5—APPELLANTS

versus

THE PRESIDENT OF THE TALUK BOARD OF GUNTUR AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Madras Local Boards Act (V of 1884), s. 51 - Trust, powers as to, transferred from Board of Revenue—Suit for recovery of trust property, when maintainable by local body.

The local body to which the powers of the Board of Revenue are transferred under section 51 of the Madras Local Boards Act, 1884, is invested with the rights of management as well as superintendence of a trust property and is entitled, where there is no trustee, to sue for the recovery of trust property.

Chairman, Municipal Council of Rajahmundry v. *Susurla Venkataseerlu*, 31 M. 111; 3 M. L. T. 241, followed.

Second appeal from the decree of the Court of the Temporary Subordinate Judge of Guntur in Appeal Suit No. 492 of 1910, preferred against that of the District Munsif of Tenali in Original Suit No. 701 of 1908.

Mr. *P. Nagabushanam*, for the Appellants.

Mr. *P. Narayanamurti*, for Respondent No. 2.

JUDGMENT.—The first point argued on behalf of the appellants is that the 2nd respondent was invested only with the power of superintendence originally possessed by the Board of Revenue under Regulation VII of 1817, and was not entitled to bring this suit. Section 51 of the Local Board's Act, V of 1884, is identical with section 26 of the District Municipality Act, IV of 1884, and the ruling in *Chairman, Municipal Council of Rajahmundry* v. *Susurla Venkateseerlu* (1) is clear authority for the proposition that the local body to which the powers of the Board of Revenue were transferred was invested with the rights of management as well as superintendence and that the former include the right to sue for the recovery of trust property. It is suggested that even the Board cannot sue over the heads of trustees, but we consider that Exhibit C is a valid resignation of their posts by such trustees as held office at the date of its execution and it is not suggested that any other trustees had come into office prior to the date of suit. We must hold that the 2nd plaintiff was entitled to sue.

It is next argued that the suit is time-barred. It is brought against appellants as legal representatives of B. Chenna Reddy, one of the original trustees, and section 10, Limitation Act, is applicable.

The last point sought to be raised is that defendants Nos. 2 to 5 should not be held liable; but the judgment of the Subordinate Judge shows that this was given up in the lower Appellate Court, and we cannot allow it to be set up again here. The second appeal is dismissed with costs.

Appeal dismissed.

(1) 31 M. 111; 3 M. L. T. 241.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 776 OF 1913.

December 15, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Hannay.

GANDI RAMASWAMI—DEFENDANT No. 2—APPELLANT

versus

PURAMSETTI PEDAMUNAYYA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Suit for possession—Hindu widow suing in representative capacity—Death of plaintiff—Suit, whether abates—Reversioners of last male owner—Legal represen.

GANDI RAMASWAMI v. PURAMSETTI PEDAMUNAYYA.

tative—Civil Procedure Code (Act V of 1908), s. 2 (11)—Survival of right to sue.

A suit for possession brought by a Hindu widow in a representative capacity as representing the estate does not abate on her death. The right to sue survives to the reversioners of the last male owner, who are her legal representatives within the meaning of section 2 (11) of the Civil Procedure Code and as such are entitled to be brought on the record.

Premmoyi Choudhrani v. *Preonath Dhur*, 23 C. 636; *Rikhai Rai* v. *Sheopujan Singh*, 7 Ind. Cas. 97; 7 A. L. J. 960; 33 A. 15; *Tribhuvan Sundar Kuar* v. *Sri Narain Singh*, 20 A. 341; A. W. N. (1898) 65, *Chiruvolu Punnammal* v. *Chiruvolu Perrazu*, 29 M. 390; 1 M. L. T. 183; 16 M. L. J. 307 (F. B.), *Musammat Parbutty* v. *Musammat Higgin*, 17 W. R. 475, followed.

Sakyahani Ingle Row Sahib v. *Bhavani Bozi Sahib*, 27 M. 588; *Kommeneni Chinna Veerayya* v. *Kommeneni Lakshmi Narasamma*, 15 Ind. Cas. 213; 22 M. L. J. 375; 11 M. L. T. 184; (1912) M. W. N. 442; 37 M. 406; *Arunachellam* v. *Vellaya Pillay*, 15 Ind. Cas. 461; 12 M. L. T. 199; (1912) M. W. N. 897; 23 M. L. J. 719, distinguished.

Second appeal against the decree of the District Court of Kistna at Masulipatam, in Appeal Suit No. 166 of 1912, preferred against that of the Court of the Additional District Munsif of Masulipatam, in Original Suit No. 333 of 1910.

Mr. *V. Ramadoss*, for the Appellant.

Mr. *V. Ramesam*, for the Respondents.

JUDGMENT.—The suit out of which this second appeal arises was brought by one Peramma to establish her right to certain *inam* land and to recover possession after ejecting the defendants. Her case was that the suit property belonged to her father, Bapula, that after his death her mother, Venkamma, enjoyed the land and that on Venkamma's death, the plaintiff became entitled to the land as daughter of Bapula but that the defendants prevented her from taking possession. The defendants alleged that Bapula had made over the land to one Ratham, the husband of the 3rd defendant, to do the *inam* service for him over 50 years before suit and that their family had held the land and done service ever since. The plaintiff, Peramma, died pending the suit and the plaintiffs Nos. 2 to 5 were then brought on record as being her legal representatives. The plaintiffs Nos. 2 to 5 are the grandsons of Bapula's brother. Both the lower Courts on the merits have given a decree in favour of the plaintiffs Nos. 2 to 5, and it is conceded by the present appellants that on the findings of fact arrived at by the lower Courts the decree in favor of the plaintiffs Nos. 2 to 5 cannot be impeached. They contend however that upon the death of Peramma, the suit abated and that the plaintiffs Nos. 2 to 5 could not be added as legal representatives of the deceased Peramma or continue the suit, as they claim, not as legal representatives of Peramma, but as reversioners of the last male holder *i.e.*, Bapula. The lower Appellate Court, relying upon the cases of *Premmoyi Choudhrani* v. *Preonath Dhur* (1), *Rikhai Rai* v. *Sheopujan Singh* (2), *Tribhuvan Sundar Kuar* v. *Sri Narain Singh* (3) and *Musammat Parbutty* v. *Musammat Higgin* (4), held that the plaintiffs Nos. 2 to 5 were rightly added as plaintiffs, and the question for determination is whether that decision is correct or not. This point involves the determination of the questions whether the right to sue survived after the death of Peramma and whether the plaintiffs Nos. 2 to 5 are her legal representatives.

The appellants rely upon the cases of *Sakyahani Ingle Row Sahib* v. *Bhavani Bozi Sahib* (5), *Kommeneni Chinna Veerayya* v. *Kommeneni Lakshmi Narasamma* (6) and *Arunachellam* v. *Vellaya Pillay* (7). The first two cases were suits by presumptive reversioners on their own behalf to set aside a widow's alienation. On the death of the plaintiff in each case, it was held that the right to sue did not survive to the next reversioners. In the former case, it was decided that the right to sue in such cases was a personal right and that such suits could not be treated as representative suits, reversioners who are not actual parties to such litigations not being bound by the adjudications thereon.

This decision was followed in the latter case, *Kommeneni Chinna Veerayya* v. *Kommeneni Lakshmi Narasamma* (6). The case of *Kommeneni Chinna Veerayya* v. *Kommeneni Lakshmi Narasamma* (6) is authority for the view that for the purposes of deciding the question whether the right to sue survives or not, there is no distinction between suits to set aside an adoption and

(1) 23 C. 636.
(2) 7 Ind. Cas. 97; 33 A. 15; 7 A. L. J. 960.
(3) 20 A. 341; A. W. N. (1898) 65.
(4) 17 W. R. 475. (5) 27 M. 588.
(6) 15 Ind. Cas. 213; 37 M. 406. 22 M. L. J. 375; 11 M. L. T. 184; (1912) M. W. N. 442.
(7) 15 Ind. Cas. 461; 23 M. L. J. 719, 12 M. L. T. 199; (1912) M. W. N. 897.

suits to set aside an alienation. It was there held that the right to sue to set aside an adoption would not survive after the death of the mother of the last male owner, who was the plaintiff in the suit notwithstanding that, as held in *Chiruvolu Ponnammal* v. *Chiruvolu Perrasu* (8), an adjudication in such a suit would have been binding on the other reversioners, if there had been a fair trial, for the rights of the reversioners remain subject to the rule of law laid down in *Chiruvolu Punnammal* v. *Chiruvolu Perrasu* (8).

The respondents contend that these rulings do not conclude the points for determination in this case, as they relate to declaratory suits whereas the present is a suit for possession. The cases of *Premmoyi Choudhrani* v. *Preonath Singh* (1) and *Rikhai Rai* v. *Sheopujan Singh* (2) relied upon by the lower Appellate Court clearly support the view that in suits such as the present the right to sue survives to the reversioners, who are the legal representatives of the widow, for the purposes of such suits although they do not claim title through her but as reversioners of the last male owner. These two cases are referred to in *Kommeneni Chinna Veerayya* v. *Kommeneni Lakshmi Narasamma* (6). It was observed as regards *Premmoyi Choudhrani* v. *Preonath Singh* (1) that it could not be reconciled with the Madras cases relating to declaratory suits upon the question of the survival of the right to sue, etc., on the ground that the claim there was to recover possession of property. The case of *Rikhai Rai* v. *Sheopujan Singh* (2) was also distinguished on the ground that it was a suit for possession. We think that these cases are not in conflict with the Madras cases relied upon by the appellants on the ground of distinction given in *Kommeneni Chinna Veerayya* v. *Kommenni Lakshmi Narasamma* (6). In this connection the respondents rely upon the observations in *Sakyahani Ingle Row Sahib* v. *Bhavani Bozi Sahib* (5). There is no analogy between the case of widows and other qualified female holders entitled to present possession of property and the case of reversioners, presumptive or otherwise, whose rights are absolutely contingent. The vested right to the estate and possession in the case of the former renders it necessary and proper to invest them with the right to bind those who may come in succession to them by any adjudication duly made in litigation to which they were parties. Upon this basis the line of reasoning adopted in the case of *Premmoyi Chuodhrani* v. *Preonath Singh* (1) appears to us to be entirely applicable here upon the question of the survival of the right to sue. Upon the second point also, *viz.*, whether in the circumstances of this case, the plaintiffs Nos. 2 to 5 are the legal representatives of the deceased Peramma, that case as well as the case of *Rikhai Bai* v. *Sheopujan Singh* (2) are fully in point. The widow sued in a representative capacity as representing the estate which would after her death go to the succeeding heirs and as found by both the lower Courts, the plaintiffs Nos. 2 to 5 are the persons on whom the estate has devolved on the death of Peramma. The plaintiffs Nos. 2 to 5, therefore, fall within the terms of the definition of a legal representative contained in section 2 (11) of the present Civil Procedure Code.

In these circumstances, therefore, we hold that the right to sue in this case survived on the death of Peramma to the plaintiffs Nos. 2 to 5 as legal representatives and that the plaintiffs Nos. 2 to 5 were, therefore, rightly added as plaintiffs on the death of Peramma.

The second appeal is dismissed with costs.

Appeal dismissed.

(8) 29 M. 390: 1 M. L. T. 183; 16 M. L. J. 307 (F. B.).

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 451 OF 1911.

July 23, 1914.

Present:—Mr. Justice Woodroffe and Mr. Justice Coxe.

MAHAMMAD NASSARUDDIN SARCAR —PLAINTIFF—APPELLANT

versus

SHEIKH ISAB—DEFENDANT—RESPONDENT.

Bengal Tenancy Act (VIII *of* 1885) (*as amended*), *s.* 88, *cl.* (6), *construction of—Incumbrance, meaning of —Surrender—Incumbrance created by tenant, effect of, upon landlord*,

MAHAMMAD NASSARUDDIN SARCAR *v.* SHEIKH ISAB.

Per *Woodroffe, J.*—The term "incumbrance" in section 86, clause 6, of the Bengal Tenancy Act, means not one which is binding on the landlord, but one which is binding as between the tenant and the incumbrancer.

In a case of surrender unlike that of abandonment, the landlord taking the tenant's rights should equitably be bound by the tenant's previous transaction by way of a mortgage. Neither the landlord nor the tenant can derogate as against his own grant.

Per *Coxe, J.*—The landlord's rights under section 86 clause (6), of the Bengal Tenancy Act cannot be affected by the tenant's incumbrance which is not legally binding upon him.

Appeal against the decree of the Additional Subordinate Judge, Mymensingh, dated the 29th of November 1910, modifying that of the Munsif, second Court at Kishoregunj, dated the 9th of June 1910.

Babu *Mohini Mohan Chatterjee*, for the Appellant.

Babu *Sasanka Jiban Roy*, for the Respondent.

JUDGMENT.

WOODROFFE, J.—The substantial question in this appeal is whether or not there was a valid surrender by the 5th defendant to the landlord, seeing that defendant had previously mortgaged the holding to the plaintiff, mortgagee, who now sues to recover rent from the sub-tenants of defendants Nos. 5 and 6. If the surrender is a valid surrender then it will appear, as the lower Appellate Court has held, that the plaintiff will only be entitled to recover rent to the extent of 8 annas representing the interest of defendant No. 6. If, on the other hand, the surrender was not a valid one then the plaintiff would, as held by the first Court, be entitled to the whole 16-annas rent.

The question whether this surrender was valid as against the plaintiff, turns upon the construction which we should put upon section 86, clause 6, of the Bengal Tenancy Act and in particular upon the meaning of the word "incumbrance" in that clause. The question which has been argued before us is, whether or not the word "incumbrance" of that clause means an incumbrance which is binding upon the landlord or whether it is an incumbrance which is binding as between the tenant and the incumbrancer. This point arose in Suit Appeal No. 2955 of 1911 to which we have been referred and was decided in the latter sense.

The learned Pleader who appears on behalf of the appellant contends before us that it is not a case of abandonment but a case of surrender and that, therefore, the landlord taking the tenant's rights should equitably be bound by his previous transaction by way of a mortgage; that is to say, as a tenant could not derogate as against his own grant, so the landlord, who took the tenant's right, could not do so, though it may be open for him to assert his superior right as landlord otherwise than by accepting a surrender from his tenant.

On these grounds I think that it is made out by the appellant that he is entitled to recover 16-annas rent and I, therefore, set aside the judgment and decree of the lower Appellate Court and restore those of the first Court with costs.

COXE, J.—I am unable to hold that under section 86, sub-section 6, of the Bengal Tenancy Act the landlord's rights can be affected by an incumbrance, which is not legally binding upon him. But I think that in this case I can agree that the Munsif's order should be restored. The holding belonged to defendants Nos. 5 and 6. They mortgaged it to the plaintiff. Thereafter defendant No. 5 surrendered his interest to the landlord. There is nothing, however, befor us to show whether defendant No 6 agreed to surrender, or whether or not he was willing to go on paying rent for, the whole, and it may well, therefore, be held that in the circumstances the landlord is not entitled to recover rent from the under-tenant.

That being so, it is clear that the plaintiff was entitled to the whole rent and in that view I agree to the order that has been passed.

Appeal allowed.

BOMBAY HIGH COURT.

CIVIL REFERENCE No. 5 OF 1914.

August 31, 1914.

Present:—Mr. Justice Beaman and Mr. Justice Hayward.

DHONDO RAMCHANDRA KULKARNI —PLAINTIFF—APPELLANT

versus

BHIKOJI GOPAL—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11, Expl. IV, O. XXXIV, r. 1, O. II, r. 2—Several mortgages upon same property—Necessary parties to suit—Two mortgages in favour of same person—Suit on later mortgage—Subsequent suit on former mortgage, whether maintainable.

Where there are several mortgagees upon the same property, any mortgagee suing upon his mortgage must make all the other mortgagees as well as the mortgagor parties to the suit.

Where a mortgagee having two mortgages of different dates upon the same property sues upon the mortgage of later date first and has the property sold without reference to the prior mortgage, he cannot afterwards bring a separate suit on the prior mortgage.

Civil Reference made by the District Judge, Poona, under section 54 of the Dekkhan Agriculturists' Relief Act, 1879.

Mr. *B. V. Desai*, for the Appellant.

Mr. *V. V. Bhadkamkar*, for the Respondent.

JUDGMEMT.

BEAMAN, J.—This is a reference by the District Judge of Poona under section 54 of the Dekkhan Agriculturists' Relief Act. The principal question referred to us, put in the simplest language, is whether a mortgagee having two mortgages of different dates upon the same property may sue upon the mortgage of later date first, and having had the property sold without reference to the prior mortgage can thereafter bring a separate suit on the prior mortgage. We think that he cannot do so. In our opinion, the question is not to be answered under Order II, rule 2. The causes of action certainly are distinct. It could hardly be seriously contended, we think, that in such circumstances if the mortgagee allowed the prior mortgage to be time-barred, he could not sue upon the puisne mortgage, or again, that by doing so, he could revive the prior mortgage which had become time-barred. Thus, it is clear that the causes of action are not the same. The answer then will have to be sought by reference, we think, to the general principles of the law of mortgage and *res judicata*. The rule is that where there are several mortgages upon the same property, any mortgagee suing upon his mortgage must make all the other mortgagees as well as the mortgagor parties to the suit. To this rule there are exceptions. Until the alteration of section 85 by Order XXXIV, rule 1, the Courts appear to have put a very strict interpretation upon the words of old section 85 of the Transfer of Property Act. But there can be no doubt that under the general law of mortgage as administered in England a puisne mortgagee might sue his mortgagor, if he chose to do so, for foreclosure and sale without making a prior mortgagee a party to the suit, and the result of such a suit between a puisne mortgagee and his mortgagor would be to have the property sold, as it is said, subject to the prior mortgage. Accurately stated, in all cases of that kind what is really sold is not the property at all but the right to redeem the prior mortgage upon it.

Similarly, when a puisne mortgagee sues the mortgagor and joins a prior mortgagee, the effect of the suit between the puisne mortgagee and the mortgagor is exactly the same as though the prior mortgagee had not been a party to it, assuming (1) that the mortgagee has insisted upon his rights, (2) that neither the puisne mortgagee nor the mortgagor has redeemed him in the suit. Then the result would be that the property would be sold subject to that prior mortgage as between the puisne mortgagee and the mortgagor. In other words, again, what would be sold would not be the property but the right to redeem the prior mortgagee. It is equally clear, we think, that in a suit so framed if the prior mortgagee did not choose to assert his rights, although a party to the suit, the result would be that the property would be sold free of that mortgage, and that the prior mortgagee would be disentitled to assert any rights he might otherwise have had under his prior mortgage against a purchaser at any such sale. That rule depends upon the principle of *res judicata*. This is very clearly apparent from the dicta of their Lordships of the Privy Council in *Sri Gopal v. Pirthi Singh* (1).

In our opinion, precisely the same result is worked out where the puisne mortgagee suing on his puisne mortgage is himself a prior mortgagee. By no stretch of fictional forms

(1) 4 Bom. L. R. 827; 24 A. 429, 29 I. A. 118; 6 C. W. N. 889.

or fictional ideas can it be said, we think, that in such circumstances he is not a party to the suit. He is just as much a party as though he had been impleaded by a puisne mortgagee other than himself. So that where a mortgagee holds two mortgages of different dates upon the same property, and sues upon the later mortgage, he must be deemed to be a party to the suit in a position to assert any rights he might have under his prior mortgage. There might be no objection in such circumstances to his reserving those rights, as though he and the prior mortgagee were different persons, and so have the property put to sale subject to the prior mortgage. But if he makes no mention of his rights as prior mortgagee, then he is in the same position, we conceive, as a prior mortgagee would be, if being duly impleaded, he did not attempt to assert his rights. In such cases the decision in *Sri Gopal* v. *Pirthi Singh* (1) is conclusive, establishing that such a prior mortgagee would be precluded from bringing another suit upon his prior mortgage against the purchaser at the sale; that is to say, the matter would be *res judicata* against the prior mortgagee.

This being our view, it follows that we must answer the question asked us by the learned District Judge in the negative. He has referred to us a subsidiary question under the special provisions of section 13 (*b*) of the Dekkhan Agriculturists' Relief Act upon which, I believe, my brother Hayward will express our opinion, though, in the view we take, it is not essential to the decision of the suit upon which the first question has been referred to us.

We wish to express our thanks to the learned gentlemen who afforded us much assistance as *amicii curiæ* during the argument.

HAYWARD, J.—I entirely concur with regard to the first question that prior and subsequent mortgages in favour of one mortgagee cannot be considered one cause of action so as to bar separate suits under Order II, rule 2. They must, in my opinion, ordinarily constitute two different causes of action, as causes of action are said to comprise all facts material to prove the particular suits, and, clearly in the case of separate mortgages, there would be different facts which would have to be proved to establish the separate suits. So that there could be no bar to separate suits under Order II, rule 2.

I also concur with regard to the further question which thereon arises, that the prior mortgage must be considered as necessarily brought in by way of defence in a suit on the subsequent mortgage in favour of the same mortgagee under Order XXXIV, rule 1, and that failure to plead the prior mortgage in the suit on the subsequent mortgage would give rise to *res judicata* under section 11, Explanation IV, of the Civil Procedure Code. The several decisions quoted before us in support of this proposition, namely, *Dorasami* v. *Venkataseshayyar* (2), *Kesharram* v. *Ranchhod* (3) and *Hari Narain Banerjee* v. *Shama Sundari Dasi* (4), all proceeded on the assumption that prior mortgagees were in all cases necessary defendants in suit brought by subsequent mortgagees under section 85 of the Transfer of Property Act. But it has since been made clear that they are not necessary defendants and that it is a matter of the choice of the subsequent mortgagees by the Explanation to Order XXXIV, rule 1, of the Civil Procedure Code. So the further question which has arisen must be thus stated: whether the prior mortgagee can practically be left out of the suit by the subsequent mortgagee where the two mortgages are vested in the same mortgagee, so as to avoid the penalty of *res judicata* which would otherwise result under the decision of the Privy Council in *Sri Gopal* v. *Pirthi Singh* (1). The matter is, in my opinion, not free from difficulty, but after consideration it does not seem to me practicable to hold the prior mortgagee in such a case not to be a party, when he is himself actually represented in the case, with full knowledge of the prior mortgage as subsequent mortgagee. Nor would there be any prejudice to him in so holding because he would be able, if he so desired, to keep his prior mortgage alive by requiring that the sale of the property should be subject to the prior mortgage, or in the alternative he might

(2) 25 M. 106; 11 M. L. J. 373.
(3) 7 Bom. L. R. 811; 30 B. 156.
(4) 6 Ind. Cas. 159; 37 C. 589, 11 C. L. J. 551.

allow the sale free of the prior mortgage and recover the amount due on the prior mortgage out of the proceeds of the sale on the subsequent mortgage. This is clear from the provisions of rules 12 and 13 of Order XXXIV. On the other hand, if the prior mortgagee were held in such a case not to be a party and not bound to disclose his prior mortgage, though himself the subsequent mortgagee, the ruling would, in my opinion, open the door to possible fraud in the subsequent dealings with the property and would tend to defeat the general policy of finally settling all questions regarding mortgaged property in one suit and of limiting litigation, underlying the various provisions of the Transfer of Property Act and the Civil Procedure Code.

With regard to the subsidiary question whether in any case the prior mortgage and the subsequent mortgage must not be held to be one cause of action in view of the special provisions of sections 12 and 13 of the Dekkhan Agriculturists' Relief Act, it is not strictly necessary, in view of our decision on the preceding questions, to come to any definite decision; nor does it appear to me that the materials before us are sufficient to enable us to arrive at such a decision. It will be sufficient, therefore, merely to indicate that it would depend on the questions of fact, as pointed out in the decisions of *Mahadu* v. *Rajaram* (5) and *Gopal Purushotam* v. *Yashwantrav* (6), whether the two mortgages can be said to be independent transactions or transactions "out of which the suit has arisen" within the meaning of section 13 of the Dekkhan Agriculturists' Relief Act. If it had been found as a matter of fact that the transactions were transactions "out of which the suit has arisen," then they would have constituted the same cause of action, and the subsequent suit would have been barred under Order II, rule 2, by reason of the special provisions of section 13 of the Dekkhan Agriculturists' Relief Act.

So that the reply to the questions put to us must, in my opinion, be that the subsequent suit on the prior mortgage was barred, by reason of the decree in the previous suit on the subsequent mortgage, as *res judicata* under section 11, Explanation IV, of the Civil Procedure Code, and that in any case, if the two mortgages had been found as a matter of fact to have been transactions "out of which the suit has arisen", the subsequent suit on the prior mortgage would have further been barred in view of the previous suit on the subsequent mortgage by the provisions of Order II, rule 2, and the special provisions of section 13 of the Dekkhan Agriculturists' Relief Act.

(5) (1887) 6 Un. P. J. 216.
(6) (1887) 6 Un. P. J. 273.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1079 OF 1913.

October 8, 1914.

Present:—Mr. Justice Ayling and Mr. Justice Hannay.

CHAMBOZIL MOIDIN KUTTI—PLAINTIFF—APPELLANT

versus

ACHUTAMBAL KUNHI KOYAN MUTH HAJI AND OTHERS—DEFENDANTS—RESPONDENTS.

Malabar Law—Melcharath *executed prior to expiry of* kanom. *validity of—Family necessity—Successor, whether bound.*

A *melcharath* executed without family necessity before the expiry of a prior *kanom*, in respect of the same property is not binding on the successor of the *karnavan* whether the *karnavan* did or did not survive the expiry of the prior *kanom*.

Second appeal from the decree of the Court of the Subordinate Judge of Calicut, in Appeal Suit No. 288 of 1912, preferred against that of the District Munsif of Parapanangadi, in Original Suit No. 566 of 1911.

Mr. *N. A. Krishna Aiyar*, for the Appellant.

Mr. *C. V. Ananthakrishna Aiyar*, for the Respondents.

JUDGMENT.—It is found that there was no family necessity to justify the *melcharath*, Exhibit B; and we must hold that this transaction is not binding on the successor of the *karnavan* who executed it, whether the latter did or did not survive

the expiry of the prior *kanom*. The appeal is dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 635 OF 1914.

January 13, 1915.

Present:—Mr. Justice Rossignol.

HIRA—PLAINTIFF—APPELLANT

versus

JOWALA DAS AND ANOTHER—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), ss. 23, 65—Contract—Illegal contract—Rule of in pari delicto—*Consideration paid for contract void* ab initio, *whether recoverable—Betrothal agreement*

A breach of betrothal agreement gives rise to a claim for damages.

The plaintiff advanced money to the defendant in consideration of his daughter's betrothal to the former's son. The *fiance* died and the plaintiff sued for refund of the money paid by him:

Held, that the suit was not maintainable.

Second appeal from the decree of the Additional Divisional Judge, Shahpur Division, at Lyallpur, dated the 22nd January 1914, reversing that of the Munsif, first Class, Chiniot, District Jhang, dated the 16th June 1913, decreeing the claim.

Mehta *Bahadur Chand*, for the Apellant.

Mr. *Nur-ud-Din*, for the Respondents.

JUDGMENT.—This was a claim for recovery of an alleged loan; the defendant contended that it was not a loan, but was a payment made in consideration of the betrothal of *Musammat* Viran to plaintiff's son.

The first Court found that the money claimed was a loan, but held that even if it were of the nature described by defendant, plaintiff could maintain a suit for its recovery.

The lower Appellate Court has found that it was not a loan, but consisted of payments made for the purpose described by defendant and it has held that the suit is not maintainable, inasmuch as the money was paid by plaintiff for an improper and immoral object which rendered the whole contract void *ab initio*.

Before this Court, it it contended on the legal point that *Kahna* v. *Kahn Singh* (1) is in point and would warrant a decree in plaintiff's favour.

That ruling would appear to refer to the English rule of *in pari delicto*, and in effect, the decision appears to be that since the bride's father was not *in pari delicto* inasmuch as he had not caused the marriage to be celebrated, he could assert that his position was superior to that of the plaintiff. But, is the case quite the same here?

It was pleaded by defendant that the money was advanced by the plaintiff in consideration of the girl's *betrothal* and that is the finding of the lower Appellate Court.

If that is so, is defendant not *in pari delicto*? Did he not betroth his daughter in consideration of the sum received? A betrothal is not a mere formality and as it is notorious, a breach of betrothal gives rise to a claim for damages.

In this case then the illegal consideration for the cash advanced had been performed and if we regard the bethrothal and marriage as the real consideration, a part had been performed and but for the death of the *fiance* the whole would have been carried out.

I have considered whether section 65 of the Contract Act applies to such a case, and although the matter has often been the subject of doubt, the prevailing view is that it does not apply to contracts which are known to be void *ab initio* by reason of the illegality of the consideration.

Holding then that plaintiff advanced the money claimed to defendant as consideration for an illegal promise which was performed either in whole or in part, according to the view taken, I decide that the plaintiff is entitled to no relief and dismiss the appeal, leaving parties to bear their own costs in view of the fact that neither side is deserving of sympathy.

Appeal dismissed.

(1) 106 P. R. 1879.

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Abwab means an arbitrary and indefinite imposition levied by the landlords on their tenants. An item which forms part of the consideration for which the lease is granted is not an *abwab*.

Where a lease executed prior to the passing of Regulation VIII of 1793, which forbade imposition of *abwabs*, specifically provided for the payment of *zilla kharach*:

Held, that as this was a part of the rent agreed upon, the landlord was entitled to recover it under section 3 of Regulation V of 1812. **C.** KALI KUMAR ROY *v.* KAILASH NATH ROY **470**

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The statement of an accomplice before the Committing Magistrate, though retracted in the Sessions Court, can be treated as substantial evidence, on the same footing as any other evidence on the record.

But this evidence must be treated with caution in so far as it implicates any particular accused or assigns him a particular part in the actual crime.

The value of the statement of any witness that he recognises a particular man, depends ultimately on the opportunities he had of observing the man and on his personal veracity. **S.** PUKHU *v.* EMPEROR, 8 S. L. R. 208; 16 CR. L. J. 233 **905**

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—— 1887—XVII. *See* PUNJAB LAND REVENUE ACT.
—— 1900—I. *See* PUNJAB LIMITATION (ANCESTRAL LAND ALIENATION) ACT.
—— 1905—II. *See* PUNJAB PRE-EMPTION ACT.
—— 1912—I. *See* PUNJAB COURTS ACT.
—— 1912—IV. *See* PUNJAB COURTS (AMENDMENT) ACT.
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—— 1886—XXII. *See* OUDH RENT ACT.
—— 1901—II. *See* AGRA TENANCY ACT.
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—— 1799—V. *See* REGULATION.
—— 1812—V. *See* REGULATION.
—— 1819—VIII. *See* PUTNI REGULATION.
—— 1825—XI. *See* BENGAL REGULATION.
—— 1872—III. *See* SONTHAL PARGANAS SETTLEMENT REGULATION.

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3 & 4 WILLIAM IV, C. 85. *See* GOVERNMENT OF INDIA ACT.
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——————————Incorporeal right, whether can be adversely possessed **930**

——————————*Limitation—Eleven years 5 months, possession for—Practice of Settlement Department—Judicial procedure—Possession follows title—Presumption, when raised.*

Where 11 years 5 months before suit for possession of a tract of jungle the final Record of Rights was published by the Settlement Department showing the defendants to be in possession at that time:

Held, that having regard to the well-known practice of the Settlement Department, which was itself a kind of judicial procedure, the defendant must have been found to be in possession at least seven months before that record was published.

The presumption that possession follows title in these kinds of cases must depend upon the circumstances of the case. **C.** SABOJINI DEBI *v.* KIRTIBASH DAS **802**

——————————, nature of possession necessary to create **640**

——————————*Bengal Land Registration Act (VII of 1876), s. 78—Registration of name, whether proves possession—Possession of co-tenant, when becomes adverse—Character of evidence required to prove it—Assertion of hostile title—Knowledge of co-tenant out of possession—Suit for partition—Court-fee—Actual or constructive possession not proved—Plaintiff not entitled to maintain suit—Proper remedy—Leave to amend plaint—Costs.*

The registration of the name of a person, under the Bengal Land Registration Act, is some evidence of possession, but does not necessarily prove that the person who has been able to get his name substitut-

Adverse possession—concld.

ed in the place of that of his vendor is in possession of any share of the estate.

To enable one of several co-tenants to acquire title by adverse possession as against the others, his possession must be of such an actual, open, notorious, exclusive and hostile character as to amount to an ouster of the other co-tenants, that is, must have been such as to render him liable to an action of ejectment at the suit of the co-tenants.

The evidence to show adverse possession by one co-tenant must be much clearer than between strangers to the title, and the hostile intent of the co-tenant in possession must be shown by unequivocal conduct.

The ouster of the other co-tenants, in order to render the possession adverse, need not be by violent or intimidating expulsion or repulsion; nor need notice of the adverse holding be actually brought home to the other co-tenants by personal or formal communication, but it is sufficient, if the contrary is not proved, that the circumstances show that such knowledge may reasonably be presumed.

A person who has failed to prove that he had possession, actual or constructive of any share of the disputed property, is not entitled to maintain a suit for partition. His remedy is by a suit for joint possession and partition and he may be allowed to amend his plaint on terms as to payment of costs. On the plaint in a suit so framed, Court-fees must be paid *ad valorem*. C. LOKENATH SINGH *v.* DHWAKESHWAR PROSAD, 21 C. L. J 253 **465**

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Agra Tenancy Act (II of 1911), s. 22—Hindu Law—Adoption—Adoptee not a lineal descendant of his natural father—Occupancy holding, succession to—Right of brother adopted in another family **34**

——— ——— ——— **s. 22**—*Land held on service tenure—Rent-free grant—Succession—Hindu Law of inheritance—Pleadings—Practice.*

Land held on a service tenure is a rent free grant, and its descent is governed by the ordinary Hindu Law of inheritance and not by section 22 of the Agra Tenancy Act.

The mere fact that the plaintiffs did not admit themselves to be entitled to possession of the land in suit as a service tenure, should not disentitle them to a decree for recovery of possession of the land as a service tenure holding, provided that such right is established on the evidence. A. JOKHAN CHAUBEY *v.* MAHESH SINGH, 13 A. L. J. 160 **720**

——— ——— ——— **ss. 79, 81**—*Dispossession of tenant by zemindar through another tenant*

Agra Tenancy Act—concld.

*—Limitation—Rival claimants to tenancy, suit between—Jurisdiction of Civil or Revenue Court—*Res judicata.

A suit between rival claimants to a tenancy can only be brought in a Civil Court, and not in a Revenue Court. Therefore, a decision of the Revenue Court in a suit for rent between rival claimants to a tenancy would not operate as *res judicata* in a subsequent suit in the Civil Court between the same parties.

Where a lessee from the *zemindar* dispossess a previous lessee, the dispossession of the latter must be deemed to be a dispossession by the *zemindar* through his tenant. The remedy of the dispossessed lessee is a suit under section 79 of the Tenancy Act within six months of the dispossession. A. BALBHADDAR CHAUBEY *v.* SOMAROO RAI, 13 A. L. J. 295 **914**

——— ——— ——— **s. 79 (1) (b)**—*Suit for compensation for crops wrongfully removed by landlord—Jurisdiction of Civil or Revenue Court.*

Section 79 (1) *(b)* of the Agra Tenancy Act entitles a plaintiff to recover the value of any crop which has been wrongfully removed by the defendant as one of the resultant damages of wrongful dispossession.

Therefore, a suit for compensation for the value of the crops which were wrongfully removed is a suit for compensation for illegal ejectment by a tenant against his landlord and should be brought in a Revenue Court. A. CHET RAM *v.* SAHABA, 13 A. L. J. 102 **532**

——— ——— ——— **s. 95**—*Suit between rival claimants to tenancy—Cognizable by Civil Court—Jurisdiction*—Res judicata.

Section 95 of the Agra Tenancy Act deals with questions arising between landlord and tenant, and not between rival claimants to a tenancy.

Therefore, a suit between rival claimants to a tenancy that the plaintiff is entitled to it is cognizable by a Civil Court.

A decree of a Revenue Court in a previous suit, holding that the plaintiff was the sub-tenant of the defendant in respect of the holding, does not operate as *res judicata* in the plaintiff's suit in the Civil Court to establish his claim to the holding. A. KANHI RAM *v.* DURGA PRASAD, 13 A. L. J. 278 **913**

——— ——— ——— **s. 199**—*Suit for ejectment—Defendant set up lease—Direction of Revenue Court to file suit for declaration of title in Civil Court within three months—Suit filed after expiration of three months—Limitation.*

In a suit for ejectment in the Revenue Court the defendant pleaded that he was holding the land under a lease the term of which had not yet expired. The Revenue Court directed the defendant to institute a suit in the Civil Court within three months to establish his rights under the lease. The suit was instituted after the expiration of three months.

Held, that as a cloud was cast on the plaintiff's title under his lease he was entitled to institute the present suit notwithstanding that the period prescribed in the order of the Revenue Court had expired. A. SURAJ MAL *v.* HIRA KUNWAR, 13 A. L. J. 31; 37 A. 94 **51**

Agreement creating future interest in favour of unborn persons, whether valid **379**

————, voluntary, validity of—Ex-proprietary tenancy converted by ex-proprietor into rent-free holding for life—Occupancy right, relinquishment of, by ex-proprietor **376**

Alienation. *See* HINDU LAW; MALABAR LAW; MORTGAGE.

———— *Khakhi Jats of Mouza Salihan, Tahsil Muzaffargarh—Transfer of landed property to wife in lieu of* sharni *dower, validity of—Sale—Registration—Document thirty years old—Presumption—Evidence Act (I of 1872), s. 90—Registration Act (XVI of 1908), s. 17.*

Among *Khakhi Jats* of *Mouza* Salihan in Tahsil Muzaffargarh a sonless proprietor can validly transfer his holding to his wife in lieu of *sharai* dower.

The wife has absolute power of disposing the property thus transferred to her, consequently a gift of it to her daughter is valid by custom and cannot be challenged by the reversioners of her husband.

A document thirty years old coming out of proper custody is to be presumed genuine under section 90 of Act I of 1872.

According to Muhammadan Law a gift by a husband of landed property in lieu of dower in favour of his wife is tantamount to a sale, consequently such a deed of gift in lieu of dower below Rs. 100 does not require registration, although the real value of the immoveable property thus transferred exceeds that amount, and as such is admissible in evidence. **P.** NUR MUHAMMAD *v.* ALLAH WASAI, 5 P. W. R. 1915; 35 P. L. R. 1915 **562**

Alienee of minor's right in property entitled to challenge mortgage by guardian **859**

Alluvion and diluvion—Government as owner of river-bed and proprietor of land abutting on river, dispute between—Encroachment **509**

Amendment of decree—Application filed after long time, whether allowed **639**

———— ———— *Mistake as to costs—Pleader's fee—Arithmetical or clerical error—Revision.*

Where in the preparation of a decree two sets of Pleader's fee were erroneously charged instead of one, and an application for amendment made nearly after a year was refused:

Held, that the High Court could not interfere in revision, as it was very doubtful whether the error could properly be considered either as a clerical or an arithmetical mistake. **A.** PAHLAD DAS *v.* COLLECTOR OF JAUNPUR, 13 A. L. J. 60 **922**

———— **of plaint**—Leave to amend—Costs **465**

————, when allowed—Objection against amendment, when to be made—Misjoinder of causes of action—Limitation extending time, how pleaded—Sale of partnership business—Contract Act (IX of 1872), s. 253 (7) **344**

Appeal—Admission of additional evidence—Appellate Court, duty of **33**

———— Admission of appeal presented after time—Discretion of Court—Discretion must be legal and regular—Presentation of appeal to wrong Court, whether sufficient cause **967**

Appeal—contd.

————Appellate Court allowing award to be filed—Revision **332**

———— Application to restore application for reversal of sale, dismissal of—Appeal, whether allowed — Sufficient cause — Party deliberately absenting, whether can claim restoration **492**

———— against consent decree, when maintainable **242**

———— Costs—Power of Appellate Court to allow costs disallowed by Subordinate Court **621**

———— against decree passed on award, grounds for **424**

————Bengal Tenancy Act (VIII of 1885), ss. 103A, 105, 109A—Entry in Record of Rights, Court not precluded from enquiring into correctness of—Application by landlord for fair rent—Enhancement—Jurisdiction **446**

———— Execution of decree—Legal representative of judgment-debtor, objection by—Attached property not of judgment-debtor—Determination of such question **328**

———— Facts, finding of, by trial Court—Appellate Court, power of, to disturb **276**

———— *Final decree passed before filing appeal against preliminary decree—Preliminary decree, whether appealable.*

Where before the filing of a second appeal against a preliminary decree, a final decree was passed and no appeal was preferred against the final decree:

Held, that no appeal lay against the preliminary decree as it had been confirmed by the final decree. **C.** SADHU CHARAN DATTA *v.* HARANATH DATTA **135**

———— *Finding adverse to defendant—Defendant, whether entitled to appeal*—Res judicata.

There is no right of appeal against a mere finding.

Where, therefore, in a suit to declare an adoption invalid, the invalidity of the adoption is found but the suit itself is dismissed as time-barred, the defendant has no right of appeal against that finding as there is no decree against him.

The fact that that finding may operate as *res judicata* in subsequent proceedings will not give him a right of appeal. **M.** ACHANTA VENKATASURYANARAYANA *v* YELAPRAGADU SHIVASANKARA NARAYANA, 2 L. W. 101; 17 M. L. T. 85 **861**

———— Finding of fact not to be questioned in second appeal even if based upon evidence on remand **265**

———— Hindu Law—Partial partition proved—*Onus probandi* as to jointness—Mortgage-decree, form of—Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 4, 5, 6 **489**

————Limitation—Award, filing of **31**

————, whether maintainable—Order refusing to wind up Company **44**

————Memorandum of appeal unaccompanied by copy of decree, whether effective—Collector, whether a Judge—Acts of Collector, presumption as to regularity of **447**

Appeal—contd.

——— Civil Procedure Code (Act XIV of 1882), s. 244—Non-transferable occupancy-holding sold in execution of rent-decree—Application by purchaser to set aside sale—Bengal Tenancy Act (VIII of 1885), s. 178—Fraud **431**

——— Objections to report not taken in first Court or not raised in grounds of appeal before lower Appellate Court, whether allowed in second appeal **598**

——— Order refusing to attach property for disobedience of injunction, whether appealable—Appellate Court, power of, to order imprisonment **131**

——— Order refusing rateable distribution **644**

——— Provincial Insolvency Act (III of 1907), ss. 43 (2) (*b*), 46 (1)—Order refusing to take action against insolvent—Creditor, whether an aggrieved person **241**

——— Partnership suit—Court competent to pass decree for amount exceeding its pecuniary jurisdiction—Incompetency to order amendment of valuation according to amount found due after preliminary decree—Course of appeal to be determined by amended valuation **988**

——— *Party in lower Court not impleaded in appeal, effect of—Limitation for adding party in appeal—Civil Procedure Code (Act V of 1908), O. XLI, r. 20—Court, power of, to direct addition of parties in appeal.*

Where by a mere act of inadvertence the appellant fails to implead a person who was a party in the lower Court, the appeal ought not to be dismissed on the simple technical ground that the said person is no party to the appeal and that limitation has expired for the purpose of making him a party, but must be decided on merits after that person is directed by the Appellate Court to be made a party; for, under Order XLI, rule 20, Civil Procedure Code, the Court has full authority to direct the addition of parties in an appeal, and when it takes action under this rule, no question of limitation can arise. **O.** GAJRAJ SINGH *v.* GAURI SHANKAR, 2 O. L. J. 20 **609**

——— Preliminary decree—Decision on issues in bar, whether preliminary decree—Omission to frame decree, effect of, on right to appeal—Final decree, effect of—Preliminary decree, preparation of, where provided **317**

——— Remand, evidence taken on—Appellate Court, discretion of—High Court, power of, to interfere in second appeal. **827**

——— Removal of guardian—Grounds of removal—Appointment of successor **28**

——— and revision—Advocate's act, how far binding on his client—Agent—Negligence **829**

——— *Suit filed in Subordinate Judge's Court but heard and decided by Munsif—Jurisdiction of Subordinate Judge to hear appeal.*

A suit was filed in the Court of the Subordinate Judge, but was subsequently transferred to the Court of the Munsif who heard and decided it On appeal the District Judge transferred the case to the Subordinate Judge to hear the appeal:

Appeal—contd.

Held, that the Subordinate Judge had jurisdiction to hear the appeal. **A.** WILAYAT ALI KHAN *v.* GHANI KHAN, 13 A. L. J. 290 **874**

——— filed beyond time, admissibility of—Court's negligence to observe procedure—Sufficient cause **784**

———, **second**—Appeal re-heard on application for review—Limitation **732**

——— Application for certificate to appeal made after 90 days—Question of custom mixed with law — Certificate refused — Second appeal, whether lies to Chief Court **723**

——— *Concurrent findings—Question of legal necessity.*

Where on the question of legal necessity for a sale the Courts below had come to a concurrent decision, the Chief Court declined to interfere in second appeal. **P.** SHIB RAM *v.* HAMIR SINGH, 1 P. L. R. 1915 **645**

——— *Definite finding of fact—A share-holder in possession of more shamilat than his share—Failure to get deed of sale registered—Punjab Courts Act (III of 1914), s. 41.*

A finding of fact though not very clear but sufficiently definite cannot be interfered with in second appeal.

The mere fact of a share-holder cultivating more than his admitted share in the *shamilat* is no inference of his having purchased a further share, specially when he has failed for a long time to get his deed of sale registered or his title recorded in the Revenue Record. **P.** JAWAHIR SINGH *v* NAURANG SINGH, 20 P. W. R. 1915; 67 P. L. R. 1915 **620**

——— *Finding—Interference.*

Where the lower Court after considering the whole evidence adduced by the parties, finds an adoption proved, the finding cannot be interfered with in second appeal. **P.** THAKAR DAS *v.* CHUNI LAL, 12 P. W. R. 1915; 62 P. L. R. 1915 **606**

——— Finding of fact **446**

——— *Finality of order passed on appeal by judgment-debtor against order refusing to set aside auction-sale of his immoveable property to decree-holder—Civil Procedure Code (Act V of 1908), ss. 2, 47, 104, O. XXI, rr. 90, 92, O. XLIII, r. 1 (j)—Revision—Punjab Courts (Amendment) Act (IV of 1912, s. 70—Punjab Courts Act (III of 1914), s. 44.*

An order of the Appellate Court in appeal by the judgment-debtor, under rule (1) *(j)* of Order XLIII of the Code of Civil Procedure, 1908, against the order of the Court executing the decree refusing, under rule 92 of Order XXI, to set aside, on his application under rule 90 of the said Order, the auction-sale of his immoveable property to the decree-holder, is not a decree within the meaning of sections 2 and 47 of the said Code, and consequently, under the force of sub-section (2) of section 104 of the Code, no second appeal lies therefrom to the Chief Court.

The Chief Court is not bound to interfere on revision with an order which is not so unjust or so perverse that it should not be allowed to stand. **P.** BABU LAL *v.* CHANDA, 6 P. W. R. 1915; 38 P. L. R. 1915 **589**

Appeal—concld.

——, **second**—Mixed question of law and fact **933**

——Order refusing to set aside sale—Second appeal, whether maintainable—Revision petition treated as memorandum of appeal **294**

——Party, whether entitled to make a new case **810**

——*Plea raised for the first time, whether can be allowed.*

The plaintiff sued his vendor and the brother and mother of the vendor for possession of a specific portion of a house, alleging that it represented his one-third share in the house which had been purchased in the name of the defendants and one-third of which had been sold to the plaintiff. The vendor confessed judgment, but the other defendants pleaded that in a partition after the purchase the house had fallen to the share of the defendant, who was vendor's brother. The plea was held proved by the original Court and the suit was dismissed, but the Appellate Court found that the plea was not established and passed a decree for possession of one-third of the house. On second appeal it was contended that the vendor, being a member of a joint Hindu family, had no right to alienate any portion of the house which the plaintiff could claim:

Held, that it was a new plea and could not be raised for the first time on second appeal. **P.** NARAIN DAS *v. Musammat* DAROPTI, 2 P. L. R. 1915 **673**

——*Point not taken in original Court, or in Appellate Court, whether allowed to be raised in second appeal.*

Ordinarily a point not taken in the original Court cannot be advanced in appeal, and similarly a contention not raised either in the first appeal or in the memorandum of appeal cannot be allowed to be argued in second appeal. **P.** AHMAD KHAN *v.* BAKHTAWAR, 3 P. L. R. 1915; 14 P. W. R. 1915 **646**

——Suit for rent, other than house rent **258**

Appeal to Privy Council—*Connected appeals—One appeal allowed, another dismissed—Leave to appeal granted in appeal which was allowed—Other appeal, whether fit case for leave to appeal to be granted.*

Two connected first appeals arising out of the same suit were disposed of by the High Court. In one of the appeals the High Court confirmed the decision of the lower Court and in the other reversed it. The same question was involved in both the appeals. Leave for appeal to the Privy Council was given in the one in which the High Court had reversed the judgment of the Court below:

Held, that under the circumstances the other case also was a fit one for appeal to His Majesty in Council. **A.** MOHAMAD WALI KHAN *v.* MOHAMAD MUINUDDIN KHAN, 13 A. L. J. 57; 37 A. 124 **378**

Arbitration—Agreement to arbitration after institution of suit—Application for stay of suit—Adjustment within the meaning of O. XXIII, r. 3 **46**

——*Award—Order to file award before certain date—Award made in* Hindi *on that day but filed with its English translation two days later, validity of—Use of word "file" instead of "make" in order, effect of—Civil Procedure Code (Act V of 1908), Sch. II, paras. 8, 15.*

Where a Court allowed the arbitrators to make their award within a certain time, but instead of using the word "make" used the word "file", and the award was made in *Hindi* and signed within that day but was filed two days later, as the arbitrators decided to have it translated into English, and where the arbitrators also before filing it took an agreement from the parties not to raise any objection to this being done:

Held, that the award was made within time and was valid and that the use of the word "file" instead of "make" was immaterial. **C.** SRI LAL *v.* ARJUN DAS, 18 C. W. N. 1325 **233**

——*Party having notice of hearing not appearing—Ex parte award, validity of—Costs, order as to, included in award—Award, whether bad.*

Where a party to an arbitration proceeding receives notice of the hearing but does not appear, the arbitrators are right in making an *ex parte* award.

Costs incurred in the process of obtaining an order from the Court are within the discretion of the Court and outside the province of the arbitrator, but an award is not bad merely because of their inclusion. **S.** LANG, J. M. *v.* HOLLAND AND MOSS, LD., 8 S. L. R. 136 **526**

——*Reference to arbitration, resiling from—Appeal against decree passed on award, grounds for.*

A party cannot resile from a reference to arbitration at his sweet will and pleasure, and it cannot avail him to show that having once agreed to the reference he afterwards repented of his action.

Where the parties to a suit referred the case to arbitration and a decree was made in accordance with the award of the arbitrators:

Held, that no appeal lies from such a decree, except where the decree is in excess of or not in accordance with the award. **O.** CHET KUNWAR *v.* PUTTU SINGH, 17 O. C. 386; 2 O. L. J. 129 **424**

——*Revocation of submission not allowed without good cause—Notice of meeting to party who has already withdrawn not necessary—Arbitrators not bound to discuss in presence of parties—Civil Procedure Code (Act V of 1908), Sch. II, para. 20—Regular suit to enforce award—Court Fees Act (VII of 1870), s. 7 (X) (d)—Limitation—Appeal.*

Neither party to a submission to arbitration can revoke it unless for good cause shown.

Omission to give notice of the meeting of arbitrators to a party, who has prior to such meeting notified to the arbitrators his withdrawal from the submission, does not invalidate the award.

The arbitrators are not bound to discuss in presence of the parties what award they are going to make.

The procedure laid down in the Civil Procedure Code, Schedule II, paragraph 20, is not obligatory. Instead of applying that an award may be filed, a party may institute a regular suit to enforce the award. For such a suit, the Court-fee would be *ad valorem* on the value of the property in dispute [section 7 (X) (d), Court Fees Act], and the period of limitation is three years at least, in some land cases it may be twelve years, and there is free right of appeal and second appeal. **U. B.** NGA HLA GYAW *v.* MI YA PO, 4 U. B. R. (1914) II, 26; 7 BUR. L. T. 279 **31**

Arbitration Act (IX of 1899), s. 2—*Application to file an award—Cause of action arising in part—Jurisdiction.*

A "cause of action" consists of every fact which is material to be proved to entitle the plaintiff to succeed, every fact which the defendant would have a right to traverse, and it arises "in part" within the jurisdiction of a Court, if any fact material for the plaintiff to prove took place therein.

Where a trader entered into a contract at Multan with the agents of a Karachi firm, and the contract was to be completed in Karachi and the money payable thereon was expressly made payable in Karachi:

Held, that the cause of action arose in part in Karachi and that the Karachi Court had jurisdiction to file an award based on a reference contained in the contract. **S.** WILSON, G. W. *v.* VOLKART BROTHERS, 8 S. L. R. 107 **129**

——— **s. 14**—*Award made ex parte—Sufficient cause for non-appearance—Court, power of, to set aside award.*

If a party shows sufficient cause for his non-appearance before an arbitrator, the Court will set aside an award passed *ex parte* against him. **S.** WHITEHOUSE *v.* KAHN KAHN & Co., 8 S. L. R. 110 **135**

——— ——— **s. 19**—*Insolvent guarantee-broker—Guarantee deposit—Employer's claim for damages adjudicated by Judge in insolvency proceedings—Suit to recover guarantee deposit after setting off damages, whether can be referred to arbitration—Sufficient cause.*

A suit by an Official Receiver of the property of an insolvent guarantee-broker against his employer for the balance of the guarantee deposit with interest, after setting off the amount of damages settled by the Judge in the insolvency proceeding as due to the employer, cannot be referred to arbitration under section 19 of the Act, as the main question of damages cannot now be litigated without the leave of the Court under section 16 (2) of the Provincial Insolvency Act. **S.** JAMES FINLAY AND Co. *v.* E. RAYMOND, 8 S. L. R. 60 **138**

Assessment of rent, suit for, landlord's rights as to **974**

Attachment. *See* EXECUTION.

Auction-purchaser. *See* CIVIL PROCEDURE CODE, s. 47.

Auction sale, bid in, whether can be withdrawn **805**

Award. *See* ARBITRATION **526**

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———Application to set aside—Limitation **371**

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Benami transaction—Mortgagor and mortgagee—Mortgagor purchasing *benami* in revenue sale—Subsequent mortgage sale, validity of—Right of *bona fide* lessee **274**

Benamidar, whether can sue—Mortgage—Presumption—Mortgagor, whether can object to such institution **136**

Bengal, Assam and North-Western Provinces Civil Courts Act (XII of 1887), s. 13 **751**

Bengal Cess Act (IX B. C. of 1880), s. 20, *construction of—Whether suit barred, where* zerait *in occupation of tenant entered in the cess return simply as* zerait*—False entry in the return, effect of.*

Section 20 of the Bengal Cess Act (IX B. C. of 1880) does not enact that if a proprietor, whether by mistake or otherwise, enters a piece of land in the wrong part of his return, he thereby loses his right to claim rent. The Cess Act is a fiscal Act, and its object is that no land within the estate should escape assessment. It is immaterial for this purpose whether *zerait* land is entered as in the possession of a tenant or the *khas* possession of the *zemindar*; and this is sufficient to satisfy the requirements of section 20. The *zemindar* will be liable to punishment only if he enters land of one class in another class. **C.** SRI NARAIN SINGH *v.* SAHBOOL KHAN **304**

Bengal Land Registration Act (VII of 1876), s. 78 **465**

Bengal Land Revenue Sales Act (XI of 1859), s. 37—Taluk *in existence from before Permanent Settlement, division of—Portion of such* taluk *transferred—Protection of such portion.*

When a portion of a *taluk* existing from before the Permanent Settlement is transferred and it is subsequently held in proportionate *jama* under a name different from the original *taluk*, but the subsequent transfer and descent thereof can be traced from the original *taluk*, the portion so transferred is also protected under section 37 of Act XI of 1859.

What the effect of the division of a *taluk* is must depend upon the intention of the parties. **C.** DOYAMAYEE CHOWDHURANI *v.* NARENDRA KISHORE ROY, 19 C. W. N. 79 **114**

——— ——— **s. 37 cl. (4)**—Land on which a garden stood before, sold for arrears of revenue—Incumbrance, whether void—Landlord, right of, to annul notice—Notice, how sufficient—Civil Procedure Code (Act V of 1908), s. 102—Appeal, second, whether competent **258**

Bengal Regulation XI of 1825, ss. 4, 5—*Alluvion and diluvion—Government as owner of river-bed and proprietor of land abutting on river, dispute between—Encroachment.*

Section 4 of the Bengal Regulation XI of 1825 is intended to apply not merely to cases of alluvion and dereliction arising between the owners of properties situated on opposite banks of a river, but also to cases in which the dispute is between the Government as the owner of the bed of the river and a proprietor whose land abuts on the river. Section 5 does not apply to cases of accretions made owing to recession of rivers. **C.** SECRETARY OF STATE *v.* JAGDAMBA DEBI **509**

Bengal Rent Act (X of 1859) **928**

Bengal Tenancy Act (VIII of 1885), applicability of **271**

——— ——— ——— **s. 5** **432**

——— ——— ——— **s. 5 (1), (5)**—*Tenure-holder—Presumption—Lease—Construction of lease.*

A lease provided:

(1) that the grant was made in order that the grantee might cultivate the land after making it fit for cultivation at his own expense by his own efforts.

(2) that the grantee might enjoy the land by cultivating it or having it cultivated, and that it would

Bengal Tenancy Act—contd.

be competent to the grantee to make such other arrangements or adopt such other means as he might consider necessary for cultivating the same and that the grantor would not raise any objection thereto.

There was a period of remission fixed, during which no rent was to be paid for the land itself. The rate of rent itself was fixed in perpetuity and a premium was paid by the grantee to the grantor. The area covered by the lease exceeded one hundred *bighas*:

Held, (1) that under section 5 (5) of the Bengal Tenancy Act it was obligatory upon the Court to presume that the grantee was a tenure-holder,

(2) that the terms of the lease read together with the definition of tenure-holder given in section 5 (1) of the Bengal Tenancy Act instead of rebutting supported the statutory presumption; and

(3) that the definition given in the section was not exhaustive. **C.** BIBHUDENDRA MANSINGH *v.* DEBENDRA NATH DAS, 20 C. L. J. 140 **432**

——— ——— ——— **s. 26** **235, 352**

——— ——— ——— **s. 29**—*Partition among superior landlords—Distribution of rent—Enhancement.*

If the total rent remains unaltered, its distribution, by agreement of parties, over different parcels of land does not constitute enhancement within the meaning of the Bengal Tenancy Act. **C.** ROWSHAN SIRCAR *v.* SHYAMA CHARAN CHAKRABARTY, 20 C. L. J. 331 **49**

——— ——— ——— **s. 48 (h)** **56**

——— ——— ——— **s. 49**—*Under*-raiyat—*Suit for rent by* raiyat *dismissed*—Res judicata *as to title—Under*-raiyat *claiming to hold directly under landlord and paying rent to plaintiff as* gomastah—*Notice to quit necessary.*

The plaintiff, a *gomastah* of the landlord of a village obtained certain lands from the landlord and let them out to the defendant. In a previous rent suit brought by the plaintiff against the defendant, the defendant had pleaded that he had always paid his rent to the plaintiff for the benefit of the landlord and that the plaintiff was nothing more than a *gomastah*, and he was a *raiyat* holding directly under the landlord The rent suit was decided in favour of the defendant, and the plaintiff then sued that in establishment of his title as *raiyat* he could eject the defendant without notice as a trespasser:

Held, that the decision in the rent suit did not operate as *res judicata* on the question of title of the plaintiff;

that the defendant could not be evicted without notice to quit as required by section 49 of the Bengal Tenancy Act 1885. **C.** KALA GAZI *v.* MAHESWAR CHAUDHURI **273**

——— ——— ——— **s. 49 (a)**—*Lease-hold property, whether heritable—Lease for a term of years—Death of tenant before expiry of term—Right of son to hold lease—Suit for ejectment—Notice to quit.*

A lease-hold property under the Bengal Tenancy Act or under any other Act if it is for a term of years is necessarily heritable, inasmuch as the contract

Bengal Tenancy Act—contd.

enables the lessee to remain in possession for the full term.

Where a tenant holding under a written lease for a fixed term of years died before the expiry of his term and his son held the lease and went on cultivating the lands even after the lease:

Held, that the son was liable to be ejected without a notice to quit. **C.** NIRODE MOHAN DEY *v.* JAGARALI, 20 C. L. J. 328 **45**

——— ——— ——— **s. 52** **19**

——— ——— ——— **s. 65**, *scope of—Rent, when first charge—Landlord and tenant, relationship of—Landlord parting with his proprietary right, whether entitled to sell tenant's holding under s. 65—Civil Procedure Code (Act V of 1908), O. XXI, rr. 89 to 96—Court, power of, not to confirm sale.*

Under section 65 of the Bengal Tenancy Act the sale of a holding is possible, so long as the rent is a first charge thereon, and it remains the first charge only so long as the relationship of landlord and tenant subsists.

Therefore, a landlord who has parted with his proprietary interest, is not entitled to invoke the special remedies vested in a landlord under section 65 of the Bengal Tenancy Act, but still he can have a sale in execution of his decree under the Code of an interest which is saleable.

Where after a sale in execution of a decree the decree-holder is paid the amount of his decree and there is a concurrent wish of the parties that the sale should be set aside, the Court, although not warranted by any provisions of rules 89 and onwards of Order XXI of the Civil Procedure Code, 1908, to set aside the sale, may treat the sale as being of no effect and may decline to confirm it. **C.** RAM PRASAD *v.* RAM CHARAN SINGH **601**

——— ——— ——— **ss. 67, 193, Sch, III, Art. 2, cl. (b)**—*Lease, construction of—Fishery right, suit for—Limitation—Fishery, money payable for, whether rent.*

Where a lease merely gives a right to fish in a *jalkar*, the fact that the lessee is not to claim reduction of the *jama* on the ground of drought or inundation does not necessarily show that any right to the soil is also conferred.

A suit to recover money due under such a lease comes under section 193 of the Bengal Tenancy Act and is barred if not brought within the special period provided by Schedule III, Article 2, clause (*b*), of the Act.

The money payable in respect of a fishery is not rent within the meaning of the Bengal Tenancy Act, and as such, interest at the rate stipulated in the lease is recoverable on the amount.

Section 67 of the Bengal Tenancy Act relating to interest affects the contract between the parties, and the restriction on the liability of the tenants to pay interest at the rate of 12½ per cent. per annum is a matter of substantive right, and does not apply to suits. **C.** KRISHNA LAL *v.* SALIM MAHOMED, 19 C. W. N. 514 **614**

——— ——— ——— **s. 86 (6)** **564**

Bengal Tenancy Act—contd.

——— ——— ——— ——— **s. 86, cl (6),** *construction of—Incumbrance, meaning of—Surrender—Incumbrance created by tenant, effect of, upon landlord.*

Per *Woodroffe, J.*—The term "incumbrance" in section 86, clause 6, of the Bengal Tenancy Act, means not one which is binding on the landlord, but one which is binding as between the tenant and the incumbrancer.

In a case of surrender unlike that of abandonment, the landlord taking the tenant's rights should equitably be bound by the tenant's previous transaction by way of a mortgage. Neither the landlord nor the tenant can derogate as against his own grant.

Per *Cose, J.*—The landlord's rights under section 86, clause (6), of the Bengal Tenancy Act cannot be affected by the tenant's incumbrance which is not legally binding upon him. **C.** MAHAMMAD NASSARUDDIN SARDAR *v.* SHEIKH ISAB, 21 C. L. J. 185 **1003**

——— ——— ——— **s. 88** **564**

——— ——— ——— **ss. 98, cls. (3) and (7), 103**—*Common Manager, powers of—Application under s. 103, whether excluded.*

The powers of a common Manager under section 98 (3) of the Bengal Tenancy Act are the same as the co-owners jointly might, but for his appointment, have exercised.

Clause 7 of section 98 giving the Manager power to make any application under section 103 does no operate as an exclusion. **C.** BAKTA PRAMANIK *v.* KISHORI MOHAN **307**

——— ——— ——— **s. 103** **307**

——— ——— ——— **s. 103A**—*Record of Rights—Presumption of correctness—Draft Record of Rights, whether admissible in evidence*

It is not until a Record of Rights is finally published that the presumption of its correctness arises Therefore, entries in a draft Record of Rights, published under section 103A of the Bengal Tenancy Act, are not admissible in evidence. **C.** GULAB KUER *v.* RAM RATAN PANDEY, 18 C. W. N. 896 **229**

——— ——— ——— **ss. 103A, 105, 109A**—*Entry in Record of Rights, Court not precluded from enquiring into correctness of—Application by landlord for fair rent—Enhancement—Jurisdiction—Appeal.*

Section 103A of the Bengal Tenancy Act precludes a Court from going into the question whether the procedure under the Chapter has been followed and not from inquiring whether the resultant entry in a Record of Rights is correct.

Where on an application by a landlord under section 105 of the Bengal Tenancy Act the Special Judge enhanced the rent of a tenant who was described as *korfa* and the purpose of whose tenancy was residential, on the ground that it was below the prevailing rate:

Held, that the Bengal Tenancy Act did not apply to such a tenancy and the Special Judge had no jurisdiction to enhance the rent.

Section 109A is no bar to an appeal in a case of settlement of rent in which a question of jurisdiction is definitely raised **C.** RAMDAS MOKHOPADAYA *v.* BIPRA DAS PAL, 19 C. W. N. 85 **446**

Bengal Tenancy Act—contd.

——— ——— ——— **s. 105** **446**

——— ——— ——— **s. 106,** *suit under—Question of title, whether determined in suit under s. 106—Civil Court, jurisdiction of.*

A person who is not in possession of land which is claimed as rent-free at the date of the Record of Rights, cannot have the mere question of his title to hold the land rent-free tried in a suit under section 106 of the Bengal Tenancy Act (VIII of 1885), nor can he obtain possession of the land in a suit under that section.

Where, however, the plaintiff has a title and his claim is not barred by limitation he is entitled to possession, but he cannot get all the reliefs in a suit under section 106, whereas he can get a complete remedy by a suit in the Civil Court. **C.** PRAN KRISHNA SAHA *v.* TRAILAKHYA NATH CHOWDHURY **863**

——— ——— ——— **s. 109A** **446**

——— ——— ——— **s. 140,** *scope of—Remedy against distraint*—Ex parte *order, Court's inherent power to review—Civil Procedure Code (Act V of 1908), s. 151—Inherent power, object of.*

Section 140 of the Bengal Tenancy Act does not afford the only remedy against a distraint made erroneously or on insufficient materials.

The Court which passes an *ex parte* order has the power to review it, as the Court has an inherent power to deal with an application to set aside an order made *ex parte* and to set it aside on a proper case being substantiated.

Section 151 of the new Code of Civil Procedure is intended to enlarge the discretion of Courts and to discourage technicalities. **C.** MADHAVANAND RAM *v.* MADHU MAHTO **812**

——— ——— ——— **s. 148 (b)**—*Rent suit—Parties—Plaint—Property in arrears, identification of.*

It is not competent to a landlord to choose arbitrarily some out of several representatives of the original tenant and to institute a suit for rent against such selected persons.

Where in a suit for rent the defendant asserts that he is not in possession of the lands for which rent is claimed and that he is not able to identify the properties in arrears, on account of their boundaries not having been set out in the plaint.

Held, that the plaintiff should be made to comply with the requirements of clause (*b*) of section 148 of the Bengal Tenancy Act. **C.** SATYABHUSHAN GHOSAL *v.* MONMOTHO NATH **313**

——— ——— ——— **s. 153**—Suit for rent for less than Rs. 100—Decree—Execution **294**

——— ——— ——— **s. 170 (3)**—*Decree, satisfaction of—Purchaser of part of occupancy-holding, whether entitled to make deposit.*

The purchaser of a *part* of an occupancy-holding, which is not transferable by local custom or usage, is entitled to make a deposit under section 170 (3) of the Bengal Tenancy Act. **C.** BHAGRAJ SINGH *v.* MITHUB SINGH **424**

Bengal Tenancy Act—contd.

——— ——— ——— **s. 170 (3)**—*Non-transferable occupancy holding, whether can be transferred—Landlord, right of—Decree for arrears of rent—Deposit by private purchaser.*

A right of occupancy which is not transferable by custom or local usage can be transferred, but where the transfer is a sale of the whole holding, the landlord in the absence of his consent is entitled to enter on such holding.

A private purchaser of such an occupancy holding is quite competent to make a deposit under section 170 (3), Bengal Tenancy Act, to prevent the landlord from selling the holding in execution of a decree for arrears of rent as, his interest is such as is voidable on the sale. **C.** AHMDULLAH CHOWDHURY v. HARKARU SAHA **176**

——— ——— ——— **s. 173** **431**

——— ——— ——— ——— **ss. 178 (1) (d), 194**—*Privity of contract, whether exists between lessor and under-lessee—Covenant by tenure-holder not to excavate tank—Breach of covenant by raiyat—Tenure-holder, liability of—No actual damages suffered—Infringement of right—Nominal damages.*

Section 178 (1) (*d*) of the Bengal Tenancy Act is controlled by section 194.

There is neither privity of contract nor privity of estate between the head lessor and the under-lessee and hence the under-lessee is not personally liable for the rent reserved by, nor on the covenants contained in, the head lease.

Wherever any act injures another's right and would be evidence in future in favour of the wrong-doer, an action may be maintained for an invasion of the right, without proof of any specific damage.

Where a tenure-holder, who had expressly undertaken not to excavate any tank on the property, granted to a *raiyat* a lease of some land within the tenure and the *raiyat* being unaware of the restrictive covenant in the lease of the tenure-holder excavated a tank:

Held, (1) that the tenure-holder, and not the *raiyat*, was liable in damages to his lessor for excavation of the tank by the *raiyat*;

(2) that there had been a breach of covenant not to excavate any tank, that is, an infringement of the legal right of the plaintiff, who was consequently entitled to nominal damages, even though he may not have suffered actual damage. Nominal damages does not necessarily mean small damages. **C.** AKSHOY KUMAR CHATTERJEE v. AKMAN MOLLA, 20 C. L. J. 551 **397**

——— ——— ——— **s. 178 (3) (d)** **235**

——— ——— ——— **s. 183** **352**

——— ——— ——— **s. 193** **614**

——— ——— ——— **s. 194** **397**

——— ——— ——— **Sch. III, art. 2 (b)** **614**

——— ——— ——— **Sch. III, art. 6** *as amended by Eastern Bengal and Assam Tenancy Act (I of 1908)—Special limitation—Suit by a co-sharer landlord for his share of rent, whether governed by Art. 6.*

The special limitation provided by Article 6 of Schedule III of the Bengal Tenancy Act, as amended by Act I of 1908, Eastern Bengal and Assam Tenancy Act, governs an application for execution of a decree obtained by a co-sharer landlord for his share of the rent in a suit to which the other co-sharers were not parties, the decree being for a sum of money not exceeding Rs 500.

Article 6 is applicable when the decree has been made in a suit between landlord and tenant *to whom* (and not *to which*) the provisions of the Act are applicable, it being immaterial that all the provisions of the Act are not applicable **C.** NARENDRA CHANDRA v. AFIFANNESSA BIBI, 19 C. W. N. 731 **729**

Bequest in favour of a person not named—Secret instructions to trustee—Admissibility of oral evidence to prove trust **946**

Bombay Abkari Act (V of 1878), s. 43—*Mhowra flowers—Consigned by railway—Found at an intermediate station for transhipment—Possession—Consignor, whether guilty.*

The accused consigned at a Railway Station certain *mhowra* flowers for conveyance to Nandod. The Railway Company took possession of these goods and in the course of the conveyance to Nandod they were found at Ankleshvar, a place where they naturally would be in the course of this transport. Ankleshvar being a place in a prescribed area within which even the possession of *mhowra* flowers without a permit is unlawful the accused was charged and convicted for possessing *mhowra* flowers without a permit under section 43 of the Abkari Act:

Held, that the applicant was not guilty of the possession of the flowers, and in the absence of any evidence that he conspired with the Railway Company that these goods should be conveyed without a permit, he was not guilty of even abetting the offence. **B.** CHUNI LAL MANI LAL v. EMPEROR, 17 BOM. L. R. 72; 16 CR. L. J. 212 **836**

Bombay District Municipal Act (III of 1901), ss. 3 (17), 14, 59—*Trollies pushed on rails in a public street, whether subject to wheel-tax—Vehicle carrying rubbish, meaning of.*

Trollies running on rails in the streets of a Municipal town, pushed or pulled by hand and used by contractors for the purpose of carrying material to fill up a tank, are 'vehicles' and subject to the wheel-tax under the District Municipal Act. **B.** DAYABHAI NARANDAS v. PESTONJI JAMSHEDJI, 17 BOM. L. R. 63 **497**

——— ——— ——— **s. 14** **497**

——— ——— ——— **ss. 82, 83, 86**—*Bill to recover arrears—Statutory requirements not fulfilled—Failure to pay—Distress warrant, whether legal.*

A bill to recover the arrears of house-tax served upon a person by a Municipality does not fulfil the requirements of section 82 (2) *(b) (ii)* of the District Municipalities Act, 1901, if it does not specify the time within which an appeal may be preferred under section 86 of the Act, and in such a case the issue of a distress warrant on failure to pay the arrears is illegal inasmuch as the right of distress depends upon the observance of the statutory formalities, it being a right conferred by the Statute upon those conditions only. **B.** SURAT CITY MUNICIPALITY v. CHHABILDAS DHARAMCHAND, 16 BOM. L. R. 749 **573**

Bombay District Municipal Act—concld.

——————— **s. 160 (3)**—*Compensation, award of—Boom in prices, whether to be considered in estimating market-value—Value of portion of land enhanced owing to acquisition of part of it—Compensation for that portion, whether allowed on severance.*

In awarding compensation for acquisition of land under section 160 (3) of the Bombay District Municipal Act if a boom in prices of lands exist owing to certain extraordinary circumstances, it must be considered in estimating the market-value of the land to be acquired.

Where a portion of a land acquires a fancy value owing to the acquisition of a part of it for widening a street, no compensation is allowed for the severance of the same. **S.** KARACHI MUNICIPALITY *v.* KHATAN MAL HIRANAND, 8 S. L. R. 126 **326**

Bombay Gambling Act (IV of 1887), ss. 5, 6—*Criminal Procedure Code (Act V of 1898), ss. 1 (2), 103, 243—Search under Gambling Act—Mashirs, absence of, effect of—Accused pleading guilty—Magistrate, duty of, to convict.*

All searches under a special or local law are not to be conducted in accordance with the provisions of the Criminal Procedure Code and, therefore, the absence of *mashirs* at a search held under the Bombay Gambling Act, 1887, does not make the search illegal.

Where an accused pleads guilty but shows no sufficient cause why he should not be convicted, the Magistrate should not acquit him. **S.** EMPEROR *v.* ASLUM, 8 S. L. R. 213; 16 Cr. L. J. 238 **910**

Bombay Land Revenue Code (Bom. Act V of 1879), s. 135J—*Presumption attaching to entries in Record of Rights Mortgage—Properties mortgaged—Ownership of mortgagor—Suit between mortgagee and third party—Burden of proof—Registration Act (XVI of 1908), s. 60—Endorsement by Registering Officer—Evidence.*

Section 135J of the Bombay Land Revenue Code enacts that entries in the Record of Rights shall be presumed in effect to be a true statement of their contents. Therefore, in the absence of any other evidence, a Court would be obliged to be guided by any facts so entered in the Record of Rights.

In a suit between the mortgagee and a third party the onus of proving that the properties comprised in the mortgage-deed belong to the mortgagor, lies upon the mortgagee.

The Registering Officer's endorsement on a registered document is evidence, though, of course, necessarily not conclusive of the truth of the facts set forth therein. **B.** ANANDIBAI BHASKAR *v.* NARAYAN DHONDDEV, 7 BOM. L. R. 49 **478**

——————— **ss. 189, 197 147**

Buddhist Law—*Mortgage by husband, when binding on wife—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 1—Transfer of Property Act (IV of 1882), ss. 85, 59—Mesne profits.*

Where it is found that a Burmese Buddhist husband had authority from his wife to enter into a mortgage of the property, to sign the mortgage document and to register the same, and to be sued on the mortgage so as to bind her interest, the mortgagee is entitled to a declaration that he is the owner and to possession.

Buddhist Law—contd.

A decree for mesne profits may be passed against a defendant who has no right to be in possession as against the plaintiff, though he is the other defendant's tenant. **L. B.** MA SHWE MIN *v.* P. A. R. M. CHETTY **788**

Burden of proof. *See* EVIDENCE **610**

——— —— Landlord and tenant, relation of, proof of—Presumption **804**

———————Liability of Director of Company grounds of **594**

———————, mitigation of—Consideration—Loans, oral—*Lekha bahi*, entries in, whether reliable by themselves—Extrinsic evidence, necessity of **581**

——— ——— Necessity of trying Magistrate's evidence—Transfer **848**

——— ——— Private land, meaning of—Conversion of ryoti into private land—Degree of proof—Letting lands as *Kambattam*, whether amounts to conversion—Landlord cultivating lands himself—Presumption **77**

——— ——— Question of fact—Tenancy permanent or not **500**

——— ——— Rent-decree, setting aside of—Fraud, allegation of—Rent, exaggeration of—Entry in Record-of-Rights, mistake due to, effect of **890**

——— ——— Right of convert's son to inherit—Exclusion of *kafir* under Muhammadan Law **357**

——— ———Suit between mortgagor and third party **478**

——— ——— Suit for possession by purchaser **13**

——— ——— Will—Testamentary capacity **276**

Burmese Buddhist Law—*Widower's power of disposing his property*—Auratha *son's right—Purchaser, rights and liabilities of*

Where a Burmese Buddhist and his wife jointly acquire certain property and the wife dies leaving a son of the marriage and the husband marries again without partitioning the property with that son, the son is entitled only to a fourth share of the property as an *auratha* son and the father can dispose absolutely of the three-fourths of the property and a purchaser of the whole property takes the property subject to the *auratha* son's fourth share, unless the son's right to claim is barred by limitation. **L. B.** NAUNG SHWE PO *v.* MAUNG BEIN **632**

Calcutta Municipal Act (III of 1899), ss. 223, 228—*Consolidated rate first charge on property—Mortgage and charge, distinction between—Purchaser for value without notice—Purchaser under involuntary alienation—Inquiry.*

Section 223 of the Calcutta Municipal Act, 1899, deals with the question of the personal liability (liability *in personam*) of the purchaser of the premises for arrears unsatisfied when the title vested in him. Section 228 deals with the question of the liability of the premises (liability *in rem*) for the rates due thereon. Section 228 is perfectly general in its terms and makes the consolidated rate, as it accrues due from time to time, a first charge on the property (subject to arrears of land revenue). The ob-

Calcutta Municipal Act—concld.

jects of the two sections are radically distinct and section 228 cannot be controlled by section 223.

A mortgage is a transfer of an interest in specific immoveable property. A charge only secures payment of money out of that property. The distinction becomes important in the determination of the question whether the property can be followed in the hands of a *bona fide* purchaser for value without notice.

Where only a charge has been created by express words of the Statute, the charge cannot be enforced against the property in the hands of a *bona fide* purchaser for value without notice.

A defendant to avail himself of the defence ought to plead in his written statement that he is a purchaser for value without notice, and the onus of proving it lies on him.

A purchaser with notice may shelter himself under the title of the person from whom he purchased if the latter could successfully raise the defence of want of notice.

To a purchaser acquiring title under an involuntary alienation, constructive notice cannot be imputed to the same extent as to a purchaser at a private sale. A purchaser without notice from a person who had notice is protected.

Where a purchaser should, and could, have ascertained before his purchase the true state of affairs as to the charge upon the property purchased by him, he is in the same position as if he had made such inquiry and the purchasers from him are in no higher position, if they could have by inquiry, before they acquired title, ascertained the fact. C. AKSHOY KUMAR v. CORPORATION OF CALCUTTA, 19 C. W. N. 37; 21 C. L. J. 177 **261**

Caste Disabilities Removal Act (XXI of 1850)—*Right of convert's son to inherit—Exclusion of* kafir *under Muhammadan Law—Burden of proof—Admission on point of law.*

A convert's son must be put in the position in which he would have been if his father had not changed his religion. The words "any right of inheritance" in Act XXI of 1850 refer to any right of inheritance accruing to any person, which right is not affected by conversion.

Therefore, a Hindu son is entitled to inherit the property of his father who was converted to Muhammadanism.

Though, under the Muhammadan Law, a son is *prima facie* entitled to a share yet the fact of his being a Hindu shifts the burden of proof on him to show that he is not excluded as a "*kafir*".

A party is not bound by the erroneous admission on a point of law made by his Pleader in the lower Court. S HASSOMAL MURLIMAL v. GHULAM MAAOMED, 8 S. L. R. 156 **357**

Cause of action against agent and his legal representatives, whether same—Principal and agent—Misappropriation by agent—Termination of agency—Suit to recover money—Limitation Act (IX of 1908), Sch. I, Arts. 62, 89, 120 **807**

——— arising in part—Jurisdiction **129**

——— Claims for possession and mesne profits **679**

Cause of action—concld.

——— Claim for rent accruing due from year to year—Recurring claim **265**

——— Fresh suit—Mortgagee's rights to possession of mortgaged property declared—Execution of decree **637**

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——— Suit for redemption dismissed—Second suit on basis of promise to allow redemption, maintainability of **732**

——— Suit on bond conditioned with performance of several acts **849**

Central Provinces Tenancy Act (IX of 1883), s. 94—*Ejectment, meaning of—Wrongful but peaceful possession with intention of excluding the rightful holder.*

Ejectment in section 94 of the Central Provinces Tenancy Act means a dispossession, that is to say, a loss of possession through some act of the defendant which was a taking of possession with the intention of excluding the plaintiff. Force includes in cases of this sort the moral equivalent of force

Thus, a person who takes wrongful but peaceful possession, and when asked to give up possession by the rightful holder, refuses to do so, must be held to eject the rightful holder, provided his declared intention is to retain possession permanently. N. *Musammat* AMBA v. SHEORAM, 11 N. L. R. 8 **864**

Certificate of Collector. *See* PENSIONS ACT, s. 6. **927**

Cess—*Sadelwar and Madiri Kasuvs* **688**

Charge. *See* MORTGAGE.

——— Consolidated rate first charge on property—Mortgage and charge, distinction between—Purchaser for value without notice—Purchaser under involuntary alienation—Inquiry **261**

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——— s, joinder of—Offences committed on different dates—Same transaction **184**

——— Lease providing for payment of arrears of rent from buildings erected on land—Priority over unsecured creditors—Charge **34**

Charter Act (24 & 25 Vic., C. 104), s. 15 **917**

Cheating. *See* PENAL CODE, s. 415.

Chota Nagpur Encumbered Estates Act (VI of 1876), ss. 1, 2, 3, 5, 8, 11, 12, 19 (d)—*Mortgage-debt created on property outside Chota Nagpur, whether affected by Act—Manager, jurisdiction of, to deal with outside debts and liabilities—Mortgagee, rights of—Proprietor, liability of.*

The Chota Nagpur Encumbered Estates Act does not apply to debts and liabilities which are charged upon immoveable property outside Chota Nagpur.

Therefore, a Manager of an encumbered estate appointed under the Act and the Revenue Authorities in Chota Nagpur have no jurisdiction to reduce the interest or deal in any other way with a mortgage-debt created by the proprietor of the estate on a property outside Chota Nagpur, and the proprietor of such an estate is not entitled to the rents payable under the *patni* leases which were reserved in lieu of interest on the mortgage-debt, until the principal sum secured by the mortgage is re-paid, and is liable to refund any amount realized as such. C. JYOTI PROSAD SINGH *v.* KUMUD NATH **526**

Chota Nagpur Tenancy Act (B. C. VI of 1908), s. 11—*Suit to recover rent—Rent not recoverable for period prior to registration in office of landlord.*

Under section 11 of the Chota Nagpur Tenancy Act (B. C. VI of 1908), the transferee of a tenure can never recover any rent for the period prior to his application to the landlord for registration in his office.

An entry in the Record of Rights gives the transferee only the presumption of possession under the title he claims, but it cannot give him the right to recover rent which is barred by a statutory provision of the rent law, and such entry cannot take the place of the procedure which the law has laid down as a condition precedent to the collection of rent. C. ANGNU GHASI *v.* CHAITHU PATRA, 19 C. W. N. 461 **605**

——— ——— ——— **ss. 139 (6), 20 (3)**—*Suits for recovery of possession, when barred by s. 139 (6) Occupancy right, acquisition of.*

Section 139, clause (6), of the Chota Nagpur Tenancy Act, 1908, bars only a suit which relates to agricultural land and is instituted by the headman of a village in his character as headman, but does not bar a suit for recovery of possession on declaration of title.

The mere fact that a *raiyat*, who has a right of occupancy in his agricultural lands, is at the same time the rent-collector of the village and is remunerated as such, does not deprive him of his right of occupancy. C. DURGA PROSAD SINGH *v.* HARI RAM MAHTO, 19 C. W. N. 578 **538**

Civil Procedure Code (Act XIV of 1882), s. 244—*Non-transferable occupancy-holding sold in execution of rent-decree—Application by purchaser to set aside sale—Bengal Tenancy Act (VIII of 1885), s 173—Fraud—Appeal.*

A purchaser of a portion of a non-transferable occupancy-holding sold in execution of a decree for rent is a representative of the judgment-debtor within the meaning of section 244 of the Civil Procedure Code of 1882, and therefore, the question whether the sale should be set aside on application of the purchaser on the ground of fraud or under the provisions of section 173, Bengal Tenancy Act, is a question between the parties to the suit or their representatives, and against the decision of such question there is both an appeal and a second appeal C. KALI CHARAN MAHATO *v.* GOURI SANKAR SINGH **431**

——— ——— ——— **ss. 282, 283**—*Decree—Property sold subject to mortgage lien—Mortgage lien, order for, not contested within a year—Suit by mortgagee—Defence—Fraud—Purchaser, whether entitled to contest mortgage as fraudulent—Evidence Act (I of 1872), s 44.*

A claimed to be the holder of a mortgage upon certain property which had passed to *B* on a sale in execution of a decree. In the execution proceedings under that decree *A's* claim was recognized under section 282 of the Civil Procedure Code, 1882, but *B* did not challenge that claim under section 283 of the Code. The property was sold subject to the charge. *A* then sued to assert his mortgage. *B* set up that the mortgage was fraudulent. *A* contended that the order under section 282 was conclusive, as it was not set aside in a suit filed under section 283 within a year from its date:

Held, that section 283 of the Civil Procedure Code, 1882, can only contemplate a suit based upon facts known to the party against whom an order was passed under section 282 within a year from the date of the order and that if *B* was not aware of the fraud within a year and became aware of it afterwards, he could, under section 44 of the Evidence Act, assert the fraudulent nature of *A's* application and the consequent invalidity of the order passed upon it in any proceeding instituted by *A* on the strength of such order. B. CHIMNA SADASHIV *v.* RAMDAYAL PRAYAGDAS, 16 BOM. L. R 648 **238**

——— ——— ——— ——— **s. 283** **265**

——— ——— ——— ——— **s. 317** **230**

——— ——— ——— ——— **s. 335**—*Order under s. 335, effect of, if not set aside within one year.*

An order passed under section 335 of the Code of Civil Procedure, 1882, is conclusive as between the parties and, if not set aside by a suit instituted within one year, it cannot be questioned in any subsequent suit as between the same parties, whether the possession given to the auction-purchaser is actual or symbolical. M RANGASWAMI AIYAR *v.* SUBBARAYA AIYAR, (1914) M. W. N. 897 **90**

——— ——— ——— **s. 602**—*Mortgage created by security bond—Transfer of Property Act IV of 1882, s. 67—Execution—Decree for costs—Application against surety—Sale on claim arising under mortgage—Civil Procedure Code (Act V of 1908), O. XXXIV. r. 4—Personal liability of surety.*

Where an application for execution of a decree for costs obtained in the Privy Council against a surety and the properties which he had charged as security under section 602 of the Civil Procedure Code of 1882, was resisted on the ground that the security could not be realised without a suit under section 67 of the Transfer of Property Act

Held, (1) that the claim of the decree-holder was based entirely on the security bond which created a mortgage in her favour and the claim against the surety was thus a claim arising under the mortgage, within the meaning of Order XXXIV, rule 14, of

Civil Procedure Code—(1882)—contd.

the Civil Procedure Code, 1908, and the properties could not be sold without a suit under section 67 of the Transfer of Property Act, 1882:

(2) but that the security bond also created a personal liability, and the decree-holder could realise the amount of costs covered by the security bond from the person and other properties of the surety under section 145, Civil Procedure Code, 1908. C. CHANDRABATI v. BABU RAM 365

Civil Procedure Code (Act V of 1908), s. 2 589

——— ——— ——— **ss. 2, cl. (2), 97, O. XX, rr. 12 to 18**—*"Matters in controversy in the suit," meaning of—Preliminary decree—Decision on issues in bar, whether preliminary decree—Appeal—Omission to frame decree, effect of, on right to appeal—Final decree, effect of—Preliminary decree, preparation of, where provided.*

The expression "matter in controversy in the suit" in clause (2) of section 2 of the Civil Procedure Code, 1908, refers to the subject-matter of the litigation, and should not be understood in its widest possible sense.

Therefore, a decision in plaintiff's favour on the issue of his *locus standi* to sue is not a decision of a matter in controversy in the suit and, consequently, is not a preliminary decree within the meaning of clause (2) of section 2 of the Civil Procedure Code, 1908, and is not appealable.

If a decision is in reality a preliminary decree, the mere omission on the part of the Court to embody its effect in a formal expression does not negative the right of the party affected to prefer an appeal.

There should be only one preliminary decree in a suit to be followed by one final decree. A preliminary decree ascertains what is to be done, while the final decree states the result achieved by means of the preliminary decree.

The cases where the Legislature contemplated the preparation of a preliminary decree, are specified in rules 12 to 18 of Order XX of the Code. C. KAMINI DEBI v. PROMOTHO NATH, 20 C. L. J. 476, 19 C. W. N. 755 317

——— ——— ——— ——— **s. 2 (2)** 317

——— ——— ——— ——— **s. 2 (11)** 1001

——— ——— ——— ——— **s. 9** 112

——— ——— ——— ——— **s. 10, scope of**—*Jurisdiction—Res judicata—Title—Issue—Parties—Charter Act, 1861, s. 15.*

Section 10 of the Code of Civil Procedure, 1908, requires, among other things, that the suit should be between parties litigating under the same title and the issue should be the same in both suits.

A Court has no jurisdiction to decide the question of *res judicata* in a proceeding under section 10 of the Code of Civil Procedure. Its only jurisdiction in the proceeding is to stop the new suit if it finds the existence of the circumstances mentioned in the section as conditions precedent to the passing of the order.

A High Court can interfere under section 15 of the Charter Act with interlocutory orders when they might lead to failure of justice or irreparable injury. C. SIVAPROSAD RAM v. TRICOMDAS 917

Civil Procedure Code—(1908)—contd.

——— ——— ——— **s. 11** 249, 417

——— ——— ——— **s. 11, O. II, r. 2**—*Res judicata—Cause of action—Suit for redemption dismissed—Second suit on basis of promise to allow redemption, maintainability of—Specific Relief Act (I of 1877), s. 12—Appeal re-heard on application for review—Second appeal—Limitation.*

When an application for review of an appeal is admitted and the appeal is re-heard and a fresh decree dismissing the appeal is passed on grounds different from those on which the appeal was originally dismissed, a fresh period of limitation for appeal begins to run from the date of the new decree.

The plaintiff-appellant first sued the defendant-respondent for redemption of a piece of land on the basis of a mortgage for Rs. 280, but failed; subsequently he brought the present suit, alleging the same set of facts but basing the suit on the 1st defendant's promise to allow redemption on payment of Rs. 400, for which sum the land had been sub-mortgaged to the 2nd and 3rd defendants. The lower Courts found the promise proved, but dismissed the suit as barred by *res judicata* and Order II, rule 2, Civil Procedure Code:

Held, that the suit is not barred by *res judicata* or by Order II, rule 2, Civil Procedure Code, as the suit is not based on the mortgage but on a subsequent promise to allow redemption, which is an entirely new cause of action.

If a man promises to deliver land for an agreed price and fails to fulfil his promise, there is nothing to prevent the Court from decreeing specific performance of the contract. L. B. MAUNG KYAW v. MA GAUK 732

——— ——— ——— **s. 11**—Res judicata—*"Heard and finally decided"—Compromise—Relief claimed in plaint not dealt with in compromise—Fresh suit, whether barred—Cause of action—Estoppel by judgment.*

When a matter was not "heard and finally decided" in a suit but a decree was passed on the basis of a compromise agreement, the reliefs claimed in the plaint but not included in such a decree, should not be deemed to have been refused so far as to bar a fresh suit for the said reliefs, if the cause of action in the succeeding suit had not arisen on the date of presentation of the plaint in the prior suit.

There can be an estoppel by judgment in a consent decree only when the question raised by the subsequent suit was present to the minds of the parties and was actually dealt with by the consent decree. In all these cases the question is whether the parties did intend that the question at issue should be finally settled between the parties by the consent decree, and did the consent decree so actually settle that question. M. MAHALINGA SUNDARA THEVAN v. KRISHNA THEVAN 708

——— ——— **s. 11**—Res judicata—*Jurisdiction—Conduct of party to be bound by res judicata—Previous decision, when conclusive between parties—Hindu widow, decree against, when binding on reversioners—Compromise decree—Limitation Act (IX of 1908), Sch. I, Art. 141—Adverse possession—Thak and survey map, presumption relating to.*

Civil Procedure Code—(1908)—contd.

In determining the jurisdiction of the Court, which decided the former suit, to try the subsequent suit, in order to apply the rule of *res judicata* regard should be had to the jurisdiction of that Court at the date, not of the subsequent suit, but of the former suit.

Res judicata operates against a person who took an active part in a litigation in contesting, though unsuccessfully, the claim of the then plaintiff, notwithstanding the fact that he was merely described as a *pro forma* defendant.

The decision regarding the operation of *res judicata* between the parties in a previous suit is conclusive as between the parties or their representatives.

A decree obtained upon a fair trial in a suit by or against a Hindu widow in possession of the estate of the full owner, operates as *res judicata* regarding only the questions tried in the suit.

Where a compromise amounting to a *bona fide* settlement of disputes is made for the benefit of the estate, it binds the reversioner quite as much as a decree on contest.

The mere transfer of title does not prolong a cause of action.

Article 141, Schedule I, of the Limitation Act, applies when it is proved that the last full owner was in possession at the time of his death, and the fact that on his death, he was succeeded by his widow, daughter or mother, will not bar limitation in case time began to run against him on his being dispossessed.

Before Act IX of 1871 came into operation the title of the reversioner ceased along with the loss of the title of the female heir by adverse possession.

The presumption of genuineness of *thak* and survey maps, furnishing valuable evidence of possession and title at the time they were made, is rebuttable. **C.** MOHENDRA NATH BISWAS *v.* SHAMSUNNESSA KHATUN, 19 C. L. J. 457 **954**

——— ——— ——— **s. 11**—Res judicata—

Finding of lower Court objected to in appeal but not disposed of by Appellate Court, whether final.

Where an appeal is preferred against the finding of an issue, but the Appellate Court does not decide finally on that point as the appeal is disposed of on other points, it cannot be held that the finding of the lower Appellate Court is final and, therefore, the decision cannot operate as *res judicata*. **U. B.** NGA TI *v.* NGA PAN, 7 BUR. L. T. 249 **959**

——— ——— ——— **s. 11**—Res judicata—

Court deciding previous suit not competent to try subsequent suit, effect of.

The decision in a previous suit by a Court not competent to try the subsequent suit does not operate as *res judicata* in the subsequent suit. **O.** JIT SINGH *v.* RAM BAKHSH SINGH, 2 O. L. J. 44 **537**

——— ——— ——— **s. 11**—Res judicata—

Suit by reversioner against purchaser—Legal necessity, issue of, determination of—Suit failing for portion of property—Second suit for that portion—Issue of legal necessity—Decision in former suit, whether res judicata—*"Litigating under the same title."*

Where in a former suit between a reversioner to the estate of a widow and a purchaser from her, an sue was raised as to whether there was legal necessity for the widow's alienation and it was decided adversely to the purchaser, but the reversioner's suit failed for a moiety of the property because it was not found that that moiety had passed to him then, and he filed the present suit after that moiety had passed to him:

Held, that the decision on the issue of legal necessity in the former suit, was *res judicata* between the parties in the present suit as in both the suits the plaintiff litigated as the owner of the reversion and the defendant as the purchaser from the widow. **C.** SURJA KANTA RAI CHOWDHURY *v.* FANI BHUSHAN BANERJEE, 18 C. W. N. 888 **226**

——— ——— ——— **s. 11, Ex. IV, O. XXXIV, r. 1, O. II, r. 2**—*Several mortgages upon same property—Necessary parties to suit—Two mortgages in favour of same person—Suit on later mortgage—Subsequent suit on former mortgage, whether maintainable.*

Where there are several mortgages upon the same property, any mortgagee suing upon his mortgage must make all the other mortgagees as well as the mortgagor parties to the suit.

Where a mortgagee having two mortgages of different dates upon the same property sues upon the mortgage of later date first and has the property sold without reference to the prior mortgage, he cannot afterwards bring a separate suit on the prior mortgage. **B.** DHONDO RAMCHANDRA KULKARNI *v.* BHIKOJI GOPAL, 17 BOM. L. R. 144; 39 B. 188 **1005**

——— ——— ——— **s. 11, Ex. IV**—*Suit for recovery of water rate—Subsequent suit for injunction restraining defendant from tapping water-course—*Res judicata*—Enjoyment of water-course—Right of person in possession—Jus tertii*

The plaintiffs sued the defendants' father for recovery of water rate and obtained an *ex parte* decree. The defendants having again threatened to draw water, the plaintiffs sued for an injunction restraining the defendants from tapping the plaintiffs' water-course.

Held, (1) that the allegation that the water-course belonged to the Government and not to the plaintiffs was a matter which might and ought to have been made a ground of defence in the former suit within the meaning of Explanation IV to section 11 of the Civil Procedure Code and that the judgment in that suit operated as *res judicata*, as it held that the water-course was the plaintiffs' and that the defendants had no right to take water from it.

(2) that even assuming that the plaintiffs were trespassers and had been in enjoyment of the disputed portion of the water-course for less than the statutory period sufficient to give them an easement by prescription, still they were entitled to protection in their enjoyment of the water-course against all persons except the true owner, and the plea of *jus tertii* was not sufficient to disentitle them to the injunction sought. **S.** GOBIND RAM *v.* SABGHATULAH, 8 S. L. R. 218 **999**

——— ——— ——— **s. 13**—*Foreign judgment, when suit on, competent in British Courts—Decision on merits, when not—Competent jurisdiction, Court of.*

A case in which the written statement of the defendant is struck out for his failure to answer

Civil Procedure Code—(1908)—contd.

interrogatories and he is not permitted to go into the merits at the trial, cannot be said to have been decided on the merits.

Therefore, a plaintiff is not entitled to sue in the Courts in India on a foreign judgment thus obtained.

Quære.—Whether a judgment passed in the exercise of jurisdiction conferred on the High Court in England pursuant to an Act of the Imperial Parliament is the judgment of a Court of competent jurisdiction for the purpose of section 13 of the Civil Procedure Code, 1908? M. PERURI VISVANATHA *v.* KEYMER 386

——— ss. 20, 80, O. VII, r. 11 (d)—*Notice, whether necessary in all suits against Secretary of State for India in Council—Jurisdiction—District, meaning of—Acquiescence in jurisdiction, whether presumed from defendant's failure to apply for transfer.*

Notice under section 80 of the Civil Procedure Code, 1908, is necessary in every case instituted against the Secretary of State for India in Council. The term "district" in that section must mean the district in which the suit is instituted, and the notice required under section 80 must be served on the Collector or on one of the Collectors of that district.

A suit instituted at Sealdah based on a notice to the Collector of Purneah under section 80 of the Civil Procedure Code and on a cause of action arising mainly at Howrah against defendants, one of whom carries on business at Howrah, is wholly untenable.

Order VII, rule 11 (*d*), does not apply where there is no statement in the plaint which suggests that the suit is barred.

A defendant who objects to the jurisdiction of a Court cannot be said to have acquiesced in the trial of the suit if he does not apply for a transfer. C. RATAN CHAND DHARAM CHAND *v.* SECRETARY OF STATE, 18 C. W. N. 1340 232

——— ss. 22, 23, 24, 151—*Court not subordinate to High Court, whether s. 23 applicable to—Original side of High Court, suit pending in, whether can be transferred—Inherent power, exercise of—Stay of suit, grounds for—Abuse of process of Court*—Forum.

Section 23 of the Civil Procedure Code does not apply where the Court in which the suit has been instituted is not a Court subordinate to a High Court.

Therefore a suit pending on the original side of the High Court cannot be transferred under the provisions of the above section nor can the proceedings be stayed when the cause of action or a cause of action arose within the jurisdiction of the Court.

A High Court has an inherent jurisdiction to stay any suit which is an abuse of the process of the Court.

But where the parties in a defamation suit do not reside within the jurisdiction of the High Court and the plaintiff proves that he has been defamed and that the defamatory matter has been published within the local limits of the jurisdiction of the Court and that he has suffered damages within the local limits of the jurisdiction of that Court by reason of the publication, it cannot be said that the institution of the suit in the High Court is such an abuse of the process of the Court as to invoke its inherent jurisdiction to stay the suit.

Per *Tyabji, J.*—The plaintiffs have the choice of the forum and their choice should not be restricted because the defendants may find it more difficult to make their defence in one forum than in another. M. HINDUSTAN ASSURANCE AND MUTUAL BENEFIT SOCIETY LD. *v.* MULRAJ, 27 M. L. J. 645 455

——— s. 23 455

——— s. 37—*Court passing decree, whether entitled to execute it, when property transferred to jurisdiction of other Court—Different Courts having jurisdiction to execute decree—Convenience, jurisdiction determined on ground of.*

A Court which originally passed a decree ceases to have jurisdiction to execute it if the properties comprised in the decree are transferred to another district.

In a case where different Courts have jurisdiction to execute a decree, the question which Court will execute it, is settled on the ground of convenience. M. PARTHASARADHI APPA RAO *v.* MAKA VENKATADRI APPA RAO, (1914) M. W. N. 896 88

——— s. 42 597

——— ss. 42, 47, 104 (h), 145—*Small Cause Court decree transferred for execution to Munsif—Order directing arrest of surety, whether appealable.*

Where the decree of a Small Cause Court is sent for execution to a Munsif and the latter directs the arrest of the surety of the judgment-debtor, the order of arrest is appealable. C. ADHAR CHANDRA GOPE *v.* PULIN BEHARY, 20 C. L. J. 129 10

——— s. 47 10, 61, 249, 254, 363, 589

——— ss. 47, 73—*Execution proceedings—Rateable distribution—Rival decree-holders—Order refusing rateable distribution—Decree—Appeal.*

An order made under section 73 of the Code of Civil Procedure rejecting an application for rateable distribution of the assets between two rival decree-holders, which does not affect or interest the judgment-debtor, is an order in execution proceedings, but is not a decree unless all the conditions enumerated in section 47 are present. No appeal, therefore, lies from such an order.

It is essential for the application of section 73 of the Code of Civil Procedure that the decrees should have been passed against the same judgment-debtor. C. BALMER LAWRIE & Co. *v.* JADU NATH BANERJEE, 42 C. 1 644

——— s. 47, O. XXI, r. 60—*Execution of decree—Legal representative of judgment-debtor, objection by—Attached property not of judgment-debtor—Determination of such question—Appeal.*

Where a decree-holder in execution of a decree for money against a judgment-debtor personally attaches and proceeds to sell properties, of which the judgment-debtor alleges that he is in possession not in his own right but as *shebait* of a deity to whom the properties

Civil Procedure Code—(1908)—contd.

have been dedicated, the case does not fall within section 47, but under Order XXI, rule 60, of the Civil Procedure Code.

When a decree has been passed in a suit against a *shebait* as representing an idol, it is binding on the succeeding *shebait*, provided it has been passed without any fraud or collusion. But where a decree has been passed against a person in his capacity as *shebait*, execution can be taken out only against the properties of the endowment in his hands.

Per *Beachcroft, J.*—If the claim of an objector, who has been brought on the record as the legal representative of the judgment-debtor, is really in his own interests as representative of the judgment-debtor, the case will come under section 47 of the Civil Procedure Code, 1908, but if the claim is adverse to his interests as representative, it will not. **C.** UPENDRA NATH *v.* KUSUM KUMARI DASI, 20 C. L. J. 485; 19 C. W. N. 520 **328**

——— **s. 47, O. XXI, r. 60** *—Legal representative of judgment-debtor—Objection that attached property not of judgment-debtor, determination of—Applicability of Order XXI, r. 60.*

An objection, raised by a person, who has been brought on the record in an execution proceeding as the legal representative of a deceased judgment-debtor, that certain properties sought to be made liable do not constitute assets available to the decree-holder, must be determined under section 47 of the Civil Procedure Code, 1908.

Obiter dictum.—Where X, in execution of a decree for money against Y personally, attaches property in the possession of Y, which Y alleges he holds not in his own right but as *shebait* of a deity who is not a party to the suit, the question does not arise between the parties to the suit, but between X on the one hand and Y in his capacity as trustee of an endowment on the other hand and should be determined under Order XXI, rule 60, of the Civil Procedure Code. **C.** AJO KOER *v.* GORAK NATH, 20 C. L. J. 481; 19 C. W. N. 517 **321**

——— **s. 47**—Order in execution proceedings, when appealable **444**

——— **s. 47, O. XXXIV, r. 12**—*Prior mortgagee, ex parte decree on subsequent mortgage against—Interest of prior mortgagee, whether can be declared subsequently—Application to prevent execution by such prior mortgagee, whether under s. 47.*

Where a prior mortgagee is made a party to a suit on a subsequent mortgage and allows an *ex parte* decree to be passed against him, he is not precluded from having his right as a prior mortgagee declared under Order XXXIV, rule 12, of the Civil Procedure Code, 1908.

An application by such a prior mortgagee to prevent execution being taken out against the mortgaged properties comes under section 47 of the Civil Procedure Code, 1908, being a question between the parties. **C.** GADADHAR PROSAD *v.* AULADIN **164**

——— **s. 47**—*Representative—Judgment-debtor, application of—Auction-purchaser, relief against—Property erroneously sold in execution—Possession, restoration of, application for—Court, discretion of.*

Civil Procedure Code—(1908)—contd.

An auction-purchaser is a representative neither of the decree-holder nor of the judgment-debtor.

Section 47, Civil Procedure Code, does not contemplate an application by a judgment-debtor asking as against the auction-purchaser possession of the property erroneously sold to him by the executing Court.

It is entirely discretionary for the Court to treat a proceeding under section 47, Civil Procedure Code, as a suit. An applicant is not entitled to the benefit as of right. **O.** ITRAJ KUAR *v.* RAJA RAM, 2 O. L. J. 57 **570**

——— ——— **ss. 47, 115, O. XXI, r. 22**—*Bengal Tenancy Act (VIII of 1885), s. 153—Suit for rent for less than Rs. 100—Decree—Execution—Sale of non-transferable occupancy holding—Proceedings carried on against a dead judgment-debtor—Application to set aside sale by a private purchaser, maintainability of—Order refusing to set aside sale—Second appeal, maintainability of—Revision petition treated as memorandum of appeal.*

A decree-holder initiated execution proceedings and carried them on throughout against a deceased judgment-debtor as if he were still alive. The Court was not only not apprised that the proceedings were taken against a dead man, but untrue returns were repeatedly filed to show that the processes had been duly served:

Held, that a sale held under such circumstances must be set aside on the ground of grave irregularity in the proceedings.

Judicial proceedings cannot be carried on in the name of a dead man.

A purchaser of a non-transferable occupancy holding from whom rent was received after his purchase but whose name was not formally entered as tenant, is competent under section 47 of the Civil Procedure Code to make an application to set aside the sale held in execution proceedings against a dead judgment-debtor.

In such a case the burden lies upon the decree-holder to show that the person applying to have the sale set aside had knowledge of the sale before the delivery of possession to the decree-holder-purchaser.

A second appeal lies against an order refusing to set aside a sale held in execution of a decree obtained in a suit for rent for less than Rs. 100.

Where no question of limitation or Court-fees arises a petition may be treated as a memorandum of appeal, if necessary. **C.** ARJUN DAS *v.* GUNENDRA NATH, 18 C. W. N. 1266, 20 C.L. J. 341 **294**

——— **s. 48**—*Minor—Extension of period of limitation—Limitation Act (IX of 1908), s. 6, applicability of.*

Section 6 of the Limitation Act, 1908, serves only to extend, for the benefit of minors, periods of limitation provided by the Act itself, it does not extend the period of limitation provided by section 48 of the Code of Civil Procedure, 1908. **A.** CHATAR PALMAN *v.* PREMNATH TEWARI, 13 A. L. J. 166 **865**

——— **s. 48, Sch. III, Para. 11 (3)**, *retrospective effect of—Mortgage-decree passed before the coming into force of the Code—Execution—Limitation.*

Section 48 of the Civil Procedure Code, 1908, has retrospective effect and limits the period for the execution even of mortgage decrees passed before the new Code came into force.

Civil Procedure Code—(1908)—contd.

Where an application was made in 1911 for execution of a decree for sale under a mortgage made absolute in 1898 and it appeared that before then several applications had been made each within the prescribed period from the last step taken in aid of execution and that during the interval the property had been in the hands of the Collector for about 6 years.

Held, that the decree-holder could not take any benefit from paragraph 11 (3) of Schedule III of the Civil Procedure Code and that his last application for execution was barred by time under section 48 of the Code. **N.** SADASHIV v. RUKHMABAI, 11 N. L. R. 25 **969**

S. 72—*Execution of decree—Decree for sale of land—Reference to Collector—Executing Court, power of.*

A Court executing a decree for sale of mortgaged land sent it to a Collector to sell the mortgaged land. He directed a Sub-Divisional Officer to carry out the sale. The latter officer proposed temporary alienation of the property. The Court was of opinion that it was bound to sell the property and no reference could be made under section 72 of the Civil Procedure Code. On appeal the view taken by the Court was held to be erroneous. The execution Court then referred the case to the Collector under section 72 of the Civil Procedure Code. On appeal it was contended that the order was *ultra vires*:

Held, that the contention was untenable. **P.** GURANDITTA MAL v. J. RUSTOMJI, 9 P. L. R. 1915; 34 P. W. R. 1915 **630**

S. 73 **644**

S. 80 **232**

S. 92—*Maintainability of suit—Trustee* de facto *or* de son tort *subject to same liabilities as trustee* de jure—*Minor, position of, as trustee.*

A suit under section 92, Civil Procedure Code, is maintainable as against a *de facto* trustee or a trustee *de son tort*, for he is subject to the same liabilities, while he is so acting, as a trustee *de jure*.

A person who is not *sui juris* and requires a guardian to look after his property, cannot be entrusted with the management of a trust. **O.** MUHAMMAD NASIM v. MUHAMMAD AHMAD, 1 O. L. J. 726, 18 O. C. 38 **389**

S. 92—*Scheme, suit for framing and for appointment of a committee of supervision, after removal of trustee—Death of trustee—Cause of action, if survives against successor-in-office.*

Where, during the pendency of a suit instituted by the Advocate-General against the trustee of certain *devastanams* for his removal on the ground of mismanagement and breach of trust and for the settlement of a scheme and the appointment of a committee of supervision, the defendant died

Held, that the cause of action survived against the successor-in-office of the deceased defendant and that he was rightly brought on record, inasmuch as the plaint contained averments to the effect that there had been systematic mismanagement of the funds of the trust, that there was no means of checking what was deposited in the *hundials*, that the servants of the temple were making fortunes out of it, that there was a large surplus income every year which had to be properly employed and that the new defendant, the present trustee, had also contributed to the previous mismanagement in his character of agent of the deceased trustee—facts which would by themselves be sufficient to found a suit for the framing of a scheme.

Per *Sadagiri Aiyar, J.*—In considering whether the prayer for the settlement of a scheme is only ancillary to the prayer for the removal of the trustee or is the principal relief claimed in the suit, the fact that the person who is said to have contributed to the prior mismanagement has succeeded to the trusteeship is a factor to be taken into account.

When the income of a temple is in excess of its expenditure, the Advocate-General will be well-advised in seeking the aid of the Court for the framing of a scheme for the proper application of the surplus.

The relief by way of settlement of a scheme need not depend upon charges against the trustee-in-office. It is sufficient if mismanagement is averred and it is alleged that a proper scheme is necessary to render the recurrence of the state of affairs impracticable. **M.** SIVAGNANA v. ADVOCATE-GENERAL OF MADRAS, 2 L. W. 148; 28 M. L. J. 174; (1915) M. W. N. 185 **874**

S. 97 **317**

S. 100—*Second appeal—Mixed question of law and fact.*

The pleas of limitation or estoppel involving questions of fact which are not admitted or undisputed cannot be taken for the first time in appeal.

Per *Crouch, A. J. C.*—It is improper for a Court of Appeal to raise a fresh issue of fact and to proceed to decide it on such evidence which chances to be on record. **S.** BHERUMAL TEKCHAND v. DUHLAMOMAL 8 S. L. R. 272 **933**

S. 102 **258**

S. 104 **589**

S. 104 (1)—*Reference to arbitration, application for—Court finding one of defendants unwilling to refer—Order rejecting application for reference, whether appealable.*

Where an application for reference to arbitration is made in a pending case and the Court, finding one of the defendants unwilling to have the case sent to arbitrators, rejects the application, despite the plaintiff's readiness to discharge the unwilling defendant from the array of parties, no appeal lies from such an order of rejection. **O.** JANKI PRASAD v. BAL MAKUND **721**

S. 104 (2), Sch. II, r. 20—*Appellate Court allowing award to be filed—Appeal—Revision.*

An order passed by an Appellate Court under rule 20 of the second Schedule to the Code of Civil Procedure, 1908, allowing an award to be filed and directing the first Court to pass a decree in accordance therewith is not open to appeal.

It is exceedingly doubtful whether a revision of such an order is permissible. **P.** SUNDER DAS v. MANAK CHAND, 280 P. L. R. 1914; 143 P. W. R. 1914 **332**

S. 104 (h) **10**

S. 105, O. VI, r. 17—*Amendment of plaint, when allowed—Objection against amendment, when to be made—Misjoinder of causes of action—Limitation extending time, how*

Civil Procedure Code—(1908)—contd.

pleaded—Sale of partnership business—Contract Act (IX of 1872), s. 253 (7).

No amendment should be allowed which includes a claim which could not, under the law of limitation, be made the subject of a first suit, nor one that introduces a completely new cause of action.

Although no appeal lies against an order allowing an amendment, objection as to amendment can properly be raised in appeal against the decree in the suit.

Anything on which the plaintiff relies for extending the period of limitation must be specifically alleged in the plaint.

When some of the partners sell the partnership business without the knowledge or consent of the other partners, the partnership is thereby dissolved.

A suit for declaration that the sale of a partnership business is fraudulent, null and void as regards plaintiffs and for recovery of the assets from the purchasers and also for an account of the partnership business from the other partners is bad for misjoinder. **S.** GULRAJMAL *v.* PAMANMAL, 8 S. L. R. 69 **344**

——— **s. 115 294, 366**

——— **s. 115, O. XXI, r. 66**—*Civil Rules of Practice (Madras), r. 189—Attachment of debt—Court, duty of, to inquire as to its existence—Receiver, appointment of, whether irregular—Jurisdiction.*

Where an application for attachment of a debt is made the Court is not bound to satisfy itself as to the existence of the debt and if it appoints a Receiver in consonance with rule 189 of the Civil Rules of Practice (Madras), it does not fail to exercise a jurisdiction vested in it by law or act with material irregularity in the exercise of such jurisdiction within the meaning of section 115 of the Civil Procedure Code. **M.** SURYANARAYANA *v.* VENKATARATHAMMA **812**

——— **s. 115**—Guardianship of person and property of minor, application for—Person interested, not made party—Revision, right to, of person not party to case **121**

——— **s. 115**—*Revision—Principal and agent—Objection as to right of agent, whether can be taken for first time in High Court—Procedure.*

The objection, whether the plaintiff is or is not the agent of a particular person on whose behalf he has sued to recover money in the Court of Small Causes, cannot be taken for the first time in the High Court in revision. **A.** BUDHU KHAN *v.* HANUMAN PERSHAD **807**

——— **s. 145 10**

——— **s. 148 419**

——— **s. 148, O. XXXIV, rr. 7 (1) (d), 8 (2)**—*Mortgage—Simple—Court's power to enlarge time of paying mortgage amount.*

In the case of a simple mortgage, an order debarring all right to redeem on a fixed date should not be passed in view of Order XXXIV, rule 7 (1) *(d)* and rule 8 (2), Civil Procedure Code, 1908. Section 148 of the Civil Procedure Code, 1908, gives a Court power to enlarge the period of redemption if it thinks fit. **L. B.** MG. AUNG GYI *v.* MA THEIN MYA **706**

Civil Procedure Code—(1908)—contd.

——— **s. 151 455, 628**

——— **s. 151**—Inherent power object of **812**

——— **s. 152**—*Revision—Amendment of decree—Application filed after long time, whether allowed.*

An application to amend decree made a long time after the decree was passed, cannot be granted unless sufficient reasons are shown for it. **P.** GURANDITTA MAL *v.* RUSTOMJI, 7 P. L. R. 1915; 32 P. W. R. 1915 **639**

——— **O. I, r. 10 94**

——— **O. I, r. 10 (2) 704**

——— **O. 2, rr. 1 & 2**—*Suit for possession of land only—Subsequent suit for mesne profits payable before institution of suit for possession, whether barred—Claims for possession and for mesne profits—Causes of action.*

Claims for recovery of land and claims for mesne profits are separate causes of action.

If a plaintiff sues for possession only when he might have joined in the same action claims for profits and damages, it is open to him to sue subsequently for the profits which became payable before the institution of the suit and which might have been included in such suit. **M.** PONNAMMAL *v.* RAMANUDA AIYAR, 28 M. L. J. 127; (1915) M. W. N. 130; 17 M. L. T 124 **679**

——— **O. 2, r. 2 732, 1005**

——— **O. 2, r. 2**—*Contract Act (IX of 1871), s. 23—Mortgage—Suit for interest on bond executed after mortgage—Consideration—Abstention from suit—Suit to defeat provisions of any law.*

The plaintiffs sued for interest due on a mortgage but later on obtained from the mortgagor bonds for further sums of interest, and then sued for the amounts due on those bonds. The first Court decreed the claim, but the Appellate Court held that as the mortgagees had no rights left which they could enforce under the mortgage, the bonds were without consideration

Held, that the bonds were executed in return for plaintiffs' abstaining to sue for the interest, and that in view of the fact that the bonds were executed before the case of *Chaudhri Kundan Mal v. Sardar Allah Dad Khan*, 5 Ind. Cas 821; 19 P. R. 1910, 36 P. W. R. 1910; 167 P. L. R 1910, had been decided, the plaintiffs were under the *bona fide* impression that their suit would succeed, if brought, and that, therefore, section 23 of the Contract Act did not apply.

A claim which is barred by Order II, rule 2, of the Civil Procedure Code, is not on exactly the same footing as a time-barred claim. A Court is bound to dismiss a time-barred suit, even though limitation be not pleaded by the defendant, but a Court is not bound to take up *proprio motu* the question of a suit being barred by Order II, rule 2. The rule is a provision in favour of a defendant of which he may or may not choose to avail himself, the option lies with him

If an intending litigant *bona fide* forbears a right to litigate a question of law or fact which it is not vexatious or frivolous to litigate, he does give up

Civil Procedure Code—(1908)—contd.

something of value. It is a mistake to suppose it is not an advantage, which a suitor is capable of appreciating, to be able to litigate his claim, even if he turns out to be wrong. P. GOPAL DAS *v.* GHULAM MOHY-UD-DIN, 23 P. L. R 1915 **579**

——— ——— ——— ——— **O. 6, r. 17** **344**

——— ——— ——— ——— **O. 7, r. 7**—*Suit based on one sale—Decree on subsequent sale of a part, whether can be allowed.*

Where a person claims possession of the entire property on the strength of a sale which had been cancelled by the consent of both parties, but it is found as a fact that there was in his favour a subsequent sale of a part of that property upon which he has not based his claim, it is desirable in order to prevent further litigation to grant him a decree for that part only, instead of dismissing the suit and directing him to sue again on the basis of the subsequent sale. P. C. SIMPSON *v.* MRS. E. BACHMAN, 13 A. L. J 55 **622**

——— ——— ——— ——— **O. 7, r. 11 (d)** **232**

——— ——— ——— ——— **O. 8, r. 6** **350**

——— ——— ——— ——— **O. 9, r. 5** **165**

——— ——— ——— ——— **O. 9, r. 9** **924**

——— ——— ——— ——— **O. 9, r. 9, O. 21, r. 90, O. 43, r. 1 (e)**—*Application to restore application for reversal of sale, dismissal of—Appeal, whether allowed—Sufficient cause—Party deliberately absenting, whether can claim restoration.*

Under Order XLIII, rule 1 (*e*), of the Civil Procedure Code, 1908, no appeal lies against an order rejecting an application under rule 9 of Order IX for revival of an application for reversal of a sale, which had been dismissed for non-appearance of the judgment-debtor.

A party who was present in Court but left the Court of his own accord to attend to other business and without even instructing his Pleader, must take the consequence of his own conduct and is not entitled to have his case restored. C. CHABU CHANDRA GHOSH *v.* CHANDI CHARAN ROY, 19 C. W. N. 25 **492**

——— ——— ——— ——— **O. 9, r. 13**—*Compromise decree—Compromise effected by unauthorised person—Decree, whether* ex parte *and can be set aside as such.*

A decree based on a compromise cannot be treated as an *ex parte* decree and set aside as such simply because one of the parties was not authorised to compromise. C. JADU NATH DEY *v.* ASAN MANDAL **261**

——— ——— ——— ——— **O. 9, r. 13**—*Decree based on compromise—Compromise made by unauthorised persons—*Ex parte *decree.*

A decree based on a compromise cannot be treated as an *ex parte* decree and set aside as such simply because some of the parties had no authority to compromise on behalf of others. C. HIRNASHI NAIK *v.* DAMODAR MISRA, 19 C. W. N. 118 **227**

——— ——— ——— ——— **O. 9, r. 13**—Ex parte *decree against several defendants—Application to set aside made by some—Power of Court to set aside decree against non-applying defendants—Principal and surety—Liability of surety.*

Civil Procedure Code—(1908)—contd.

The plaintiff sued *M* as principal and *N* as surety. A decree was passed against both, but *ex parte* against *M*. On the application of *M* alone the Court set aside the decree against both *M* and *N*, and eventually released *N* from liability, holding that he was not liable as a surety and that he had signed the contract, the basis of the suit, as a witness only On application for revision by plaintiff:

Held, that the Court was wrong in setting aside the decree passed against *N*, as the contract clearly showed that *N* was liable as surety, and the Court was not justified in finding that *N* had signed the contract as a witness only. P. SINGER MANUFACTURING CO *v.* MUHAMMAD DIN, 246 P. L. R. 1914; 166 P. W. R. 1914 **251**

——— ——— ——— ——— **O. 9, r. 13 and O. 17, r. 3**, *scope of—Court's direction to be present—Defendant's default and Pleader's representation of "no instructions," effect of—Affidavit uncontradicted, reliability of.*

A decree passed on defendant's default of appearance inspite of the Court's direction to appear and after his Pleader's representation that he had no instructions, amounts to an *ex parte* decree within the meaning of Order IX, rule 13, of the Civil Procedure Code.

Order XVII, rule 3, Civil Procedure Code, applies only to cases of a party's failure to do an act for which time had been granted on his application.

An affidavit uncontradicted is *prima facie* reliable. M. MAJETI NAGARATNAM *v.* PACHIGOLLA RAMAYYA, 2 L. W. 105 **882**

——— ——— ——— ——— **O. 17, r. 1**—*Application for adjournment—Discretion of Court, object of—Party deliberately neglecting, effect of.*

It is purely a matter of discretion for the Court to grant an adjournment in any particular case. The discretion should be exercised judicially and reasonably and is not subject to any definite rules.

The main purpose for which a Judge is given a discretion under Order XVII, rule 1, is to enable him to prevent a party improperly delaying proceedings and abusing the process of the Court with that object.

If a party deliberately neglects to summon all his witnesses and those cited do not appear, he has only himself to blame if the Court regards this as an indication that the intention is to prevent the case proceeding on the day fixed. S. SHIVANDAS *v.* PAMANMAL MANGHARAM, 8 S. L. R. 275 **942**

——— ——— ——— ——— **O. 17, rr. 2, 3, O. 9, r. 9**—*Dismissal of suit for non-appearance at adjourned hearing—Application for restoration—Sufficient cause.*

The Civil Procedure Code clearly intends that the parties should be in readiness to proceed on the dates of the hearing and that if they do not, their cases must suffer unless there was "sufficient cause" for their non-appearance or default.

Therefore, if a plaintiff does not want his case to go on and absents himself deliberately, he does so at his risk.

Where a case was originally fixed for the 6th September 1911 but the hearing was adjourned to the 11th October, and some of the plaintiff's witnesses were served and were even present on that date but because some important witnesses were

Civil Procedure Code—(1908)—contd.

not present, the plaintiff through a Pleader applied for an adjournment, which was refused, whereupon the Pleader withdrew saying he had no instructions, and the Court dismissed the suit:

Held, (*i*) that the order dismissing the suit fell under rule 2 and not rule 3 of Order XVII of the Civil Procedure Code;

(*ii*) that the plaintiff did not shown that there was "sufficient cause" for his non-appearance within the meaning of Order IX, rule 9.

Per *Fawcett, J. C.*—It is not within the province of a Court to disregard the strict letter of the law and to grant an application for the restoration of the suit on the ground that it discloses a just and reasonable cause even though "sufficient cause" is not shown. **S.** USTO SAHEBDINO *v.* GHULAM KADIR, 8 S. L. R. 241 **924**

——— ——— ——— **O. 17, r. 3** **882**

——— ——— ——— **O. 20, rr. 12 to 18** **317**

——— ——— ——— **O. 21, r. 1** **784**

——— ——— ——— **O. 21, r. 2 (3)**—*'Certifying or recording,' meaning of—Practice—Certifying of part-payments in application for execution—Limitation for certifying.*

There is no definition of what certifying or recording under Order XXI, rule 2 (3), of the Code of Civil Procedure is, but the practice in this country is that the decree-holder certifies the part-payments in the application for execution and thereupon the Court, having recorded the whole of the petition, directs execution to issue for the balance.

There is no period of limitation fixed within which the decree-holder must certify, and, therefore, the decree-holder can certify the part-payments at any time and if the part-payment be within time to prevent the decree from being barred, an execution can issue for the balance. **C.** LAKHI NARAIN GANGULI *v.* FELAMANI DASI, 20 C. L. J. 181 **11**

——— ——— ——— **O. 21, r. 22** **294**

——— ——— ——— **O. 21, r. 28** **597**

——— ——— ——— **O. 21, r. 53 (3)** **363**

——— **O. 21, r. 57,** whether has retrospective effect—Lease created during continuance of attachment—Auction-sale—Right of lessee as against auction-purchaser **792**

——— ——— ——— **O. 21, r. 57,** *applicability of.*

Order XXI, rule 57, which provides that on the dismissal of an execution application the existing attachment on the attached property shall cease, can only apply to orders of dismissal passed after the Act came into force. **M.** VARDIPARTHI RAMAYYA *v.* KORUKONDA JAGANNADHAM **568**

——— ——— ——— **O. 21, r. 58**—*Objection to attachment - Court's duty to decide on merits.*

An objection to an attachment of property under Order XXI, rule 58, Civil Procedure Code, should not be dismissed and the claimant forced to file a regular suit to get the attached property released, on the ground that the question of possession is doubtful and of title complicated, but should be adjudicated on the merits. **P.** AMIR CHAND *v.* RAM SARAN DAS, 248 P. L. R. 1914; 162 P. W. R. 1914 **256**

Civil Procedure Code—(1908)—contd.

——— ——— ——— **O. 21, r. 60,** **321, 328**

——— ——— ——— **O. 21, r. 63** **829**

——— ——— ——— **O. 21, r. 63**—*Claim petition—Adverse order, without investigation, whether conclusive, if not set aside within one year—Difference between Old and new Code.*

Order XXI, rule 63, of the Code of Civil Procedure 1908, is much wider in its scope than the corresponding section 283 of the Code of 1882, and unlike the latter section covers cases in which there has been no investigation. Orders made under rule 63 of Order XXI become final if not set aside within one year. **M.** NARASIMHA CHETTI *v.* VIJIAPALA NAINAR, 2 L. W. 206 **944**

——— ——— ——— **O. 21, r. 63, O. 38, r. 9**—*Suit under O. XXI, r. 63, object of—Suit, whether abates, if attachment raised.*

The statutory right under Order XXI, rule 63, Civil Procedure Code, is merely to establish the right which the attaching plaintiff claims in the property, *i.e.*, to attach it as the property of the defendant whenever it is his interest to do so. The fact that the attachment before judgment ceases to be operative on the dismissal of the suit by virtue of Order XXXVIII, rule 9, of the Code, does not also cause the suit, under Order XXI, rule 63, to abate. **M.** RAMASAMY CHETTY *v.* ALIGIRI CHETTY **800**

——— ——— ——— **O. 21, r. 65**—*Auction-sale, bid in, whether can be withdrawn.*

If a person goes to bid at a sale and in full knowledge of the condition offers bids for the property, and the property is knocked down to him, the mere fact that the Court has subsequently the discretion to confirm or annul the Nazir's auction, does not leave it open to the bidder to withdraw his bid. **C.** RAJENDRA PROSAD JHA *v.* UPENDRA NATH JHA, 21 C. L. J. 174; 19 C. W. N. 633 **805**

——— ——— ——— **O. 21, r. 66** **611**

——— ——— ——— **O. 21, r. 66**—Attachment of debt—Court, duty of, to inquire as to its existence—Receiver, appointment of, whether irregular—Jurisdiction **812**

——— ——— ——— **O. 21, rr. 89 to 96** **601**

——— ——— ——— **O. 21, r. 89**—*Execution-sale, application to set aside within time but after confirmation of sale, effect of—Deposit, whether can be made by cheque.*

An application to set aside an execution-sale on the day of confirming the sale but subsequent to the confirmation is within time if it is within 30 days of sale.

A deposit under Order XXI, rule 89, must be a deposit in cash and not by a cheque. **L. B.** ISMAIL ALI *v.* VISVANADAN CHETTY **656**

——— ——— ——— **O. 21, r. 89**—*Prior mortgagee of property sold at auction—Right to set aside sale.*

A prior mortgagee of a property sold at auction has an interest in the property by virtue of a title acquired before the sale; he is as such entitled to apply to have the sale set aside under Order XXI, rule 89, of the Civil Procedure Code. **A.** KASHMIRO BIBI *v.* HATIM ALI KHAN, 13 A. L. J. 278 **831**

Civil Procedure Code—(1908)—contd.

——— ——— ——— **O. 21, r. 89**—*Several judgment-debtors—Application by one to set aside sale—Applicant, whether entitled to claim deposit by non-applying judgment-debtors as his*

A judgment-debtor who applies to have a sale set aside under Order XXI, rule 89, of the Civil Procedure Code, 1908, cannot claim that the monies deposited by other judgment-debtors who have not joined in his application should be regarded as his. M. KARUNAKARA MENON *v.* KRISHNA MENON, 2 L. W. 196; 28 M. L. J. 262 **952**

——— ——— ——— **O 21, r. 90 492**

——— ——— ——— **O. 21, rr. 99, 103, O. 39, rr. 1, 2**—*Execution proceedings—Suit to remove obstruction—Temporary injunction.*

A temporary injunction restraining defendant rom taking possession of the property in suit is not within the terms or the intention of Order XXXIX, rule 1 or 2, and cannot, therefore, be granted to a person who, after being defeated under Order XXI, rule 99, brings a suit under rule 103 of the same Order. B. CHHOTALAL *v.* JETHALAL, 16 Bom. L. R. 676 **56**

——— ——— ——— **O. 22, r. 9**—*Death of one of the defendants during pendency of suit—Legal representative not made party within time—Abatement—Sufficient cause for setting it aside.*

A preliminary decree in a suit for rendition of partnership accounts was made on the 1st November 1909 and the appeal against it was finally dismissed by the Chief Court on the 20th December 1911. In the meantime one of the defendants had died in September 1910 and when the record was returned to the first Court on the 17th January 1912, it directed that the deceased defendant's representatives shall be impleaded, which was done on the 17th February 1912. The Court then decided that the suit abated as against the deceased and decreed it against the others. On appeal the Divisional Judge held that the suit failed against all the defendants:

Held, that the deceased defendant was an essential party to the suit and as the plaintiffs did not make an application for impleading his legal representatives on the earliest possible date after the first Court was again seized of the case, there was no sufficient cause for the delay and the suit failed. P. GURMUKH SINGH *v.* KANSHI RAM, 53 P. L. R. 1915 **681**

——— ——— ——— **O. 22, r. 10, O. 1, r. 10 (2)**—*Parties, when and how made—Evidence recorded in another proceeding, Judge, whether entitled to decide a question on—Transfer, admission of, by defendant, effect of.*

A person can continue a suit as a defendant under Order XXII, rule 10, which is not restricted to plaintiffs and their representatives only.

A Judge has no jurisdiction to decide a matter on evidence recorded in another proceeding to which the applicant was not a party.

An admission by a defendant of a transfer of the property in suit is sufficient to entitle the transferee to be made a party under Order XXII, rule 10, as well as under Order I, rule 10 (2), Civil Procedure Code. C. KRISTO KUMAR DAS *v.* GIRISH CHANDRA PODDAR **704**

Civil Procedure Code—(1908)—contd.

——— ——— **O. 22, r. 10**—*Proceedings after preliminary decree for sale or redemption, whether proceedings in suit—Purchaser of property, whether entitled to be made party—Rule 10, whether applicable to execution proceedings.*

Under the Civil Procedure Code, 1908, proceedings after a preliminary decree for sale or redemption are proceedings in the suit and, therefore, a suit for redemption does not come to an end after the passing of a preliminary decree and must be considered pending, within the meaning of Order XXII, rule 10, and the private purchaser of the property after such a decree acquires an interest which entitles him to be made a party to the suit A. MUHAMMAD MASIH ULLAH KHAN *v.* JARAO BAI, 13A. L. J. 307; 37 A. 226 **771**

——— ——— ——— **O 23, r. 1 165**

——— ——— ——— **O. 23, r. 3, Sch. II, cl. 18**—*Agreement to refer to arbitration after institution of suit—Application for stay of suit—Adjustment within the meaning of O. XXIII, r. 3.*

Clause 18, Schedule II, of the Civil Procedure Code, 1908, is restricted to cases in which the suit complained of has been instituted after the agreement to refer to arbitration.

Where after the institution of a suit, the plaintiff and the defendant entered into an agreement to refer the matter in dispute to arbitration, and the defendant moved the Court to stay proceedings:

Held, that the agreement did not fall under any of the clauses of the second Schedule of the Civil Procedure Code and that, therefore, the application must fail.

Per *Beaman, J.*—A mere agreement to refer to arbitration, even though it be in other respects valid, cannot be such an adjustment in whole or in part of the suit as the Court can give effect to under Order XXIII, rule 3

Where the Court is seized of a cause, its jurisdiction cannot be ousted by the private and secret act of parties, and if they, after having invoked the authority of the Court and placed themselves under its superintendence, desire to alter the tribunal and substitute a private arbitrator for the Court, they must proceed according to the law laid down in the first sixteen clauses of the second Schedule B. VYANKATESH MAHADEV *v.* RAMCHANDRA KRISHNA, 16 Bom. L. R. 658; 38 B. 687 **46**

——— ——— ——— **O. 23, r. 3**—*Partition suit—Agreement appointing trustees to hold plaintiff's share, whether reference to arbitration and adjustment of suit*

An agreement appointing trustees to represent the plaintiff in taking an account from, and effecting partition with, defendant and, thereafter, to hold plaintiff's share in trust for him, does not give the trustees the powers of arbitrator in the matter, and even if it did, it would be a mere agreement to refer to arbitration a matter pending before a Court and would not amount to an adjustment of the dispute within the meaning of Order XXIII, rule 3, Civil Procedure Code. S. GHULAM DASTAGIR KHAN *v.* GHULAM HUSSEIN KHAN, 8 S. L. R. 187 **369**

——— ——— ——— **O. 24, r. 5 919**

——— ——— ——— **O. 32, r. 6 603**

Civil Procedure Code—(1908)—contd.

——— ——— ——— **O. 32, r. 7**—*Minor—Mutation proceeding—Compromise by mother on behalf of minor sons—Suit by minor for setting aside compromise—Leave of Court not obtained—Registration Act (XVI of 1908), s. 17—Documents evidencing family settlement—Petition of compromise declaring interests of parties in property exceeding Rs. 100 in value—Compromise not for minor's benefit, validity of.*

In the course of mutation proceedings, a petition was filed setting out the terms of a compromise arrived at between the parties. The petition was signed on behalf of the minor plaintiffs by their mother and mutation was made in accordance with the terms of the petition. On a suit by the minors to set aside the compromise and for possession of their proper share in the property.

Held, (1) that as Order XXXII, rule 7, of the Civil Procedure Code does not apply to proceedings under section 35 of the Land Revenue Act, the compromise could not be set aside merely on the ground that the Revenue Court did not give the plaintiffs' mother and guardian leave to enter into it on their behalf.

(2) that written instruments are not exempt from registration merely because they evidence or carry out a family settlement; nor does the mere fact that a document is thrown into the form of a petition or is presented to a Court along with a petition exempt its registration, if it is otherwise compulsorily registrable.

(3) that a petition of compromise presented to a Court which declares the respective interests of the parties in property exceeding Rs. 100 in value must be registered before it can be used as evidence of title, unless it is acted upon judicially by the Court.

(4) that the mere fact that the compromise was not made for the benefit of the minors was enough ground for setting it aside. **A.** BHARSA *v.* SIKHDAR, 12 A. L. J. 998 **97**

——— ——— ——— **O. 33, rr. 2, 5 (a)**—*Application for permission to sue as pauper, how framed—Omission of one item in schedule—Dismissal of application—Revision.*

The word "framed" in Order XXXIII, rule 5 *(a)*, is of special importance. It is appropriate to secure the inclusion in the petition of pauperism the various requisites specified in rule (2), and not the correctness of the particular statements of fact involved in them.

The provision for dismissal of defective petitions is not intended to be punitive.

The mere fact that the schedule to the petition does not include one item of the property is not enough ground for dismissal and the High Court can interfere in revision. **M.** KUPPUSAWMY AIYAR *v.* MUTHUSAWMY AIYAR, 1 L. W. 1068; (1915) M. W. N. 31 **891**

——— ——— ——— **O. 33, r. 5 (a)** **891**

——— ——— ——— **O. 34, r. 1** **788, 1005**

——— ——— ——— **O. 34, r. 2** **813**

——— ——— ——— **O. 34, r. 2, 5**—*Payment made out of Court—Certified in Court by decree-holder on application by judgment-debtor—Payment in Court.*

Where an application is made to Court within the period allowed by Article 174 of the Limitation Act to compel the decree-holder to certify the payment made out of Court in satisfaction of a mortgage-decree, the payment, if proved, must be recorded and then it will in law be treated as a payment in Court within the meaning of Order XXXIV, rule 2 of the Civil Procedure Code. **N.** *Musammat* BAYABAI *v.* PURSHOTTAM, 11 N. L. R. 16 **919**

——— ——— ——— **O. 34, r. 4** **139, 365**

——— ——— ——— **O. 34, rr. 4, 5, 6** **489**

——— ——— ——— **O. 34, rr. 4, 6**—*Preliminary decree on mortgage suit—Decree, combined, in suit for sale of mortgaged property and for recovery of balance due on mortgage—Mortgage, recovery of balance due on, separate decree for.*

In suits on mortgage the proper course obviously is to confine the preliminary decree to a decree under Order XXXIV, rule 4, Civil Procedure Code, but where a Court goes further and passes a combined decree under Order XXXIV, rules 4 and 6, Civil Procedure Code, a separate decree under the latter rule is not necessary, and an application for such a decree is, therefore, superfluous.

A relief claimed under Order XXXIV, rule 6, Civil Procedure Code, against the defendant includes a relief against any property in his possession. **O.** DEPUTY COMMISSIONER, FYZABAD *v.* SANT BAKHSH PATHAK, 1 O. L. J. 742; 18 O. C. 55 **72**

——— ——— ——— **O. 34, r. 6** **72**

——— ——— ——— **O. 34, 7 (1) (d), 8 (2)** **706**

——— ——— ——— **O. 34, r. 12** **164**

——— ——— ——— **O. 34, r. 14** **795**

——— ——— ——— **O. 38, r. 9** **800**

——— ——— ——— **O. 39, rr. 1, 2** **56**

——— ——— ——— **O. 39, rr. 1, 7**—*Injunction—Probate and Administration Act (V of 1881), ss. 34, 55, scope of—Appointment of Administrator pendente lite—Injunction, power of Probate Court to grant—English Law and Indian Law, distinction between.*

A proceeding for Probate of a Will or for Letters of Administration is not a suit in which property is in dispute.

The only question in controversy in a proceeding in the Probate Court is that of representation of the estate of the deceased, and no question of title thereto, that is, the title of the deceased or of the conflicting titles alleged by the parties to the proceeding can be investigated by the Court.

The terms of section 25, sub-section 8, of the Judicature Act of 1873 are wider than the language used by the Legislature in this country in rule 1 of Order XXXIX of the Civil Procedure Code.

It cannot be said that a Court of Probate is not competent, because it is a Court of Probate, to grant an injunction in any circumstances.

Where injunction is necessary, the proper procedure to follow is for the aggrieved party to apply to the Court for the appointment of an Administrator

Civil Procedure Code—(1908)—contd.

pendente lite under section 34 of the Probate and Administration Act, as an Administrator *pendente lite* appointed under section 34 takes charge of the entire estate, both moveable and immoveable, of the deceased.

On an application being made under section 34, the Court may, if necessary, grant an injunction either in the exercise of its inherent power or under rule 7 of Order XXXIX of the Code. C. NERODBHARANI DEVI v. CHAMATKARINI DEVYA, 19 C. W. N. 205 **617**

——— ——— ——— ——— **O. 39, r. 2 (3), O. 43, r. 1 (r)**—*Order refusing to attach property for disobedience of injunction, whether appealable—Appellate Court, power of, to order imprisonment.*

An order refusing to attach property for disobedience of an injunction order is an order passed under Order XXXIX, rule 2 (3), and is appealable under Order XLIII, rule 1 (*r*), and the Appellate Court has jurisdiction to pass an order of imprisonment in appeal.

Per *Oldfield, J.*—Disobedience of an injunction order is an act independent of the suit and the injunction and calls, therefore, for a separate punishment.

Per *Tyabji, J.* (dissenting)—Order XLIII, rule 1 (*r*) is not sufficient to give to the Appellate Court the power which is restricted "to the Court granting the injunction," in other words no appeal is intended to be given as regards the exercise of a power which is annexed to a specified Court. M. OTTAPURAKKAI THAKATH SUPPI v. ALABI MASHUR KOYANKA **131**

——— ——— ——— ——— **O. 40, r. 1**—*Appointment of Receivers—Authority to bring and defend suits conferred by Court—Lunacy Act (XXXV of 1858), inquiry under—Document executed by pardanashin lady—Terms not explained to her—Suit by persons of unsound mind—Next friend, whether a party.*

Ordinarily, a suit to recover possession of property can only be brought by him in whom there is a present title to it, and by the appointment of a Receiver no property becomes vested in the Receiver. But this rule is subject to modification by the Legislature, and the Code of Civil Procedure empowers the Court to confer upon a Receiver all such powers as to bringing and defending suits as the owner himself has, even if it may involve the setting aside of a voidable instrument executed by one of the co-owners who thereby purports to deal with the entire estate.

Where, therefore, one of two co-widows brought a suit against the other for a declaration that she was entitled to a half share in the estate of the deceased husband and for partition thereof, and the present plaintiffs were appointed Receivers under Order XL, rule 1 (*d*) of the Civil Procedure Code, with the power to bring and defend suits in their own name and to use the names of the plaintiff and the defendant also, and where the present plaintiffs sued to recover possession of certain immoveable property on the ground that a lease of 16th September 1906 purporting to have been executed by one of the widows in virtue of which the present defendant claimed to be a permanent tenant was invalid:

Civil Procedure Code—(1908)—contd.

Held, (1) that the co-widows were the owners of the property and the suit in which the Receivers had been appointed comprised that property and that the Receivers were, therefore, as competent to bring this suit as the widows would have been;

(2) that the omission of the Receivers to get leave in the first suit to bring this suit might have consequences adverse to them in that suit but it could not affect their power to bring this suit.

The Lunacy Act contemplates the question of lunacy or sanity at the time of the inquiry, there is no provision in it that the inquiry shall extend to the ascertainment of the period at which the alleged lunatic first became of unsound mind.

Where, therefore, lunacy proceedings commenced in November 1906 and the widow who had executed the lease in September 1906 was found on the 24th September 1907 to be of unsound mind and incapable of managing her own affairs:

Held, (1) that the finding did not carry things back further than the inquiry which commenced in November 1906 and notwithstanding the result of that inquiry the burden still rested on the plaintiffs of showing that she was of unsound mind on the date of the execution of the lease;

(2) that the executant of the lease being of unsound mind at the time it was executed, it created no title in the present defendant and the plaintiffs' right to possession was not barred;

(3) that even if lunacy be not established, the lease was void as its terms were not adequately explained to the executant, a *pardanashin* lady of weak intellect, and was not understood by her;

(4) that the Receivers were competent plaintiffs even if the lease be held to be not void, but voidable;

(5) that even if a lunatic's manager can sue still there is no established rule of practice in this High Court that requires suits relating to the lunatic's property to be brought by him and not by the lunatic and that on the contrary the Code of Civil Procedure contemplates suits by persons of unsound mind whether so adjudged or not and that though it is true that a person so incapacitated has to sue by next friend, yet a next friend is not a party and the absence of a next friend is immaterial. C. KASSIM MAMOOJI v. K. B. DUTT, 19 C. W. N. 45 **459**

——— **O. 41, r. 1**—*Memorandum of appeal unaccompanied by copy of decree, whether effective—Collector, whether a Judge—Acts of Collector presumption as to regularity of.*

A memorandum of appeal should be accompanied by a copy of the decree appealed from and, therefore, no appeal is effective under Order XLI, rule 1, unless it is accompanied by a copy of the decree.

A Collector is a Revenue Officer and although he may at times have to perform judicial functions, he is not a Judge and his acts like the acts of all other Executive Officers are presumed to be regular.

Therefore, where a Collector has certified on his order-sheet that he has duly served certain notices to annul incumbrances, a Judge is not entitled without evidence to conclude otherwise. C. SITIKANTHA ROY v. BIPRA DAS **447**

——— ——— ——— ——— **O. 41, r. 19 628**

——— ——— ——— **O. 41, r. 20 609**

Civil Procedure Code—(1908)—contd.

——————— **O. 41, r. 20**—*Parties to suit, struck off before decree was passed—Power of Appellate Court to implead persons interested.*

Order XLI, rule 20, of the Civil Procedure Code applies to persons who were parties to a suit, and persons are nonetheless parties because they ceased to be so before the passing of a decree. An Appellate Court is, therefore, authorized to consider whether they are interested in the result of the appeal and to implead them if it thinks that they are so. **M.** ISSAKKANAKATH MALIYAKKAL *v.* POURAKURIKKALAKATH KUNHI **423**

——————— **O. 41, r. 22**—*Cross-objections, whether can be taken against a co-respondent.*

A respondent can claim relief against a co-respondent by way of memorandum of objections. **M.** MUNISAMY MUDALY *v.* ABBU REDDY, 27 M. L. J. 740; (1915) M. W. N. 46 **323**

——————— **O. 41, r. 27**—*Admission of additional evidence on appeal—Appellate Court, duty of—Practice.*

In admitting additional evidence, it is necessary for an Appellate Court to comply with the provisions of Order XLI, rule 27, and if it thinks, either with the consent of the parties or on the application of any one of them, that there is sufficient ground to admit certain papers, the reasons for admitting them in evidence should be stated, and the papers should be formally admitted in evidence. **B.** DAJI ABAJI SAWANT *v.* SAKHARAM KRISHNA KULKARNI, 16 BOM. L. R. 641; 38 B. 665 **33**

——————— **O. 41, r. 27 (1) (a)**—*Documents rejected by lower Court, admissibility of, in Appellate Court—Evidence, fresh—Documentary evidence, admissibility of, at late stage—Court, discretion of.*

The plaintiff undertook at the trial to prove a fact definitely and put in documentary evidence in support of it. At the instance of the defendant interrogatories were issued to be answered by the plaintiff himself with a view to obtain his admission as to non-existence of the fact; but the answers not being given by the plaintiff, but by his general agent, and being of an unsatisfactory character, although admitting non-existence of the fact to a certain extent, the defendant asked leave to file certain documents in proof of the non-existence of the fact. The lower Court refused to receive those documents, but they were asked to be filed before the Appellate Court:

Held, that under the above circumstances the lower Court ought to have received the documents in order to dispose completely of the matter in dispute, and that they were admissible in the Appellate Court under Order XLI, rule 27 (1) (*a*), Civil Procedure Code. **O.** HANWANT RAM *v.* BHAGWATI PRASAD SINGH, 2 O. L. J. 27 **516**

——————— **O. 41, r. 27**—*Remand, evidence taken on—Appellate Court, discretion of—High Court, power of, to interfere in second appeal.*

A High Court is not justified in second appeal in interfering with the discretion of the lower Appellate Court to the extent of refusing to recognise the additional evidence taken on remand under Order XLI, rule 27, of the Code of Civil Procedure. **A.** BHULAN *v.* WAZIR **827**

——————— **O. 41, r. 31** **561**

Civil Procedure Code—(1908)—concld.

——————— **O. 41, r. 33** **336**

——————— **O. 43, r. 1**—*Order—Application for appointment of Receiver—Provisional grant of application, interpretation of—Order, whether appealable.*

Where on an application for appointment of a Receiver the Court made an order in these words: "I allow the application provisionally and call on parties to put in applications showing their claims regarding the person and power of the Receiver, and the income, if any, that is to be paid by him to the objectors:"

Held, that as the order does not amount to appointment of a Receiver, no appeal lies against the order. **A.** RANJI *v.* KOMAN DAS, 13 A. L. J. 79 **646**

——————— **O. 43, r. 1 (e)** **492**

——————— **O. 43, r. 1 (j)** **589**

——————— **O. 43, r. 1 (r)** **131**

——————— **O. 45, r. 13**—*Execution of decree, stay of, pending decision of appeal to Privy Council.*

Under Order XLV, rule 13, of the Code of Civil Procedure, execution of a decree will not, without sufficient cause being shown, be stayed pending the decision of the appeal to the Privy Council. **P.** MELA RAM *v.* RUKMAN, 29 P. L. R. 1915 **572**

——————— **O. 46, r. 7** **972**

——————— **Sch. II, para. 8** **233**

——————— **Sch. II, para. 18** **46**

——————— **Sch. II, para. 20** **31, 332**

——————— **Sch. III, para. 11 (3)** **969**

Civil Rules of Practice (Madras), r. 189 **812**

Collector, whether a Judge—Acts of Collector, presumption as to regularity of **447**

Collector's certificate, *whether confers title on possessor—Evidence, value of certificate.*

A certificate issued by the Collector in respect of immoveable properties situated within the town of Madras is only evidence of revenue registry and affords no title or security as to ownership. **M.** KUPPAMMAL *v.* GATTIPALLI GOPAUL CHETTI, 1 L. W. 649 **14**

Commissioner not knowing characters in which accounts are kept, appointment of, whether allowable **598**

Common Manager. *See* TRANSFER OF PROPERTY ACT.

Companies Act (VI of 1882)—*Security deposit mixed with funds of Bank by agreement of parties—Payment of interest—Deposit to be treated as ordinary debt in liquidation.*

In the case of a going Bank, the Bank is entitled to treat a security deposit as ear-marked for a particular purpose and refuse to deal with it for any other purpose, but in a liquidation of an insolvent Bank if the occasion for realizing the security has not arisen and if the money has, with the consent of the giver of the security, been received by the

Companies Act—(1882)—contd.

Bank and mixed with its funds in consideration of an agreement to pay interest on it, the Bank is only a debtor and not a trustee.

Where an agent of a Bank deposited a certain sum as security for the faithful discharge of his duties and agreed that the Bank should receive and hold the money paying interest at 6 per cent. for its use the money being repayable, if not forfeited for losses occasioned through the agent's default upon his ceasing to be the Bank's agent:

Held, that in liquidation proceedings the agent could only rank as an ordinary creditor and could not take preference over other creditors of the Bank. B. MALVANKAR v. CREDIT BANK OF INDIA, LTD., 16 BOM. L. R. 783 **343**

——— ——— ——— **s. 45**—*Share-holder—Minor, whether can be share-holder—Receipt of dividends—Estoppel by conduct—Estoppel—Registered holder of share, rights and liabilities of*

A share-holder of a limited Company, who was a minor at the date of allotment of shares to him, but after attaining majority received dividends and raised no objection to his name being included in the register of members, is estopped by his conduct while a person *sui juris* from denying as between himself and the Company's representative that he is a share-holder.

A minor may be a member of a Company under the Companies Act of 1882.

A registered holder of shares in a Statutory Company is a person with a vested interest in property, which may be burdened with an obligation to pay calls in the future. The registered member cannot keep the interest and prevent the Company from having it and dealing with it as their own without being bound to bear the burthen attached to it. B. FAZULBHOY JAFFER v. CREDIT BANK, 16 BOM. L. R. 780 **335**

——— ——— ——— **s. 158**—*Liquidation proceedings—Charge—Lease providing for payment of arrears of rent from buildings erected on land—Priority over unsecured creditors—Charge.*

Where a lease provided that if the lessees (a Company) caused delay in payment of rent, the landlords would be entitled to recover the arrears with interest "from the buildings which may have been erected on the land"

Held, (1) that in equity a charge was created on the buildings when they came into existence; and

(2) that although the charge did not amount to a transfer or a mortgage, it gave a right of priority to the landlords over the unsecured creditors of the company in a winding-up. B. KESHAVLAL HIRALAL v. GIRDHARILAL, 16 BOM. L. R. 643 **34**

——— ——— ——— **s. 169**—*Petition by creditor to wind up—Dispute about genuineness of claim—Object of petitioner to bring pressure in order to obtain cheap and expeditious payment—Order refusing to wind up—Appeal, whether maintainable.*

The principle upon which a Company is to be wound up on the petition of a creditor is simply its inability to pay after proper demand made and the lapse of three weeks. Any such neglect must be judged by reference to the facts of each particular case, and when the defence is that the debt is disputed, all that the Court has first to see is whether that dispute is, on the face of it, genuine or merely a cloak of the Company's real inability to pay just debts.

Where a creditor's demand is in respect of a claim which the Company honestly believes to be a fraudulent claim and unsustainable at law, and in filing a winding-up petition his object is to bring the pressure of insolvency proceedings to bear upon the Company in order to make it pay cheaply and expeditiously a heavy debt which it desires to dispute in the Civil Courts, the petition for insolvency of the Company must be dismissed under section 169 of the Indian Companies Act (VI of 1882).

An appeal will lie from an order refusing to wind up a Company. B. TULSIDAS LALUBHAI v. BHARATKHAND COTTON MILLS CO. LD., 16 BOM. L. R. 602; 39 B. 47 **44**

Companies Act—(1882)—concld.

——— ——— ——— **s. 214**—*Liability of Director, grounds of—Onus—Position of Director.*

Section 214 of the Companies Act applies to the conduct of a Director *as such*, and anything done by him during the period of his directorship in his capacity *as a debtor* cannot be made a ground of liability under the section.

The onus is on the applicant to prove the facts which bring the case within the section.

A Director is not a trustee of the loans advanced by a Company before his acceptance of office as such.

Where in an application under section 214 of the Companies Act the Liquidator sought to establish the liability of an ex-Director on the ground that he did not, at the time of his appointment as Director, disclose his indebtedness to the Company:

Held, that it was the duty of the applicant to satisfy the Court that loss or damage resulted to the Company from the alleged non-disclosure by the ex-Director. P. HANS RAJ BHANDARI v. LIQUIDATOR OF THE LAHORE BANK, 59 P. L. R 1915; 46 P. W. R. 1915 **594**

Companies Act (VII of 1913), s. 215—*Winding-up of Company—Proceedings in Court, stay of—Discretion of Court.*

In the case of a compulsory liquidation the creditor is debarred from proceeding by way of action, unless he can show special grounds for granting him leave to do so.

In the case of a voluntary liquidation the onus is on the Liquidator to show that an order should be made staying an action brought against the Company for *prima facie* the ordinary tribunal is the proper one to decide upon a claim against the Company. The proceedings may be stayed when sufficient ground is shown to do so, *e. g.*, when existence of the liability is substantially admitted and the dispute is only as to what is the exact amount due.

The plaintiff sued the Company for refund of a certain sum of money alleged to have been paid on some shares, which the plaintiff alleged were allotted to him subject to a condition. The Company went into voluntary liquidation and the Liquidators moved the Chief Court for an order under section 215 of the Companies Act, 1913, to stay proceedings in the suit filed against the Company. The claim was denied *in toto* by the Liquidators:

Held, that no sufficient ground was shown for passing the order prayed for P. LIQUIDATORS OF THE MARWAR BANK v. PANNA LAL, 19 P. L. R. 1915; 31 P. R. 1915 **685**

Company— *Liquidation — Share-holder, whether entitled to have his name struck off the list of contributories—Share-holder buying shares on faith of false prospectus, right of.*

In proceedings to wind up the affairs of a Company, a share-holder is not entitled to have his name struck off the list of contributories, on the ground that he was induced to purchase the shares by the false reports and balance-sheets issued by the Company.

If a share-holder, who has applied for shares on the faith of a prospectus which eventually is found to contain false representation, wishes to have his name struck off the register, he must take steps before the commencement of winding-up, otherwise he would be too late B. HIRJI KHETSEY v. INDIAN SPECIE BANK, LD., 17 BOM. L. R. 65 505

Compensation awarded against complainant for vexatious complaint by 2nd class Magistrate—Appeal to Sub-Divisional Magistrate—Order, whether can be set aside without notice to accused—Compensation, when should be awarded 192

——————, award of—Boom in prices, whether to be considered in estimating market-value—Value of portion of land enhanced owing to acquisition of part of it—Compensation for that portion, whether allowed on severence 326

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Composition deed—Absolute transfer of property by debtor to trustees—Resulting trust—Suit for surplus money 332

Compromise, *agreement of—Some terms not relating to suit—Decree incorporating whole agreement, whether admissible in evidence—Agreement, whether requires registration—Evidence—Admissibility of such agreement—Adverse possession, nature of possession necessary to create*—Res judicata—*Compromise decree not relating to suit whether operates as* res judicata.

A decree recording an agreement as one of the terms of a compromise though not relating to the suit, is a judicial record of the agreement of the parties and is admissible in evidence.

Therefore, such an agreement recorded in a decree, does not require registration and is admissible in evidence without registration.

Possession in order to be adverse must be adequate in continuity, in publicity and in extent.

The only act of "tethering of cattle, and throwing cow-dungs on the land" unaccompanied with the assertion of any adverse right, does not necessarily denote that a claim of ownership to the land was thereby asserted.

Quære.—Whether a compromise decree can operate as *res judicata* upon any matter other than that relating to the suit? C. MAHABIR MISSER v. NANDA KISHORE MISSER 640

——————— affecting immoveable property neither registered nor incorporated in decree, value of 379

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Confession, retracted, value of—Corroboration necessary for conviction 221

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Consideration. *See* CONTRACT ACT, s. 2 (*d*).

——————— Abstention from suit—Suit to defeat provisions of any law 579

——————, failure of—Endorsee from payer of *hundi*—Holder in due course—Presumption 362

——————— Sale—Full consideration not paid—Vendee not entitled to possession without payment of whole consideration—Civil Procedure Code (Act V of 1908), O. XLI, r. 33—Power of High Court 336

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Construction of contract. *See* CONTRACT

——————— **of deed**—Property gifted to wife for her life only 407

——————— Gift—Property gifted to wife for her life only—Reversion, right of, transfer of—Expectancy of succession—Transfer, validity of 407

——————— **of document** 385

——————————— *Mortgage executed by mother of minor for her husband's debt—Minor, liability of—Mortgagee having only incorporeal right, whether dispossessed by denial of such right—Adverse possession—Incorporeal right, whether can be adversely possessed.*

Where a mortgage-deed executed by the mother of a minor mentions that the mortgage is made in order to discharge her husband's debts and also contains a reference to the property being in the enjoyment of herself and her minor son after her husband's death

Held, that the mortgage-deed can be fairly construed to be one executed by the mother on behalf of her son.

Where a mortgagee has only an incorporeal right and is not entitled to possession of the mortgaged properties, the mortgagor's denial of the mortgagee's right cannot make him get possession of the incorporeal right nor can such incorporeal right be possessed adversely by the mortgagor by a mere denial M. VENKATARAMANACHARI v. THIRUNARAYACHARI, 2 L. W. 212 930

——————— **of lease.** *See* LEASE.

Construction—concld.

——— ——— **of statute** 304

——— ——— ——— ———. *See* STATUTE.

——— ——— **of Will.** *See* WILL.

——— ——— ——— 53

Contract *to deliver goods in particular month—Non-delivery till last day of month—Breach of contract—Late shipment—Construction of contract—Party relying upon exception—Measure of damages.*

The defendant agreed to deliver to the plaintiff a certain quantity of Rangoon rice in the month of June. The contract provided, *inter alia*, that no objection would be raised by the purchaser if the delivery of the goods was delayed owing to late shipment at Rangoon. The goods were not delivered on or before the 30th June

Held, (1) that there was a breach of the contract,

(2) that the term 'shipment' in the agreement included not merely the loading of goods on board the ship but also the starting of the ship;

(3) that the parties intended by the late shipment provision nothing more than this, that the goods should be put on board in such time as to make it possible to have them delivered to the purchaser at Calcutta on the date specified, if the ship started on such a day as to arrive in Calcutta in time; but that if for any reason for which the vendor was not responsible the ship could not start in time and consequently arrived in Calcutta too late to make it possible for the vendor to deliver to the purchaser the goods on the appointed day, the vendor was not to be held liable in damages;

(4) that, hence, it was obligatory on the defendant to establish that the delay was attributable to circumstances for which he was not responsible.

As soon as a contract has been broken, the obligation of the purchaser to take delivery vanishes; he is not bound to take the goods when they are delivered late.

The right measure of damages is the difference between the contract price and the market price on the date of delivery originally agreed upon by the parties. **C.** KALI KANTA SAHA *v* ISMAIL, 20 C. L. J. 133 **7**

——— ——— *Lease and sanad by Government—Resumption for public purposes—"Public purpose," meaning of—Erection of dwelling houses for Government officials, whether public purpose.*

A lease and a *sanad* granted by the Government contained a power of resumption at any time for "public purposes" upon certain terms as to notice and compensation. The Government gave notice to resume the lands in order to erect dwelling houses which they could offer to Government officials at adequate rents for their private residence, as suitable houses could not be easily obtained, though it was shown that it was not impossible to obtain quarters of some kind:

Held, that the term "public purpose" includes a purpose in which the general interest of the community, as opposed to the particular interests of individuals, is directly and vitally concerned and that as the scheme of the Government is one which will redound to public benefit by helping the Government to maintain the efficiency of its servants, it is a

Contract—concld.

"public purpose" within the meaning of the contracts contained in the lease and the *sanad*. **P. C.** HAMABAI FRAMJEE *v.* SECRETARY OF STATE, 13 A. L. J. 117; 17 M. L. T. 76; 19 C. W. N. 305; 17 BOM. L. R. 100; 28 M. L. J. 179; 2 L. W. 191; 21 C. L. J. 134; 3 P. B. 279 **26**

——— ——— *to sell, with a reciprocal contract to mortgage by promisee—Failure to mortgage—Gross carelessness on part of promisee—Specific performance, whether allowed.*

The defendant agreed to sell to the plaintiff two shops for Rs. 5,900. Rs. 200 were paid in advance as earnest money, Rs. 2,300 were to be paid before the Sub-Registrar, and for the remaining Rs. 3,400 the plaintiff was to mortgage the two shops with possession to the defendant. Both the sale-deed and the mortgage-deed were to be executed and registered within two weeks. In case of default on the plaintiff's part, the defendant was to retain the earnest money, and in case of default on the defendant's part, the plaintiff was to receive back the Rs. 200 and a further sum of Rs. 200 as damages. Both the deeds were duly executed but not registered, owing to the plaintiff's failing to produce the mortgage-deed before the Sub-Registrar for registration. According to the plaintiff the deed was eaten or carried off by rats. The plaintiff sued for specific performance:

Held, (1) that it is discretionary with the Courts to give a decree in such cases; (2) that assuming the facts to be as stated by the plaintiff, the gross carelessness which he had exhibited was such that he did not deserve a decree for specific performance. **P.** MAHARAJ DAS *v.* GIAN SINGH, 52 P. W. R. 1915; 128 P. L. R. 1915 **481**

Contract Act (IX of 1872), s. 2 (d)—*Consideration—Third party, right of, to sue—Plaintiff not privy to contract—Defendant, liability of, when arises—Equity.*

A plaintiff cannot make a defendant liable upon a contract to which the plaintiff was not privy, but in such cases as the defendant would be held liable in "Court of Equity" the Courts in this country should hold him liable.

A *zemindar* who is entitled to *zemindari* dues from his *muafidar* is not entitled to sue a lessee from the *muafidar* for the dues when he was not privy to the contract between his *muafidar* and lessee, although the lessee agreed in his contract to pay the *zemindari* dues, as the *zemindar* has no such equity against the lessee as a Court of Equity would enforce in his favour. **A.** MANGAL SEN *v.* MUHAMAD HUSSAIN, 13 A. L. J. 73; 37 A. 115 **737**

——— ——— **s. 11** — *Minor — Conveyance in favour of minor, validity of—Contract and conveyance, distinction between—Transfer of Property Act (IV of 1882), s. 127—Gift in favour of minor, validity of—Rulings, construction of.*

A contract of sale negotiated by a minor, who settled the terms, paid consideration and received in return a deed purporting to convey immoveable property by way of sale, is altogether void *ab initio* and no title thereby passes to the minor.

Obiter dicta—(1) Under the provisions of section 127 of the Transfer of Property Act a gift in favour of a minor is not void, though it may be voidable at the option of the minor.

(2) There is a fundamental distinction between a contract and a conveyance. A conveyance is a

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contract *plus* something more or, in other words, a conveyance by way of sale is either in itself a contract or at any rate involves or implies an antecedent contract. **A.** *Mussammat* MUNNI *v.* MADAN GOPAL, 13 A. L. J. 185 **733**

——— ——— **ss. 16, 74**—*Interest, penal—Court, power of, to grant relief—Penal stipulation as to interest, test of—Unconscionable or extravagant bargain, how determined—Stipulation for accelerating payment, when penal—Domination of Will—Undue influence.*

A Court is competent to grant relief whenever the rate of interest appears to the Court to be penal.

Section 74 of the Contract Act as amended in 1899 is comprehensive enough to cover all cases where the contract contains "any stipulation by way of penalty."

The test to determine whether a contract contains a stipulation by way of penalty is, was the agreement to pay the damage for the breach of covenant or contract unconscionable and extravagant, such as no Court ought to allow to be entered into. In order to determine what is unconscionable and extravagant no hard and fast rule can be laid down, the particular facts and circumstances of each case should be considered.

A stipulation merely accelerating payment of the whole debt on default of payment of one or more instalments is not, by itself, by way of penalty. But the position is very different where the entire sum, which the creditor had agreed to receive in instalments without interest, is not only made repayable in one sum, but is also made to carry interest at an unusual rate. The Court may, in view of all the circumstances of the case, regard the stipulation for the payment of interest at an exorbitant rate, as a penalty.

Where the stipulation was made that upon default of payment of one or two instalments not only would the whole balance due become forthwith payable, but would carry interest at the rate of 75 per cent. per annum:

Held, that the covenant for payment of interest at this rate was a penalty.

The urgent need of money on the part of the borrower does not of itself place the lender in a position to dominate his will within the meaning of section 16 of the Contract Act. But where the creditors are in a position to take advantage of the embarrassment of their debtors the bargain is unconscionable. **C.** KHAGARAM DAS *v.* RAM SANKAR DAS, 21 C. L. J. 79; 19 C. W. N. 775 **815**

——— ——— **ss. 19, 65** **130**

——— ——— **s. 23** **579**

——— ——— **ss. 23, 65**—*Contract—Illegal contract—Rule of* in pari delicto—*Consideration paid for contract void* ab initio, *whether recoverable—Betrothal agreement.*

A breach of betrothal agreement gives rise to a claim for damages.

The plaintiff advanced money to the defendant in consideration of his daughter's betrothal to the former's son. The *fiance* died and the plaintiff sued for refund of the money paid by him:

Held, that the suit was not maintainable. **P.** HIRA *v.* JOWALA DAS, 27 P. L. R. 1915 **1008**

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——— **s. 23**—*Partition—Vendor and purchaser—Condition not to partition property, whether against public policy—Breach of contract—Compensation—Damages, measure of.*

A condition imposed in a sale-deed that the vendees would not partition the share purchased without the consent of the vendor, is not opposed to public policy, as no right is absolutely given up, and the vendor is entitled to compensation for the breach of such condition.

Where the parties have themselves fixed the value of their right, that amount is a proper measure of the damages sustained by a party. **A.** KUMR SEN *v.* SUKHKHO, 13 A. L. J. 6 **203**

s. 27—*Restraint of trade—Landlord allowing cattle market to be held on his land in return of toll, whether trading—Agreement not to hold market to sell cattle on particular days, whether void.*

A landholder who, in return for market tolls or fees, allows a cattle market to be conducted on his land, is not thereby exercising the trade or business of selling cattle.

Therefore, an agreement between the owners of two neighbouring lands to the effect that a market for sale of cattle shall not be held on the same day on the lands of both of them, is not void under section 27 of the Contract Act. **A.** POTHI RAM *v.* ISLAM FATEMA, 13 A. L. J. 281; 37 A. 212 **871**

——— ——— **s. 33** **334**

——— ——— ——— **ss. 39, 75**—*Rescission of contract—Compensation for loss caused thereby—Measure of damages—Notice of insolvency, effect of.*

A bare notice of insolvency does not necessarily and in all cases amount to a declaration of intention not to fulfil obligations. It is a question of fact in each case.

Where a purchaser of goods failed to take delivery of goods under a due contract and the vendors, on receiving notice of the insolvency of the purchaser, served him with a notice that they put an end to all the forward contracts and received neither a reply to the notice nor any offer to pay for or take delivery of the goods:

Held, that the vendors had validly rescinded the contracts and were entitled to exact compensation for the loss occasioned thereby.

Per *Crouch, A. J. C.*—The great underlying principle by which the Courts are guided in awarding damages is *restitutio in integrum* and the exact cost of effecting a complete *restitutio in integrum* is the difference between the original contract rate and that at which the vendor can sell to a fresh purchaser goods of the same quantity and quality and of the same shipment.

Per *Hayward, A. J. C.*—The election to take advantage of the repudiation of a contract goes only to the question of breach, and not to the question of damages, which must be estimated by the difference between the contract price and the market price at the day or days appointed for performance, and not at the time of breach **S.** JAMES FINLAY & Co, LTD. *v.* DAVID SASSOON & Co., 8 S. L. R. 95 **102**

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——— ——— **s. 43**—*Joint promisors—Creditor's claim against one barred—Decree against other—Contribution.*

A joint promisor, whose liability to the promisee kept alive beyond three years from the date of the promissory note and who is consequently compelled to pay by a decree of the Court more than his proportion of the debt to the promisee, can sue his joint promisor for contribution, though the decree exonerated that other joint promisor from payment on the ground that the debt as against him was barred by limitation

Per *Tyabji, J.*—The duty to contribute is clearly distinct from the duty to pay to the promisee. The first is to the promisor, the second is to the promisee, the right of each joint promisor to claim indemnity does not consist merely of being subrogated to the right of the original promisee: for though the promisee's rights may have been released the responsibility to the joint promisor is not annulled. **M.** ABRAHAM SERVAI *v.* RAPHIAL MUTHIRIAN, 27 M. L. J. 746; 16 M. L. T. 569 **337**

——— ——— **s. 43**—*Joint promisors — Promisee's discretion to sue some or all—Civil Procedure Code (Act V of 1908), O. I, r. 10.*

Section 43 of the Contract Act takes away the right of a joint debtor to be sued jointly.

Where two persons jointly lease a house, in the absence of any agreement to the contrary, they are jointly and severally liable to pay the rent, and it is open to the landlord to sue one or both of them.

If the landlord sues one of them only, under Order I, rule 10, Civil Procedure Code, the Court has the power to order that the other should be made a co-defendant, but it is not bound to do so, and in case there is no clue to his whereabouts, it would not be proper for the Court to insist that he should be made a party. **P.** LIVINGSTONE *v.* FEROZ DIN, 107 P. R. 1914 **94**

——— ——— ——— **s. 65** **1008**

——— ——— ——— **s. 70** **334**

——— ——— ——— **s. 74** **815, 885**

——— ——— ——— **s. 107**—*Contract to purchase goods—Failure to take delivery—Breach of contract—Resale—Ascertainment of goods—Damages, principle of assessing—Pleadings in mofussil—Practice.*

The High Court sitting in second appeal and dealing with pleadings in the *mofussil* will not be so strict as it would be in cases from the original side of the High Court.

The defendant at Chittagong agreed by a written contract to purchase from the plaintiffs a certain quantity of Cocoanada chillies Ex. *S.S. Lawada* at a specified rate. The contract, after reciting the terms for payment of price, provided that on failure to fulfil the above terms, the difference of market-value would be recoverable by the sellers on a week's notice. There was a note also to the effect that re-sale was to be at the option of the sellers. The chillies arrived at Chittagong on the steamer *Kotaria*, having been transhipped at Calcutta from the steamer *Lawada*. The defendant was given notice to take delivery, which he failed to do. The plaintiffs sued for damages for breach of contract.

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Held (1) that section 107 of the Contract Act applied;

(2) that the plaintiffs acquired their right of re-sale by the contract itself and, therefore, had no need to invoke section 107;

(3) that the principle of assessing damages laid down by section 107 and by the Allahabad High Court in *Prag Narain v. Mul Chand*, 19 A. 535 at p. 541, must be kept in view in this case;

(4) that the fact that the quantity of chillies brought to Chittagong formed part of a large consignment of chillies Ex. *S.S. Lawada*, did not affect the quantity which reached Chittagong, Ex. *S.S. Lawada* on another steamer and which, the notices said, was set apart and appropriated to the defendant's use. **C.** ARABAR RAHAMAN *v.* ISMAIL EBRAHIM **373**

——— ——— ——— **ss. 128 to 145**—*Surety, liability of—Contract of guarantee—Loss arising after breach—Unreasonable delay in re-sale—Discharge of broker—Failure to object to statement of accounts—Evidence of correctness.*

A contract of guarantee, being a contract *stricti-simi juris*, the surety is entitled to insist on a rigid adherence to the terms of his obligation by the creditor, and is liable only for such loss as arises directly from a breach of the terms of the contract actually guaranteed.

A guarantee broker is discharged from liability if the seller suffers loss on account of his own unreasonable delay in re-selling the goods after the breach of the contract.

Where a statement substantially affecting a person's material interests is made to him in writing, and the circumstances are such that he would certainly or probably have objected had the statement been incorrect, then his silence can be treated as, an admission, that is, as evidence, but not necessarily as proof, of the correctness of the statement. **S.** MERCANTILE BANK *v.* TAHILRAM PESHUMAL, 8 S. L. R. 112 **309**

——— ——— ——— **ss. 134, 137**—*Principal and surety—Omission to pursue suit against principal on account of difficulty in service—Striking off his name—Surety not discharged—Civil Procedure Code (Act V of 1908, O. IX, r. 5, O. XXIII, r. 1, applicability of.*

Where in a suit against several defendants, there is some difficulty in serving one of them and hence his name is struck off, if not at the request, at least with the consent of the plaintiff, the striking out of the name, even before a year has elapsed, would be a procedure under Order IX, rule 5, rather than Order XXIII, rule 1.

In a suit against the principal debtor and surety, the mere omission of the plaintiff to pursue his suit against the principal debtor with the result that his name is struck off and the suit dismissed against him under Order IX, rule 5, does not discharge the surety, provided the suit be still in time against the principal. **B.** NATHABHAI TRICAMLAL *v.* RANCHODLAL RAMJI, 16 BOM. L. R. 606; 39 B. 52 **165**

——— ——— ——— **s. 137** **165**

——— ——— ——— **s. 253 (7)** **344**

——— ——— ——— **s. 253 (10)** **64**

Contribution—Contract Act (IX of 1872), section 43—Joint promisors—Creditor's claim against one barred—Decree against other **337**

——— —— —— One co-mortgagor redeeming whole mortgage, right of **780**

——— —— —— —, right of, founded on justice, equity and good conscience—Principle—Contribution for excess over one's share—Liability limited only to one's share—Over-payment good defence—Suit for contribution—Decree, how to be framed **22**

——— —— —— —, *suit for—Joint tenancy—Payment of rent by one—Liability of other joint tenants to contribute—Decree, form of—Contract Act (IX of 1872), ss. 43, 70.*

When several persons hold a tenancy jointly, the liability for rent is joint and several under section 43 of the Contract Act, and where one of these persons pays the whole rent, he can sue the others for contribution under section 70 of the Contract Act and is entitled to a decree to recover jointly from the others. **C.** NIRDOSH MUNDA *v.* JAKARIA MUNDA, 20 C. L. J. 492 **334**

——— —— —— —— ——, *suit for—Payment of decree for rent by one of the judgment-debtors—Execution by assignee of decree—Bengal Tenancy Act (VIII of 1885), s. 148 (h)—Contract Act (IX of 1872), ss. 69, 70,—Suit for contribution not cognisable by Small Cause Court—Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 41.*

Where an assignee of a decree for rent, without obtaining assignment of the landlord's interest in the land, applies for execution, and one of the judgment-debtors satisfies the decree by payment under compulsion of legal process, the latter is entitled under sections 69, 70 of the Contract Act to call upon the other judgment-debtors for contribution.

There is nothing in section 148 (*h*) of the Bengal Tenancy Act to prevent the assignee from accepting the payment of the decree and certifying such payment to the execution Court.

A suit by some of several persons, bound by a common liability of tenancy, who have discharged the joint obligation, to compel their co-sharers to make good their shares, falls within the scope of Article 41 of the second Schedule to the Provincial Small Cause Courts Act, and hence, it is excluded from the jurisdiction of the Small Cause Court. **C.** RAJANI KANTA GHOSH *v.* RAMA NATH ROY, 20 C. L. J. 200, 19 C. W. N. 458 **56**

Costs—*Power of Appellate Court to allow costs disallowed by Subordinate Court.*

In awarding costs the usual rule is that costs should be allowed to the successful party, and where no good ground exists for not following the rule the higher Court should rectify the error. **P.** CHELA RAM *v.* MUNGH RAJ, 22 P. W. R. 1915; 65 P. L. R. 1915 **621**

Court—Successor in office **145**

——— ——, power of, not to confirm sale **601**

——— , power of, to direct addition of parties in appeal **609**

Court Fees Act (VII of 1870, s. 7 (x) (d) **31**

Court Fees Act—*contd.*

——— ——— **s. 7, sub-s. xi (cc)**—*Landlord and tenant—Suit by former for ejectment and rent—Stamp duty paid on one year's rent—Competency of Court to inquire into title—Transfer of Property Act (IV of 1882), ss. 58 and 83—Mortgage by conditional sale—Sale and rental agreement—Document of even date containing an undertaking to reconvey under certain conditions—Deposit in Court—Refusal to receive money—Whether, subsisting relation of landlord and tenant affected by deposit.*

Where in a suit for ejectment and arrears of rent by certain landlords against their tenants, the plaintiffs pay stamp duty calculated upon one year's rent only under section 7, (XI) (cc) of the Court Fees Act, of 1870, the Court will not go into the question of title.

Where, in a suit by landlords against their tenants for ejectment and for arrears of rent, the tenants pleaded that the transaction between the parties was only a mortgage by conditional sale, that they had deposited the mortgage amount in Court under section 83 of the Transfer of Property Act and that as the plaintiffs (the mortgagees) had refused to receive the same from the Court, they were debarred from suing for any rent subsequent to the date of such deposit and from ejecting the defendants:

Held, that the mere deposit of the amount in Court did not put an end to the already subsisting relation of landlord and tenant between the parties and that the plaintiffs were entitled to sue for possession and rent. **M.** BALASIDHANTAM *v.* PERUMAL CHETTI, 1 L. W. 641; 27 M. L. J. 475 **162**

——— ——— **Sch. I, Art. I** **316, 326**

——— ——— **Sch. II, Art. 17**—*Suit by claimant under s 283, Civil Procedure Code, 1882, Court-fees on—Value of quantum of interest claimed.*

In suits under section 283 of the Civil Procedure Code of 1882 the test for the purposes of the Court-fees is, what is the value of the quantum of interest which the plaintiff wishes to establish. **M.** NARAYANA SINGH *v.* AYYASAWMY REDDI, (1914) M. W. N. 910 **265**

Criminal Procedure Code (Act V of 1898), s. 1 (2) **910**

——— —— —— **ss. 4 (m), 476**—*Proceedings in execution, whether "judicial proceedings"—Sanction to prosecute—Guiding principle.*

The proceedings in execution are judicial proceedings within the meaning of the Criminal Procedure Code till they are finally disposed of by the Court

No Court should direct or sanction prosecution unless there is a reasonable probability of conviction. The opinion of the Court should be judicial opinion based on evidence and formed after a thorough inquiry into the matter. **N.** SHIOSHANKARPURI *v.* EMPEROR, 10 N. L. R. 177; 16 Cr. L. J. 161 **545**

——— ——— **s. 16**—*Trial by Bench of Honorary Magistrates—Difference of opinion—Benefit of doubt—Reference to District Magistrate, whether legal—Practice*

Where there is an irreconcilable difference of opinion between the members of a Bench of two Honorary Magistrates as to the guilt of an accused, they should follow the principle laid down by the Local Government for their guidance though not formally issued by the District Magistrate of their

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district under section 16 of the Criminal Procedure Code and, giving the benefit of the doubt, should acquit the accused.

A reference by a Bench of Honorary Magistrates on difference of opinion between them to a District Magistrate is irregular and not justified by any provisions of Criminal Procedure Code. A. KASHINATH v. SHANKAR RAM, 16 CR. L. J. 113 **177**

— **ss. 88, 386, 439**—*Attachment under s. 386—Revision incompetent—Claim, determination of—Criminal Courts, jurisdiction of.*

No revision lies against an order of attachment made under section 386 of the Criminal Procedure Code.

The principles applicable to attachments under section 88 of the Code apply equally to attachments under section 386.

The Code does not contain any provision for the trial of claims which may be preferred to property distrained under section 386, and when the Magistrate has acted under it, no further proceedings in the Criminal Courts are admissible. P. HIRA LAL v. EMPEROR, 28 P. L. R. 1915 **550**

— — — **ss. 94, 96**—*Document in possession of accused—Search warrant, Magistrate, power of, to issue—'Person', meaning of—Document or thing, whether limited to document or thing, which is the subject of offence—Inspection of documents found in search.*

Under section 96 of the Criminal Procedure Code, a Magistrate is competent to issue a search warrant for documents in possession of the accused, and such documents can, after production, be inspected by the prosecution or by any experts appointed by the Court in this behalf.

The words 'a person' in sections 94, 96, Criminal Procedure Code, include the person accused in the case, and the words 'document or thing' in the sections are general and cover *any* document the production or inspection of which is 'necessary or desirable' or will serve the ends of justice. There is nothing in the sections to limit their provisions to the finding of such documents or things only in respect of which the alleged offence may have been committed. P. MUNICIPAL COMMITTEE, JHANG v. MUHAMMAD HAYAT, 36 P. R. 1914 CR.; 16 CR. L. J. 225 **897**

— — — **s. 96** **897**

— — — — **s. 103** **910**

— — — — **s. 107**—*Jurisdiction of Magistrate to take action—Dispute as to immoveable property—Breach of the peace.*

The jurisdiction of a Magistrate to take action under section 107 of the Code of Criminal Procedure is not ousted merely because the breach of the peace relates to immoveable property. M. SUPPA THEVAN v. RAMASWAMI AIYAR, 16 CR. L. J. 211 **835**

— — — — **ss. 107, 145, 435** (3)—*Proceedings under Chapter XII by Magistrate duly authorised—Interference in revision—Proceedings under sections 107 and 145 not to be combined—Nature of information necessary for issue of process.*

Where proceedings are taken under Chapter XII of the Criminal Procedure Code by a Magistrate duly empowered under that Chapter, the High Court has no power to interfere in revision and cannot even enter into the question of the legality of the Magistrate's proceedings.

It is very undesirable to combine proceedings under section 107 with proceedings under section 145, and to act against both opposing parties in the same proceedings under section 107.

In order to enable a Magistrate to issue process under section 107, the information must be of a clear and definite kind directly affecting the person against whom process is issued, and it should disclose tangible facts and details, so that it may afford notice to such person of what he is to come prepared to meet. S. FARID v. PIRU, 8 S. L. R. 207, 16 CR. L. J. 235 **907**

— — — **s. 110**—*Bad livelihood—General repute, evidence of, nature of.*

Where security under section 110, Criminal Procedure Code, 1898, is taken from a person on the evidence of general repute only, that repute should be proved to be universal and there should be no doubt about it.

Therefore, where the only evidence against an accused is that of general repute and it is not universal, it is not safe to bind him over on such meagre and doubtful evidence. P. JHANDU RAM v EMPEROR, 48 P. W. R. 1914 CR.; 16 CR. L. J. 106 **154**

— — — **ss. 110, 121, 514**—*Forfeiture of security bond in a separate proceeding, when not allowed.*

If a Criminal Court, knowing that the person charged before it is under security to be of good behaviour, in sentencing that person in the case before it, makes no reference to any confiscation of that security and takes no steps towards its confiscation, it is not competent for that Court or any other Court in a subsequent and separate proceeding to take such steps. P. BEGA SINGH v. EMPEROR, 6 P. W. R. 1915 CR.; 16 CR. L. J. 194; 96 P. L. R. 1915 **754**

— — **s. 110**—*Obtaining decree by forged documents, whether cheating or extortion—Proceedings under s. 110, whether legal—Joint trial—Association in same offences.*

The obtaining of decrees by means of forged documents is neither cheating nor extortion as defined in the Penal Code. Therefore, persons habitually committing such acts cannot be proceeded against under section 110 of the Criminal Procedure Code.

Two accused cannot be tried together unless their association in the same offence is made out. P. EMPEROR v. CHUNI, 21 P. R. 1914 CR.; 16 CR. L. J. 136 **200**

— — — **s. 112**—*Order requiring sureties to be clear in its terms—Arbitrary standard—Reluctance to stand surety—Person, when satisfactory surety—Surety, rejection of.*

The object of the provisions of Chapter VIII of the Criminal Procedure Code is not to consign bad characters to jail, but to prevent them from committing offences to allay public apprehension.

An order under section 112 must be such that if a suspect have a *bona fide* intention to be of good behaviour, it will not be impossible for him to find sureties.

It is unfair to a suspect to call on him to produce sureties of a certain class and then to reject the persons offered because they do not conform to an arbitrary

standard not set up in the order. If the sureties offered come fairly within the terms of the order, they can only be rejected because they are personally unfit.

More reluctance to be surety constitutes no valid objection, unless the Magistrate is satisfied that the surety is, under what amounts to undue influence, undertaking a risk which as a reasonable and prudent man he would not take if a free agent.

A man is a satisfactory surety if he is in a position to ascertain how the accused is behaving and if he is also of such character and standing that he would not hesitate to apply for cancellation of his bond if he saw risk of forfeiture.

A surety should not be rejected merely because a Police Inspector informs the Magistrate that he is of bad character, when such rejection involves the committal of the accused to prison. **S.** MUHAMMAD IBRAHIM *v.* EMPEROR, 8 S. L. R. 178; 16 CR. L. J. 100 **148**

——— ——— ——— **S. 118**—*Proceedings pending—Some defence witnesses called upon to show cause why they should not be prosecuted under s. 193, Indian Penal Code—Accused prejudiced—Order, whether sustainable.*

Where proceedings under section 118, Criminal Procedure Code, were still pending against an accused, the Magistrate called upon some of the defence witnesses to show cause why they should not be prosecuted under section 193, Indian Penal Code, whereby the other defence witnesses were frightened and did not give evidence:

Held, that the action of the Magistrate was highly injudicious and was calculated seriously to hamper and prejudice the accused and the order under section 118 could not be sustained. **C.** KEDAR MULLICK *v.* EMPEROR, 16 CR. L. J. 114 **178**

——— ——— ——— **S. 121** **754**

——— ——— ——— **ss. 133, 137**—*Existence of hayricks on premises of petitioner—Conditional order under s. 133—Denial by petitioner that they are nuisance—Inspection of premises by Magistrate—No evidence taken—Order made absolute—Order, whether legal.*

In consequence of a representation from the respondent that the hayricks on the petitioner's premises were a nuisance and likely to cause conflagration, the Magistrate issued a conditional order under section 133, Criminal Procedure Code. The petitioner admitted the existence of the hayricks, but denied that they were a nuisance. The Magistrate from his own inspection decided that they were a danger to adjoining houses and made the order absolute without taking any evidence.

Held, that the Magistrate should not have made the order absolute on his own opinion formed by inspection, but should have called on the respondent to adduce evidence that the hayricks constituted a nuisance and the order must, therefore, be set aside. **M.** DORAISWAMY MUDALIAR *v.* SUDARSANA CHARIAR, 17 M. L. T. 142; 16 CR. L. J. 207 **767**

——— ——— ——— **S. 133**—*Removal of encroachment—No finding as to extent of encroachment or bona fides of claim—Order, whether proper—Encroachment, extent of, how ascertained.*

Where in a proceeding taken under section 133 of the Criminal Procedure Code, an order was passed for the removal of a house which was said to represent an encroachment or obstruction on a public way, but without any finding as to the extent of the encroachment or as to the claim not being made in good faith:

Held, that the order could not be sustained.

The extent of encroachment should be ascertained by re-laying the map on the ground or otherwise. **C.** BHAGAT PERSHAD *v.* RAMRUP KARMOKAR, 21 C. L. J. 116; 16 CR. L. J. 116 **224**

——— ——— ——— **S. 137** **767**

——— ——— ——— **S. 144**—*Cow-sacrifice—General order.*

Under section 144, Criminal Procedure Code, a District Magistrate can issue an order to the public generally who in certain particular circumstances cannot be individually addressed. Sub-section (3) of the section is intended to extend rather than to limit the scope of the order so as to include therein even casual or frequent visitors from outside the limits of the particular locality within which the order is to have application.

A general order issued by a District Magistrate to the effect that no person should sacrifice or cause to be sacrificed any cow or bullock within a certain specified boundary and period, is a legal order. **O.** ABDUL GAFUR *v.* EMPEROR, 16 CR. L. J. 190 **670**

——— ——— ——— **S. 144 (3)**—*Order directed to public at large—Operation not confined to particular place—Jurisdiction.*

An order of a District Magistrate, purporting to have been passed under section 144 of the Criminal Procedure Code, is made without jurisdiction if its operation is not confined to a particular individual or to the public generally when frequenting or visiting a particular place. **B.** BHAGUBHAI DWARKADAS *v.* EMPEROR, 16 BOM. L. R. 684; 16 CR. L. J. 98 **146**

——— ——— ——— **S. 145** **807**

——— ——— ——— **S. 145**—*Dispute likely to cause breach of the peace not mentioned in notice—Parties aware—Magistrate—Jurisdiction—Revision.*

Where there is a dispute likely to cause a breach of the peace and the parties are aware of it, the Magistrate is not ousted of his jurisdiction to act under section 145 of the Criminal Procedure Code simply because in the notice issued it is not stated that a dispute likely to cause a breach of the peace exists. **A.** RAM BEHARI *v.* MUNESHER, 16 CR. L. J. 224 **848**

——— ——— ——— **ss. 145, 146**—*Magistrate, duty of, to find who is in possession on date of his order—Previous possession, effect of—Order under s. 146, when ultra vires.*

Under section 145 of the Code of Criminal Procedure a Magistrate should find as to who is in actual possession of the property in dispute on the date of his order, not on any date anterior to that, although previous possession may be a guide to his finding peaceful and actual possession on the date.

An order under section 146, Criminal Procedure Code, would be *ultra vires*, unless the Magistrate records a finding that he is unable to find which party is in actual possession under section 145, Criminal Procedure Code. **M.** THUMBALABED HAMPANNA *v.* PARISI GANGAMMA, 16 CR. L. J. 239 **911**

——— ——— ——— ss. 145, 439—*Non-compliance with provisions of s. 145—Fatal defect—Revision.*

Where a Magistrate proceeding under section 145, Criminal Procedure Code, 1898, does not strictly comply with its provisions and fails to find that the dispute between the parties concerning the property in question is likely to occasion a breach of the peace, his order is without jurisdiction and bad in law and is, consequently, liable to be set aside on revision under section 439 of the said Code. **P.** TEKU v BUTA SINGH, 9 P. W. R 1915 Cr.; 16 Cr. L J. 206; 92 P. L. R. 1915 **766**

——— ——— ——— ss. 145, 356—*Order under s. 145—Procedure under s. 356 not complied with, effect of*

The provisions of sub-section (3), section 356, of the Criminal Procedure Code apply only to cases in which the evidence recorded under the first sub-section is not recorded in the Magistrate's own hand. The provisions of the first sub-section are imperative and where a Magistrate in a proceeding under section 145, Criminal Procedure Code, does not follow this procedure, his order cannot be sustained. **C.** SADAMANDA MANDAL v. KRISTA MANDAL, 42 C. 381; 19 C. W. N. 124; 16 Cr. L. J. 192 **672**

——— ——— ——— ss. 145, 517—*Property attached under s 145—Cancelment of order—Disposal of property—Proper order—Practice.*

Where, after attaching certain properties under section 145 of the Code of Criminal Procedure, the order was on inquiry cancelled on the ground that there was no immediate danger of a breach of the peace:

Held, that in such a case the Magistrate has no jurisdiction to direct that the attached properties should be delivered to one of the parties, as that would be in effect deciding the question at issue between the parties, and that he should keep them or their sale-proceeds, if perishable, in deposit until one of the parties establishes its right in a Civil Court.

Quære:—Whether section 517 of the Code of Criminal Procedure applies to such cases? **M.** CHENGA REDDI v RAMASAMY GOUNDEN, 1 L. W 1082; 16 Cr. L. J. 104 **152**

——— ——— ——— ——— s. 146 911

——— ——— ——— ——— ss. 155, 173—*Case not disposed of by order of Magistrate—Prosecution by Police under s. 211, illegal.*

The applicant gave to the Police information of a non-cognizable offence. The Police obtained the authority of a Magistrate as required by section 155 of the Criminal Procedure Code to investigate the case. The Magistrate directed that the Police should report to him. No report was ever made. Meantime, however, the Police instituted proceedings against the applicant under section 211 of the Penal Code and obtained his conviction.

Held, that the conviction was bad and must be set aside. Even if the Magistrate had not directed a report to be made, section 173 of the Criminal Procedure Code requires that it should be made The case was one that could not be disposed of without the order of the Magistrate in some form or another. **B.** APPA RAGHO BHOGLE v. EMPEROR, 17 Bom. L. R. 69; 16 Cr. L. J. 161 **545**

——— ——— ——— ss. 155, 190 (1) (b)—*Non-cognisable case reported by Police—Procedure—Police report.*

When a Magistrate receives a Police report in a non-cognizable case and has reason for doubting its correctness, he can order an investigation under section 155, Criminal Procedure Code, but he cannot examine the Police Officer who submitted the report as if he was a complainant.

A Police report in a non-cognizable case is a Police report within the meaning of section 190 (1) *(b)* Criminal Procedure Code. **U. B.** NGA SAW KE v EMPEROR, U. B. R. (1914) II, 19; 16 Cr. L. J. 97 **145**

——— ——— ——— ——— ss. 164, 288—*Evidence Act (I of 1872), ss. 145, 155—Accused, evidence to be used against—Admissibility in evidence—Contradiction of statements made in Court.*

Statements taken under the provisions of section 164, Criminal Procedure Code, and not covered by those of section 288, Criminal Procedure Code, are inadmissible in evidence against the accused, but admissible, under the provisions of section 145 and 155 of the Evidence Act, only for the purpose of contradicting the statements subsequently made in Court by the persons making those former statements. **O.** PUTTU v. EMPEROR, 1 O. L J. 758; 17 O. C. 363; 16 Cr. L J 132 **196**

——— ——— ——— ——— s. 173 545

——— ——— ——— ——— s. 190 (1) (b) 145

——— ——— ——— ——— s. 195—*Forgery, charge of—Sanction to prosecute, whether necessary.*

It is necessary for a party wishing to prosecute upon a charge of forgery committed in respect of a document produced in Court to obtain sanction of the Court under section 195 of the Criminal Procedure Code **A.** HARDEO PRASAD v. RAM SARUP, 16 Cr. L J 203 **763**

——— ——— ——— ——— s. 195 (1) (c)—*Bombay Land Revenue Code (Act V of 1879), ss. 189, 197—Mutation—Mamlatdar holding inquiry, whether Revenue Court—Record of Rights—Production of forged Will—Sanction to prosecute.*

A *mamlatdar* holding an inquiry under Chapter XII of the Bombay Land Revenue Code is a Revenue Court within the meaning of section 195, sub-section (1), clause (c), of the Criminal Procedure Code, and sanction is necessary in order to prosecute a person for an offence in respect of a document produced before the *mamlatdar* in the course of the inquiry. **B.** EMPEROR v. NARAYAN GANPAYA HAVNIK, 16 Bom. L. R. 678, 16 Cr. L. J. 99; 39 B. 310 **147**

——— ——— ——— s. 195—*Sanction to prosecute—Sanction, when not justified—Prima facie case, whether can be indicated in sanction order.*

A Judge is entitled to call for such records as he thinks would assist him in the exercise of his discretion, but he cannot sanction the prosecution of witnesses on inferences drawn against them from such records when they were not produced before or at the time of their deposition and when the witnesses were not given an opportunity to explain them.

Per *Napier, J.*—A *prima facie* case cannot be indicated against a person in the order sanctioning his prosecution **M.** KRISHNAMMA v. CHITTURI CHINNA, 17 M. L T. 15; (1915) M. W. N. 140; 16 Cr. L. J. 115 **179**

Criminal Procedure Code—contd.

——— ——— ——— ——— **s. 195**—*Sanction, whether granted without application—Defect of procedure or form in granting sanction, effect of.*

A Court can give a sanction under section 195 of the Criminal Procedure Code even if no application is made to the Court for it.

Per *Shah, J.*—Any defect of procedure or form in granting a sanction cannot convert the sanction into a complaint. **B.** *In re* SANGAPPA GADIGEPPA, 16 BOM. L. R. 947; 16 CR. L. J. 107 **155**

——— ——— **s. 195**—*Sanction for giving self-evidence—Court, duty of—Prosecution, desirability of, in public interests.*

In giving sanction to prosecute for giving false evidence, the Courts should not merely see that there is a good prospect of conviction, but should also consider whether the circumstances are such as to render a prosecution desirable in the public interests. **M.** *In re* NATTAVA PARANKUSAM, 37 M. 564 16 CR. L. J. 167 **551**

——— ——— ——— ——— **ss. 203, 259, 437**—*Dismissal of complaint for default—Second complaint on same facts, whether entertainable—Further inquiry—Discretion.*

A prior order of discharge does not bar the jurisdiction of the Magistrate to entertain a second complaint upon the same facts.

The mere fact that a complaint has been dismissed under section 259, Criminal Procedure Code, is not a sufficient ground for refusing to entertain a second complaint and dismissing it under section 203.

It is purely discretionary with a Court to order further inquiry under section 437, Criminal Procedure Code. **S.** BULCHAND TAHILRAM *v.* GHANDHOOMAL RAMRAKHIAMAL, 8 S. L. R. 196; 16 CR. L. J 174 **558**

——— ——— ——— ——— **ss. 235, 239**—*Charges, joinder of—Offences committed on different dates—Same transaction.*

Where certain persons were wrongfully confined by the accused, who fined them and realised a certain portion of the fines and released them on their promising to pay the balance of the fine three days later, but on their failing to do so they were again confined, maltreated and shoe-beaten and were turned out by the accused on being informed that the Police were coming.

Held, that as they were all confined for one purpose *i. e.*, for the purpose of extorting money, the whole thing was one transaction and that there was no misjoinder of charges if they were tried together. **C.** DEPUTY SUPDT. & REMB. OF LEGAL AFFAIRS *v.* KAILASH CHANDRA GHOSH, 19 C. W. N. 181; 16 CR. L. J. 120 **184**

——— ——— ——— **s. 239** **184**

——— ——— ——— **s. 243** **910**

——— ——— ——— **s. 247**—*Acquittal on date not fixed for hearing—Nullity—Jurisdiction of Magistrate to ignore acquittal and proceed with case.*

An order of acquittal passed under section 247, Criminal Procedure Code, on a date which was not fixed for the hearing, is a nullity and does not debar the Magistrate from taking up the case and trying the accused without an order from a superior Court to revive it. **C.** ACHAMBIT MONDAL *v.* MAHATAB SINGH, 18 C. W. N. 1180; 16 CR. L. J. 148; 42 C. 365 **212**

Criminal Procedure Code—contd.

——— ——— ——— ——— **ss. 250, 422, 423, 435 and 439**—*Compensation awarded against complainant for vexatious complaint by 2nd class Magistrate—Appeal to Sub-Divisional Magistrate—Order, whether can be set aside without notice to accused—Compensation, when should be awarded*

In all judicial proceedings where no specific rule as to notice exists, the rule "*audi alteram partem*" applies as a principle of natural justice.

An Appellate Court can alter or set aside, to the prejudice of an accused, an order awarding compensation to him under section 250 of the Code of Criminal Procedure only on proper notice to him.

An order under section 250 of the Criminal Procedure Code can be justified only when the Court finds not merely that the complaint was false but also that it was frivolous and vexatious. **M.** VENKATARAMA AIYAR *v.* KRISHNA AIYAR, 2 L. W. 200; 28 M. L. J. 204; (1915) M. W. N. 181; 17 M. L. T. 164, 16 CR. L. J. 128 **192**

——— ——— ——— ——— **s. 256**—*Accused, right of, to cross-examine prosecution witnesses after charge is framed—Magistrate, duty of—Omission to ask, effect of.*

The provisions of section 255, Criminal Procedure Code, are imperative and it is an illegality to ignore them.

It is not until a specific charge has been drawn up and explained to the accused that he is in a position fully to cross-examine the witnesses for the Crown and, therefore, he should in all cases be asked at that time if he wishes to re-call witnesses for cross-examination, for the omission to follow the procedure involves remand and re-trial of the case from the point of drawing up of the charge. **P.** MOOLA *v.* EMPEROR, 11 P. R. 1914 CR.; 16 CR. L. J. 146 **210**

——— ——— ——— **s. 259** **558**

——— ——— ——— **s. 288** **196**

——— ——— ——— **s. 337**—*Forfeiture of pardon—Formal withdrawal or declaration, whether necessary before prosecution—Accused, plea open to.*

Under the present Code of Criminal Procedure no formal withdrawal of a pardon and no formal declaration that the pardon has been forfeited are required. If the person who has accepted a conditional pardon be subsequently proceeded against, it is open to him to plead on his trial that the pardon has not in fact been forfeited, that is to say, that he has not violated the conditions on which the pardon was tendered and accepted. This then becomes one of the issues to be heard and determined at the trial. **C.** EMPEROR *v.* SABER AKUNJI, 19 C. W. N. 179; 16 CR. L. J. 120 **184**

——— ——— ——— **s. 339**—*Forfeiture of pardon—Practice.*

Where an accomplice forfeits the pardon offered to him, it is the duty of the Sessions Judge to record a finding as to the forfeiture. It is not enough that the Committing Magistrate does so. **M.** MADIGA POTHUGADU, *In re*, 16 CR. L. J. 284 **906**

——— ——— ——— **s. 356** **672**

——— ——— ——— **s. 386** **550**

——— ——— ——— ——— **ss. 399, 426**—*Order of detention, whether sentence—Reformatory Schools Act (VIII of 1897), ss. 8, 10—Sessions Judge, whether can suspend operation of order.*

Criminal Procedure Code—contd.

An order of detention passed by a District Magistrate under section 10 of the Reformatory Schools Act (VIII of 1897) is not a "sentence" within the meaning of section 426 of the Code of Criminal Procedure, nor is it a punishment enumerated in section 53 of the Indian Penal Code A Sessions Judge, therefore, has no power to suspend its operation under section 426 of the Code of Criminal Procedure. M. EMPEROR v. KRISHNA PANDARAM, 16 CR. L J. 134 198

——— s. 403—*Previous trial without sanction—Jurisdiction of Court to try accused on some facts after sanction—Registration Act (XVI of 1908), s. 82.*

Where the law requires a previous sanction to be given before a charge can be entertained by a Court, that Court is not a Court of competent jurisdiction until the sanction has been obtained.

An accused was placed upon trial for aiding and abetting forgery in connection with a document presented for registration and was acquitted. He was then placed upon his trial for aiding and abetting cheating in connection with the same transaction. He was convicted by the Magistrate but was acquitted on appeal. The District Registrar thereupon gave sanction for his trial for an offence under section 82 of the Registration Act. He was committed to Sessions and the Sessions Judge made a reference to the High Court suggesting that section 403 of the Criminal Procedure Code was a bar to his trial

Held, that the former trial of the accused for the offence of aiding and abetting forgery was in no way a bar to his trial for an offence under the Registration Act, nor was his trial and acquittal of the offence of aiding and abetting the cheating a bar by reason of clause 4 of section 403 of the Criminal Procedure Code as at the former trial the Court was not competent to charge with or convict or acquit of the offence with which he was subsequently charged by reason of the want of sanction. A. EMPEROR v. JIWAN, 13 A. L. J. 431; 16 CR. L. J. 144; 37 A. 107 208

——— ss. 422, 423 192

——— s. 426 198

——— s. 435 192

——— s. 435 (3) 907

——— s. 436—*Discretion of Sessions Judge—Power of High Court to interfere.*

A High Court should be slow to interfere with the exercise of the very wide discretion with which Sessions Judges have been invested under the provisions of section 436 of the Code of Criminal Procedure. A. MANGAT RAI v EMPEROR, 13 A. L. J. 111; 16 CR L. J. 139 203

——— s. 437 558

——— s. 437—*Further inquiry—Discharge after fully considering whole evidence—Notice to accused.*

An order of further inquiry under section 437, Criminal Procedure Code, 1898, is improper and is liable to be set aside on revision if the whole evidence on the record has been duly considered and the order of discharge is not manifestly perverse or foolish, etc.

Although before directing further inquiry notice to the accused is not absolutely necessary, yet according to the general principle of criminal jurisprudence an order to the prejudice of an accused should not ordinarily be passed without giving him an opportunity of being heard. P. SITA RAM v. EMPEROR, 4 P. W. R 1915, 130 P. L. R. 1915; 16 CR. L. J. 214 838

Criminal Procedure Code—contd.

——— s. 439 192, 205, 550, 762, 766, 840, 902

——— ss. 439, 476—*Order of prosecution—Interference in revision.*

The High Court has no power under section 439 of the Criminal Procedure Code to interfere in revision with an order made by a Civil Court under section 476, Criminal Procedure Code M. MANNER CHETTI, *In re*, 17 M. L. T. 268; 16 CR. L J. 282 904

——— s. 439—*Revision by private prosecutor against order of acquittal—High Court, jurisdiction of, to set aside acquittal—Practice.*

Per *Jenkins C. J.*, and *Fletcher, J.*—A High Court has jurisdiction to set aside on revision an order of acquittal at the instance of a private prosecutor but it should ordinarily exercise this jurisdiction sparingly and only where it is urgently demanded in the interests of public justice.

Per *Teunon, J.*—A High Court has ample jurisdiction, under section 439, Criminal Procedure Code, to interfere with an acquittal and remedy the wrong, if wrong has been done. Section 439 is expressed in the widest terms and vests in the Court an absolute and unqualified discretion which cannot be restricted by any series of decisions. C. FAUJDAR THAKUR v. KASI CHOUDHURI, 19 C. W. N. 184; 21 C. L. J. 53; 16 CR. L. J. 122 186

——— s. 476 545, 904

——— s. 476—*Court—Successor in office.*

The expression "Court" in section 476 of the Criminal Procedure Code includes the successor in office. A. MUHAMMAD IBRAHIM v. EMPEROR 12 A L. J. 1003; 16 CR. L. J 97 145

——— s. 476—*District Registrar, whether Court—Jurisdiction.*

A District Registrar, as provided in section 195 of the Criminal Procedure Code is not a "Court" and has, therefore, no jurisdiction to make an order under section 476 of the Code.

Obiter dictum:—What is declared not to be a "Court" for the purpose of section 195 is also not a Court for the purpose of section 476 B. MANKU BALA PATIL, *In re*, 16 BOM. L. R 946, 16 CR. L. J 106 154

——— s. 476—*Order to prosecute—Charge to be clearly specified—Power of Magistrate to order prosecution under s. 182, Indian Penal Code.*

An order under section 476, Criminal Procedure Code, should specify clearly the exact charges against the accused.

The mere fact that no sanction is necessary for a prosecution under section 182, Indian Penal Code, does not deprive a Court of jurisdiction to order that prosecution under section 476, Criminal Procedure Code. S. EMPEROR v. KHUBCHAL, 8 S. L. R. 179; 16 CR. L J. 104 152

——— s. 488—*Maintenance of children—Mother dissuading children from father's custody to enable her to claim their maintenance—Father, liability of.*

Criminal Procedure Code—contd.

Where a father has custody of his minor children and is maintaining them properly, the mere fact that they go and live with their mother would not make him liable to be charged for maintenance under section 488, Criminal Procedure Code, though he refuses to maintain them unless they return to his custody. **L. B.** MA SHWE HMYIN *v.* MG. PO CHAT 16 CR. L. J. 217 **841**

——— ——— ——— **ss. 497, 498,** *scope of — Confession of one of accused materially corroborated as to others—Bail, whether to be granted to others.*

The rule laid down in section 497 of the Code of Criminal Procedure, 1898, for the guidance of Courts other than the Hight Court is a rule founded upon justice and equity and one which should be followed by the High Court as well as by every other Court subordinate to it, unless anything appears to the contrary.

The extended powers given to the High Court under section 496 of the Criminal Procedure Code are certainly not to be used to get rid of the very reasonable and proper provisions of section 497 of the Code.

Where one of the accused, under sections 307 and 337 of the Penal Code, made a confession implicating himself and the petitioners and the confession was corroborated by such of the evidence as was recorded by the Magistrate who was inquiring into the case, the High Court refused bail, holding that the evidence put forward was such that if believed it would amount to material corroboration of the confession. **C.** ASHRAF ALI *v.* EMPEROR, 42 C. 25, 16 CR. L. J. 215 **839**

——— ——— ——— ——— **s. 498** **839**

——— ——— ——— **s. 514** **754**

——— ——— ——— **s. 517** **152**

——— ——— ——— ——— **s. 517**—*Complaint of theft dismissed—Dispute as to ownership of property—Order, proper form of.*

Where a complaint of theft brought on behalf of a *talukdar* against his tenant in respect of some fallen trees which the tenant had cut down and taken is dismissed on the ground of uncertainty of ownership, the proper order to be passed with regard to the wood is that it should be sold, if it has not been already sold, and the proceeds should be retained by the Court until they are shown to be payable to one or other of the parties, either in virtue of a decree of Court or in virtue of an agreement amongst themselves. **B.** VISA SAMTA, *In re*, 16 BOM. L. R. 951; 16 CR. L. J. 111 **159**

——— ——— ——— ——— **ss. 523, 524**—*No offence proved in respect of property—Possessor unable to prove how he acquired it—Order for disposal of property.*

K was suspected of having been concerned in a theft. On search of his house a considerable quantity of jewelry and money was found and was taken possession of by the Police Inquiry, however, showed that there was no definite evidence of guilt against *K*, nor was any of the property found in the house claimed by any one else although steps were taken under section 523, Criminal Procedure Code, to give others the opportunity to claim it. *K* was unable to show that it was legally acquired by him and consequently the Magistrate ordered that the property should be at the disposal of the Government:

Held, that having regard to the words of sections 523, 524 of the Criminal Procedure Code it could not be said that the Magistrate's proceedings were illegal, but in the circumstances of the case the intention and spirit of these sections had been disregarded, and the order made by the Magistrate should be set aside. **B.** KARAPPA CHANBASAPPA, *In re*, 17 BOM. L. R. 79; 16 CR. L. J. 207 **767**

——— ——— ——— **s. 524** **767**

——— ——— ——— ——— **s. 524**—*Seizure by Police of property—Presumption in favour of possessor—Evidence Act (I of 1872), s. 110.*

The words "is unable to show that it was legally acquired by him" in section 524 of the Criminal Procedure Code must be read consistently with the ordinary Law of Evidence, and not as intended to supersede anything in that law.

Where on a proclamation being issued under section 523 no one except the accused claims to be the owner of the property attached and no evidence is adduced to show clearly that the claim is false, the proper and safest course for the Court is to follow the presumption laid down in section 110 of the Evidence Act and to hold the accused as the owner in the absence of proof to the contrary. **S.** ASLUM *v.* EMPEROR, 8 S. L. R 141; 16 CR. L. J. 138 **202**

——— ——— ——— ——— **s. 526**—*Transfer — Necessity of trying Magistrate's evidence—Burden of proof.*

An application for transfer based on the ground that the evidence of the trying Magistrate is necessary for the defence, cannot be entertained unless it is clearly shown that the evidence is really essential and that there is likelihood that he can give evidence which would aid the accused in his defence. The burden of proof lies very heavily on the applicant to show that such is the case. **S.** NABIBUX KHAN AHMEDKHAN *v.* EMPEROR, 8 S. L. R. 170; 16 CR L J. 222 **846**

——— ——— ——— ——— **s. 528** **837**

——— ——— ——— ——— **s. 537**—*Penal Code (Act XLV of 1860), ss. 182, 211—Trial for an offence under s. 182—Facts alleged showing offence under s. 211—Conviction, whether to be set aside—Prosecution for minor offence, whether legal*

A Sessions Judge is not justified in ignoring the provisions of section 537, clause (*b*), of the Criminal Procedure Code in setting aside on appeal, without going into the merits of the case, a conviction for an offence under section 182, Indian Penal Code, on the ground that the facts alleged disclosed the commission of an offence punishable under section 211 of the Indian Penal Code, for which no sanction as required by the Code was taken.

It is perfectly legal to prosecute for the minor offence under section 182, Indian Penal Code, when it is doubtful whether the facts alleged constitute a graver offence under section 211, Indian Penal Code. **A.** GUR BAKSH SINGH *v.* KASHI RAM, 18 A. L. J. 53; 16 CR. L J. 169; 37 A. 110 **223**

——— ——— ——— **s. 540**—*Witness—Examination of witnesses—Magistrate, whether can exercise discretion in selection of witnesses—Practice,*

Criminal Procedure Code—concld.

Magistrates should always be chary of taking upon themselves the duties of deciding on behalf of the parties which witnesses should be examined. **M.** DUGGIRALA VENKATAPPAYA *v.* MULPURI VENKATRAMAMAYYA, 28 M. L. J. 134; 16 CR. L. J. 156 **220**

Cross-objections, whether can be taken against a co-respondent **323**

Custom. *See* PRE-EMPTION.

——— *Chanda District—Cultivation of sugarcane* —Lambardar, *right of, to take land out of possession of any tenant.*

In Chanda District there is an old established village custom as regards the taking of land by a *lambardar* out of the possession of any tenant for cultivation of sugarcane and the deduction to be made therefor. **N.** GANGADHAR RAO *v.* RAJANNA **502**

——— Family custom—Pachete Raj—Maintenance grant, nature of—Impartible estate, alienability of—Equitable interest, value of—*Punundar* under grantor of maintenance—Grantor, right of, against grantee—Transfer of Property Act (IV of 1882), s. 43, scope of **982**

——— *Kalighat* palas, *whether transferable in limited market—Heritable and partible and devisable —Alienation of a religious office, when permissible—Essentials of a valid custom—Immemorial existence of custom—Presumption—Reasonableness of custom—Inconsistency with general law—Mortgagor setting up title of third person—Estoppel—Trustee mortgagor—No estoppel where mortgage void as contrary to Statute—Mortgage of intangible property—Foreclosure*

According to custom the *palas* or turns of worship of the Kalighat shrine are transferable in the limited market of hereditary *shebaits* by blood or marriage

The custom is a valid one.

A *pala* of the Kalighat temple is heritable, and it is immaterial whether the heir is a male or a female. It is also partible and devisable

Though probably religious offices were originally indivisible, they are now deemed partible.

In the absence of a custom or usage to the contrary or any term to that effect in the deed of endowment, a religious trust, or the right of management of a religious or charitable endowment or a religious office attached to a temple or any other endowment cannot be alienated by the holder.

But an alienation of a religious office may be made in favour of a person standing in the line of succession and not disqualified by personal unfitness.

A custom to be valid, (1) must be immemorial, (2) must be reasonable, (3) must have continued without interruption since its immemorial origin and (4) must be certain in respect of its nature generally as well as in respect of the locality where it is alleged to obtain and the persons whom it is alleged to affect.

Evidence showing exercise of a right in accordance with an alleged custom as far back as testimony can go, raises the presumption, though only a rebuttable presumption, as to the immemorial existence of the custom.

The period of ascertaining whether a particular custom is reasonable or not, is the time of its possible inception. It is sufficient if no good legal reason can be assigned against it.

Custom—contd.

Since customs in general involve some inconsistency with the general common law of the realm or are contrary to a particular maxim, the fact of this inconsistency is not of itself a ground for holding the custom unreasonable and bad.

Per *Mookerjee, J*—A mortgagor cannot set up against his mortgagee the title of a third person especially in view of his express declaration in the mortgage deed that no objection on his part or on behalf of his heirs or representatives shall be maintainable. Even a trustee cannot set up as a defence for himself against the mortgagee that the property mortgaged is trust property which he had no right to mortgage. The principle, however, is inapplicable when the mortgage is void as contrary to Statute.

A mortgagee of *palas* is a mortgagee of intangible property, and is entitled to foreclose the mortgage quite as much as a mortgagee of chattels, or a mortgagee of land. **C.** MAHAMAYA DEBI *v.* HARIDAS HALDAR, 20 C. L. J. 183; 19 C. W. N. 208 **400**

——— **Adoption**—*Appointment of heir—Alienation by appointee—Appointee's son whether competent to contest—Hindu Law—Ancestral property—Property ancestral* qua *grandson if it descends to son.*

The son of an appointee, whether born before or after the appointment of his father, is incompetent to contest an alienation by his father of the property received from the appointer

Property, whether ancestral or self-acquired of the appointer, received by the appointed heir, cannot be regarded as ancestral *qua* the latter's sons. But if it once descends to, or comes into the hands of the appointee's son, then it would be ancestral *qua* the grandson.

The ceremonial adoption of Hindu Law and the customary appointment of heir distinguished from each other, and ancestral property defined and explained. **P.** MEHRA *v.* MANGAL SINGH, 99 P. R. 1914; 8 P. W. R. 1915, 71 P. L. R 1915 **393**

——— **Occupancy holding**—Will **352**

——— **Rent**—Custom not to pay rent for land remaining fallow, whether improper **872**

——— **Succession**—Bhakral Rajputs *of Gujarkhan* Tahsil, *Rawalpindi District—Widow, her caste immaterial—Collaterals.*

The survivor of the two widows of a sonless *Bhakral Rajput* of Mauza Deir, Gujarkhan Tahsil, Rawalpindi District, is entitled, whatever her caste or rights as against a co-widow may be, to hold her deceased husband's property for life, and so long as she lives, no collateral can claim possession of that property. **P.** HASSAN KHAN *v.* BANO, 15 P. R 1915; 46 P. L. R 1915 **535**

——— *Custom or Muhammadan Law—Succession—Arains of Lahore depending on agriculture.*

The parties were *Arains* by caste, and resided in the Lahore City, but they owned land in the neighbourhood of the City, and cultivated their own land, and admittedly depended entirely upon agriculture for their living:

Held, that in these circumstances, seeing that the parties are members of a large agricultural tribe, custom and not the *shara* governed the parties in matters of succession. **P.** MUHAMMAD DIN *v.* AHMAD DIN, 31 P. L. R. 1915; 26 P. R. 1915 **577**

Custom—concld.

———— **Succession**—*Exclusion of daughter from inheritance*—Balayan Jats *in Meerut Division.* There is no custom excluding a daughter from inheritance among *Balayan Jats* in Meerut Division. **A.** NIADRI *v.* KURA, 13 A. L. J. 91 **707**

———— ———— ———— Religious office—Women, right of, to inherit and get services performed by proxy—Legality **440**

———— ———— ———— *Sister*—Kureshi Sheikhs *of Gohana in Rohtak District—Collateral of fourth degree not excluding sister—Presumption of following personal law in case of residents in town—Punjab Laws Act (IV of 1872), s. 5.*

Where the parties belonging to a non-agricultural tribe reside in a town and do not till land with their own hands and mostly live on Government service, the presumption is that they follow their personal law in matters of inheritance, and the onus of proving any particular custom against it lies on the person asserting such custom.

The fact that among them there are instances of exclusion of daughters by sons, of sisters by brothers and of succession of widows in the absence of sons, does not raise the presumption that in all matters their personal law has been superseded.

No custom among *Kureshi Sheikhs* of the town of Gohana in the District of Rohtak by which a collateral of the fourth degree excludes a sister from succeeding to her brother's estate was proved in this case. **P.** AYAZ-UD-DIN *v.* MAHFUZUNNISSA, 3 P. W. R. 1915, 32 P. L. R. 1915 **542**

Dacoity—*First report—Subsequent evidence of identification of dacoits—Corroboration.*

Where in the first report only two dacoits are alleged to have been recognised at the time of committing the dacoity, subsequent evidence that they were all identified cannot be relied upon unless there is a strong corroboration to support it. **P.** NUR KHAN *v.* EMPEROR, 8 P. W. R. 1915 Cr.; 16 Cr. L. J. 204; 93 P. L. R. 1915 **764**

Damages—Breach of contract—Compensation **503**

———— Breach of contract—Insolvent estate, transferee from purchaser of, right of, to sue for damages **115**

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Decision on merits, when not—Competent jurisdiction, Court of **386**

Decree. *See* EX PARTE DECREE.

———— *Consent decree, how varied.*

A decree made by consent can only be varied by consent. **B.** BAPU VITHAL, 16 BOM. L. R. 670 *note* **134**

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————Property sold subject to mortgage lien—Mortgage lien, order for, not contested within a year—Suit by mortgagee—Defence—Fraud—Purchaser, whether entitled to contest mortgage as fraudulent **238**

Defamation. *See* PENAL CODE, s. 499.

Dekhan Agriculturists' Relief Act (XVII of 1879), ss. 2 (4), 64—*"Money" whether includes cattle—Creditor receiving bullo from agriculturist—Duty to give receipt.*

Money as defined in section 2 (4) of th Dekkhan Agriculturists' Relief Act includes cattle and a creditor purchasing bullocks from an agriculturist is bound to give a receipt as require by section 64 of the Act. **B.** EMPEROR *v.* GOVINDA BABAJI BABDE, 16 BOM. L. R 683; 16 CR. L. J. 114 **178**

———— ———— ———— **ss. 15D, 16**—*Mortgage transactions — Subsequent money-dealings — Claims for both accounts not to be combined.*

Under section 15D of the Dekkhan Agriculturists Relief Act, a suit for an account may be filed by a mortgagor-agriculturist even where the time named for payment has not yet expired under the mortgage, and he may have either a declaration o the amount due on the mortgage or he may combine a declaration of the amount due with a decree for redemption.

Section 16 enables him to sue for a general account of money dealings between him and the lender and for a bare declaration of the amount due, without any relief being claimed.

But he is not permitted to import the relief to which he is entitled by way of redemption under section 15D into his claim for an account under section 16, and thus to get the benefit of surplus profits remaining in the hands of the mortgagee under the usufructuary mortgage. **B.** LAXMANDAS HARAKCHAND *v* BABAN BHIKARI, 16 BOM L. R. 71; 39 B 73 **59**

———— ———— ———— **s. 48** **101**

———— ———— ———— **s. 64** **178**

Deposit, whether can be made by cheque **656**

Discretion of Court—Discretion must be legal and regular **967**

———— ———— Further enquiry **558**

———— ———— ———Reference to High Court—Decision on merits **972**

Divorce Act (IV of 1869), ss. 22, 31—*Divorce, petition for, by wife—Adultery and desertion —Delay in petitioning, when cured—Desertion and delay, meaning of.*

A wife, who was made to believe by her husband that he would be coming back to her, but who afterwards discovered that he had taken another woman and had in fact abandoned her, is entitled to a divorce though she delayed in presenting her petition for divorce, specially when she believed

Divorce Act—concld.

that she had to wait for three years before filing the petition instead of two years from the date of abandonment.

Desertion under the Divorce Act implies an abandonment against the wish of the person charging it, but it is not a universal rule that the abandonment must be against the expressed wish of that person.

Delay intended by section 31 of the Divorce Act must be understood to be culpable delay somewhat in the nature of connivance, condonation or acquiescence. **L. B. Ma Array** v. Mg. E. Po, 8 Bur. L. T. 32 **604**

——— ——— ——— ——— **s. 31** **604**

——— ——— ——— **s. 37** — *Maintenance—Power to award lump sum—Interpretation of Statutes—Punctuation, when taken into consideration.*

Under section 37 of the Divorce Act, the Court has power to make an order for payment of a lump sum for permanent maintenance.

The words 'for any time not exceeding her own life' in the section qualify 'annual sum' and do not qualify 'gross sum.'

The word 'secure' would ordinarily include 'pay.'

There can be no reason for refusing the assistance of the punctuation, where the sense might otherwise be doubtful, in Acts of the regularly constituted Legislatures of India. **B. Taylor, B. S.** v **Bleach, C. G.**, 17 Bom L. R. 56, 39 B. 182 **494**

Document—*Genuineness—Co-owner in possession—Intention to cheat co-owners, whether extinguishes title—Ouster—Adverse possession—Prescription.*

When a document is held by a Court of Justice to be 'genuine', what is intended to be held, and in fact is held, is that the document was duly executed and that it is an operative document.

Mere mental determination of a co-owner holding possession to cheat his fellow-owners is insufficient in law for extinguishing the title of the other co-owners. His possession being in law possession of all the co-owners, it is not possible to put an end to that possession by any secret intention in his mind, and nothing short of ouster or something equivalent to ouster can bring about that result.

Therefore, when there is no ouster or equivalent of ouster, the title is not extinguished. **C. Bibi Bakhtun** v. **Ahmad Ishaque** **1**

Dower. *See* Muhammadan Law.

Easements Act (V of 1882), s. 4—*Consideration paid, nonetheless an easement.*

The mere fact that the owner of the dominant tenement paid something to the owner of the servient tenement periodically for the enjoyment of the right to do something upon the servient tenement is not inconsistent with the right claimed coming under the definition of "easement". An easement right can be conferred by the owner of the servient tenement for cash consideration and whether that cash consideration takes the shape of a sum paid once for all or paid from time to time cannot make any difference in the legal nature of the right conferred on the dominant tenement. **M. Chengalvala** v. **Madapati**, 2 L. W. 27; (1915) M. W. N. 37 **920**

Eastern Bengal and Assam Tenancy Act (I of 1908) **729**

Ejectment. *See* Landlord and Tenant.

——— ———, notice of, cancellation of—*Prima facie* case of under-proprietary rights to be established **175**

——— ———, notice of, cannot be for part of holding **382**

——— ———, *notice of, validity of—Statutory period, computation of.*

Where with reference to the *patta* and *kabuliat* the statutory period of a tenant was to expire in June 1913, while the notice of ejectment served upon him required him to vacate his holding in May 1913.

Held, that the notice was perfectly good in law inasmuch as the time for ejectment fixed by the Oudh Rent Act is with a view to enable both the landlord and the tenant to make their arrangements, respectively, in time for the next year. **U. P. B. R. Lachhman** v. **Kandhai Prasad**, 1 O. L. J. 741 **68**

———, *whether by notice or by suit—Perpetual lessee, not liable to ejectment by notice—Oudh Rent Act (XXII of 1886), s. 69.*

A perpetual lessee cannot be ejected by notice. The landlord must proceed against him by suit, as provided in section 69 of the Oudh Rent Act. **U. P. B. R Lal Munnehar** v. **Gaya Bakhsh**, 1 O. L. J. 731 **407**

———Person entitled to half share, whether can get one from whole **228**

———, suit for—Notice to quit **45**

———, *suit in—Possession under oral lease for fixed term, if valid as defence.*

It is not open to a purchaser of immoveable property to eject a tenant who is in possession under an oral agreement to lease for a fixed term which he can specifically enforce, if the purchaser had notice of the terms of the tenancy and he or his predecessor-in-title had accepted rent from the tenant on such a footing. **M. Cunniah Chetti** v. **Elamanda Chetti**, 2 L. W. 152 **877**

Electricity Act (III of 1903), s. 39 **591**

Encroachment. *See* Alluvion and Diluvion.

———, extent of, how ascertained—Removal of encroachment—No finding as to extent of encroachment or *bona fides* of claim—Order, whether proper **224**

Encumbrance on part of holding, whether encumbrance on whole—Bengal Tenancy Act (VIII of 1885), ss. 86 (6), 88 **564**

Enhancement. *See* Bengal Tenancy Act, s 103A.

——— ——— of rent. *See* Oudh Rent Act, s 33.

———Rent, distribution of **49**

Equity—Consideration—Third party, right of, to sue—Plaintiff not privy to contract—Defendant, liability of, when arises **737**

Equity—concld.

———Fraudulent transfer—Suit for declaration—Fictitious proceedings—Fraudulent confederate, when entitled to retain property fraudulently transferred to him—Suit, if for specific performance—Limitation—Civil Procedure Code (Act XIV of 1882), s. 317, applicability of **230**

——— **of redemption.** *See* MORTGAGE.

Estoppel. *See* EVIDENCE ACT, s. 115; RES JUDICATA.

———, equitable, whether creates jurisdiction **11**

——— *Holdings, separate, treated as one—Landlord, action of—Ejectment, notice of, cannot be for part of holding.*

Where a landlord has once treated the separate holdings of a tenant as one, by including all of them in one and the same suit for arrears of rent, he is estopped from subsequently issuing a notice of ejectment in respect of some only of those holdings.

In Oudh a notice of ejectment cannot be for a part of a holding. **U. P. B. R.** TULSHA DEI *v.* MAHABIR, 1 O. L. J 722 **382**

——— by judgment—Compromise—Relief claimed in plaint not dealt with in compromise—Fresh suit, whether barred—Cause of action **708**

——— *Evidence Act (I of 1872), s. 115—"Omission," interpretation of—Property decreed to be sold—Party having lien on property—Charge not notified in sale-proclamation—Auction-purchaser, position of—Civil Procedure Code (Act V of 1908), O. XXI, r. 66.*

The doctrine of estoppel cannot be said to rest absolutely upon any notice of duty on the part of the person sought to be estopped; and the word "omission" used in section 15 of the Evidence Act does not mean only an omission to perform such a duty as is prescribed by law.

If a party to a suit having a charge or incumbrance on the property in suit ordered to be sold fails to have that charge or incumbrance notified in the sale-proclamation, he is estopped from subsequently setting up his lien against the auction-purchaser **O.** MANIK RAM *v.* RAM AUTAR, 2 O. L. J. 22 **611**

——— between lessor and lessee—Erroneous representation, to create estoppel, must be believed in good faith and after due inquiry—Privies, rights and liabilities of—Classes of privies **785**

———Partnership—Manager's statement as to date of dissolution **69**

———Partnership—Money deposited with Manager of business not in course of business—Liability of proprietors **252**

——— Receipt of dividends—Registered holder of share, rights and liabilities of **335**

———Testator and legatee—Heir-at-law of *raiyat*, whether estopped from questioning validity of gift by *raiyat* **235**

———Trustee mortgagor—No estoppel where mortgage void as contrary to Statute—Mortgage of intangible property—Foreclosure **400**

Evidence—Accomplice—Evidence before Committing Magistrate retracted in Sessions Court, admissibility and credibility of—Evidence of identification, value of **905**

——— *Accused absconding after occurrence—Identification of accused.*

The accused was convicted of murder. It was found proved that the deceased was shot by the accused at night by a gun or a pistol while he was sleeping on the roof of the house adjoining his own. The principal witness was the wife of the deceased who was sleeping close by. She stated that when the shot was fired she awoke, opened her eyes and by the flash of the fire-arm recognized the accused who ran away. She at once raised her cries to the effect that the accused had killed her husband. The husband of a sister of the deceased, who was sleeping on his roof on the other side of the lane, stated that he heard a shot and then cries of deceased's wife and then going down from the roof of his house, he recognized the accused. Another witness who lived at a distance of 500 *karams*, deposed that having heard the cries he was going to the spot when he met the accused on the way. Other evidence was to the effect that after the occurrence the accused absconded from the village.

Held, that the evidence as to identification was insufficient and the fact of accused's absconding was not inconsistent with his innocence, as he might have run away in fear knowing that an incorrect accusation had been brought against him. **P.** AHMAD *v.* EMPEROR, 4 P. L. R. 1915; 2 P. W. R. 1915 Cr.; 16 Cr. L. J. 155 **219**

———Burden of proof—*Pardanashin* lady—Power-of-attorney—Document executed by Agent, claim on basis of **610**

———, circumstantial—No direct evidence—Conviction, whether legal **755**

——— ——— Collector's certificate, value of **14**

——— ——— Compromise, agreement of—Some terms not relating to suit—Decree incorporating whole agreement, whether admissible in evidence—Agreement, whether requires registration—Evidence—Admissibility of such agreement—Adverse possession, nature of possession necessary to create **640**

——— ——— of consent—Hindu Law—Hindu widow, alienation by—Legal necessity—*Onus probandi*—Consent of reversioners—Attestation by nearest contingent reversioner, effect of **674**

——— ———Dower, verbal contract of—Proof **113**

——— ——— ———Endorsement by Registering Officer **478**

——— ———Failure to object to statement of accounts—Evidence of correctness **309**

——— ——— fresh—Documentary evidence, admissibility of, at late stage—Court, discretion of **516**

——— ——— ——— General repute, evidence of, nature of **154.**

——— ——— of identification, value of **905**

——— ——— ——— *Land revenue reports, whether admissible in evidence—Judicial notice.*

Evidence—concld.

A Court is not entitled to take judicial notice of land revenue reports, and they cannot be admitted in evidence, unless they are proved satisfactorily. **C.** BOODHAN GOPE *v.* SAIRA, 20 C. L. J. 516 **470**

——— *Lekha bahi*, entries in, when reliable by themselves **581**

——— Possession—Suit on ground of dispossession **977**

——— Private land, determination of—Onus **50**

——— Prosecution, duty of, to prove their own story—Weakness of defence, effect of—Right of private defence—Benefit of doubt—Practice **216**

——— recorded in another proceeding, Judge, whether entitled to decide a question on **704**

——— taken on remand—Appellate Court, power of, to interfere in second appeal **827**

——— *Statement made to Police officer, admissibility of.*

A statement by a Police officer to the effect that certain persons made certain statements to him is not admissible in evidence, unless it is evidence of general repute. **A.** CHAINSUKH *v.* EMPEROR, 16 CR. L. J. 221 **845**

——— Thumb impression — Expert opinion, value of **203**

——— Track evidence, value of **846**

——— Will—Testamentary capacity—Opinions of witnesses as to competency, value of **276**

——— Will not proved in Probate Court, when can be used as evidence **739**

Evidence Act (I of 1872), ss. 6, 122—*Hearsay evidence—Statement by by-stander—Husband and wife, communications between.*

A statement by a person alleged to be the eye-witness of a murder made to persons who came to the scene of occurrence after the murderers had left the place, cannot be proved against the accused for the purpose of showing that their names were mentioned as murderers.

In order to make the statement of a by-stander admissible, it must have been made, as contemplated by section 6 of the Evidence Act and illustration (*a*) to it, at the time the transaction was taking place, or so shortly before or after it as to form part of the transaction. If the transaction has terminated and then the statement is made, the statement is irrelevant. The admissibility is dependent on continuity.

The evidence of the wife of the accused as to certain communications between her and her husband is inadmissible under section 122 of the Evidence Act. **P.** JOWALA SAHAI *v.* EMPEROR, 34 P. R. 1914 CR.; 15 CR. L. J. 184 **664**

——— **ss. 11, 32**—*Statements as to date of birth by person who is dead—Admissibility of such statement.*

A statement by a person who is dead made in a petition for guardianship to the effect that a certain person was born on a certain date, not being a statement relating to the existence of any relationship by blood, marriage or adoption, is not admissible under section 32 of the Evidence Act. Nor does section 11 cover a statement of this kind. **C.** RAM KRISHNA SADHUKHAN *v.* MONINDRA MOHAN RAY, 20 C. L. J. 302 **30**

Evidence Act—contd.

——— **s. 30**—*Retracted confession of co-accused, value of—Corroboration necessary for conviction.*

A retracted confession of a co-accused is admissible under section 30 of the Evidence Act and may be taken into consideration against him, but a conviction cannot be based on it unless it is corroborated in material particulars by other evidence. **P.** MUHAMMAD *v.* EMPEROR, 3 P. L. R. 1915; 3 P. W. R. 1915 CR., 16 CR. L. J. 157 **221**

——— **s. 32** **30**

——— **s. 32 (2)**—Pyatbaings—*No documents of title—Revenue Surveyor's report not signed by transferors, probative value of—Transfer of Property Act (IV of 1882), s. 41—Purchase from ostensible owner—Inquiry by purchaser.*

A Revenue Surveyor's reports though admissible under section 32 (2) of the Evidence Act have very little probative value when they are not signed by the transferors and are not supported by the evidence of persons who purport to sign them as witnesses.

To claim the protection afforded by section 41 of the Transfer of Property Act, the purchaser must prove that he inquired as to who was in actual possession of the land for 12 years before purchase, and should not assume that his vendor is the true owner merely on the strength of the *pyatbaings*, which are not signed by the transferors. The *pyatbaings* after the Transfer of Property Act came into force are no documents of title at all. **L. B.** MG. PO. NYEIN *v.* MAUNG MY. **777**

——— **s. 32 (2)**—*Statement by deceased scribe of a bond as to marks (nishani) of executant, admissibility of.*

The bond in suit purported to be executed by three persons who were all dead. The signature of each of them was represented by an irregular scribble such as might be made by an illiterate person, and against each of these marks there was the statement that it was the mark (*nishani*) of one of the executants, the name being given in each case. The scribe and the attesting witnesses were also dead. The whole of the bond including the statement as to the marks was proved to be in the handwriting of the deceased scribe by the evidence of his father, a bond-writer.

Held, that direct evidence was to be found on the bond itself in the written statement made by the deceased scribe that the signatures were those of the persons whose names were written against them, and that that statement was relevant under section 32 (2) of the Evidence Act, having been made by the deceased scribe in the ordinary course of his business as bond-writer. **N.** HARIA *v.* MANAKCHAND, 11 N. L. R. 9. **866**

——— **s. 32 (5)**—Relationship, existence of—Adoption **739**

——— **s. 44** **238**

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——— ——— **s. 50**—Actual fact of marriage—Conduct not sufficient **837**

——— ——— **s. 90**—Document 30 years old—Presumption **562**

——— ——— **s. 91**—Instrument of partition—Award **489**

——— ——— **s. 92**—Registered deed Rescission or cancellation cannot be proved by oral agreement or unregistered document Agreement to pay lesser amount in full discharge or fixing different period—Variation in terms—Endorsement on mortgage-deed, when admissible and when not **269**

——— ——— **s. 94**—Document not exclusively relied upon—Admissibility of oral evidence **701**

——— ——— ——— **s. 109**—*Presumption, rebutting of—Burden of proof—Landlord and tenant, relation of, proof of—Rental agreement, inadmissible in evidence—Oral evidence, whether admissible.*

Where a written rental agreement is inadmissible in evidence, oral evidence, though not admissible to prove the terms of the tenancy or period of the lease, is still admissible to prove that the relationship of landlord and tenant exists between the parties.

When the existence of the relationship of landlord and tenant is once proved to exist its continuance is presumed under section 109 of the Evidence Act and the burden of proving the contrary lies upon the person who denies the relationship. **M.** CHAVALI SUBBANNA *v.* TULLURU VENKATARAYUDU, 28 M. L. J. 361 **804**

——— ——— **s. 110** **506**

——— ——— **s. 110**—Seizure by Police of property—Presumption in favour of possessor **202**

——— ——— **s. 115** **565**

——— ——— **s. 117** **483**

——— ——— **s. 122** **664**

——— ——— **ss. 145, 155** **196**

Excise Act (XII of 1896), s. 49—*Selling medicine containing brandy.*

A medical practitioner who puts a little brandy into one of the medicines prescribed and sold by him to a patient, does not thereby sell brandy and contravene the provisions of the Excise Law. **P.** EMPEROR *v.* BHAGWAN DAS, 33 P. R. 1914 Cr., 16 Cr. L. J. 218 **842**

Execution by assignee of decree—Contribution, suit for—Payment of decree for rent by one of the judgment-debtors **56**

Execution of decree. *See* CIVIL PROCEDURE CODE, s. 47.

——— ——— ——— *Attachment — Dismissal of application, effect of—Civil Procedure Code (Act V of 1908), O. XXI, r. 57, whether has retrospective effect—Lease created during continuance of attachment—Auction-sale—Right of lessee as against auction-purchaser.*

While after the passing of the new Civil Procedure Code, Order XXI, rule 57, has the effect of releasing an attachment when the execution application, under which the attachment was made, has been dismissed it cannot have a retrospective effect upon an order of dismissal made before the operation of the Code.

The dismissal of an application puts an end only to an attachment made on that application.

Where a lease was executed by the judgment-debtor while an attachment under the old Code was still subsisting:

Held, that it was invalid as against the right of the auction-purchaser under his purchase in Court-auction held in pursuance of the attachment. **M.** KHANDE SUBBAYYA *v.* NARA SUBBA REDDY, 2 L. W. 4 **792**

——— ——— ——— ——— *Consent decree—Variation of terms, whether allowed in execution.*

A consent decree can only be varied by consent. Therefore, no modification of a consent decree can be allowed in execution on grounds not recognised in the decree itself as giving a right of such modification. **B.** LACHIRAM *v.* JANA YESU MANG. 16 BOM. L. R. 668 **830**

——— ——— ——— ——— Court passing decree, whether entitled to execute it, when property transferred to jurisdiction of other Court—Different Courts having jurisdiction to execute decree—Convenience, jurisdiction determined on ground of **88**

——— ——— ——— ——— *Decree cannot be executed against persons who were no parties to it—Practice.*

A decree passed by the Appellate Court against the defendants who were not parties to the appeal, cannot be executed against them. **A.** BHAGWANT DATT *v.* RAJAB CHOWDHURY, 13 A. L. J. 136 **804**

——— ——— ——— Decree for costs—Application against surety—Sale on claim arising under mortgage—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 4—Personal liability of surety **365**

——— ——— ——— ——— Civil Procedure Code (Act V of 1908), s. 72—Decree for sale of land—Reference to Collector—Executing Court, power of **630**

——— ——— ——— ——— *Decree transferred with certificate of non-satisfaction but with no order for execution—Objection as to decree-holder's right to proceed against property not mentioned in decree—Executing Court, power of, to entertain objections—Civil Procedure Code (Act V of 1908), s. 42, O. XXI, r. 28.*

Where the transmitting Court has made no order for execution but has merely transmitted the decree and the certificate of non-satisfaction, the Executing Court can entertain an objection impugning the right of the decree-holder to proceed against any property other than that charged in the decree. **O.** BADRI PRASAD *v.* GAURI NATH, 2 O. L. J. 18 **597**

——— ——— ——— *Joint decree—Execution by one of decree-holders—Decree in favour of joint Hindu family—Power of managing member to give discharge—Civil Procedure Code (Act V of 1908), O. XXXII, r. 6.*

A joint decree-holder is not bound by the acts of another who has compromised or received payment from and has given discharge to the judgment-debtor beyond the extent of his own share in the decree but a discharge given by a managing

Execution of decree—contd.

member of a joint Hindu family is binding on the members of the family.

Where the managing member of a joint Hindu family is on the worst possible terms with the other members and the judgment-debtor's conduct has been throughout dishonest and fraudulent and the latter is colluding with the former in order to defraud the other members of the family, the members are not bound by the acts of the managing member. P. RAM SINGH *v.* NANAK CHAND, 10 P. W. R. 1915; 60 P. L. R. 1915 **603**

——— ——— ——— ——— Mortgage-decree passed before the coming into force of the Civil Procedure Code—Limitation **969**

——— ——— ——— ——— *Mortgage-decree — Declaratory decree—Mortgagee's rights to possession of mortgaged property declared—Cause of action—Fresh suit.*

Where a Court passes a decree for money to be realized by sale of the mortgaged property and possession of the property is not decreed, but it is noted that the plaintiff shall be competent to enter in possession of the mortgaged property and to retain possession thereof till such time as the sale thereof takes place and the decree is finally confirmed by the Court, the decree-holder is not entitled to obtain possession by executing the decree, though he may have a cause of action to sue for possession of the property. P. J. RUSTOMJI *v.* GURANDITTA MAL, 8 P. L. R. 1915; 33 P. W. R. 1915 **637**

———————, *questions relating to—Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 58, sub-rule (3), applicability of—Decree, objection to attachment of, in execution.*

The appellant obtained a decree against two persons *I H* and *A H*. *I H* and *A H* along with two other persons held a decree against *M M* and *M Z*. The appellant applied for execution of his decree by attachment of the interest of *I H* and *A H* in the decree which they along with two other persons held against *M M* and *M Z*. This application was refused:

Held, that, *M M* and *M Z* being no parties to the appellant's decree, the questions arising between them and the appellant could not be taken as questions relating to the execution of the decree held by the appellant. The order refusing the application did not, therefore, fall under section 47, Civil Procedure Code, and was not appealable:

Held, further, that the provisions of Order XXI, rule 58, sub-rule (3), refer to the stage at which execution of the attached decree is being sought and not to a case where the application for attachment of the decree has been disallowed. O. PIARE LAL *v.* MUHAMMAD MAHMUD, 17 O. C. 374 **363**

——— ——— ——— Res judicata—*Judgment-debtor not raising an objection which he ought to have raised—Objection, whether can be raised subsequently.*

It is not necessary that a judgment-debtor who puts forward objections in the execution department must put forward all possible objections once and for all. If he does not do so, matters which he has omitted must not be treated as *res judicata* against him. A. KALIAN SINGH *v.* JAGAN PRASAD, 13 A. L. J. 102 **950**

Execution of decree—concld.

——— ——— ——— Suit for rent for less than Rs. 100—Decree—Sale of non-transferable occupancy holding—Proceedings carried on against a dead judgment-debtor—Application to set aside sale by a private purchaser, maintainability of—Order refusing to set aside sale—Second appeal, maintainability of—Revision petition treated as memorandum of appeal **294**

——— ——— ——— *Validity of decree, whether can be challenged in execution proceedings—Civil Procedure Code (Act V of 1908), s. 47—Order in execution proceedings, when appealable.*

In execution proceedings it is not open to a party to challenge the validity of the decree. A Court called upon to execute a decree has no power to go behind it, and cannot entertain any objection as to the legality or correctness of the decree.

A decree, even though it is not according to law, is binding and conclusive between the parties till it has been set aside in appropriate proceedings.

An order in execution proceedings can come under section 47 of the Civil Procedure Code only when it determines some question relating to the rights and liabilities of the parties with reference to the relief granted by the decree, not when it determines merely an incidental question as to the mode of conduct of proceedings.

Where a Court has refused to stay execution of a decree on application made, not on the ground that the decree was incapable of execution, but on the ground that as a proceeding to test the validity of the decree was still pending no execution should be allowed till its termination, the order does not in any way determine the rights and liabilities of the parties with reference to the relief granted by the decree and is not appealable. C. RAMA PRASAD ROY *v.* ANUKUL CHANDRA, 20 C. L. J. 512 **444**

Execution proceedings—Rateable distribution—Rival decree-holders—Order refusing rateable distribution—Decree—Appeal **644**

Execution-sale, application to set aside within time but after confirmation of sale, effect of—Deposit, whether can be made by cheque **656**

Executor, whether trustee **849**

Ex parte decree. *See* CIVIL PROCEDURE CODE, O. IX, r. 13.

——— ——— ——— Application to set aside *ex parte* decree—Summons not served—Sufficient time—Defendant, rights and liabilities of **351**

——— ——— ——— Decree based on compromise **227**

——— ——— ——— ———, effect of—Judgment-debtor not having notice, right of **225**

——— ——— ——— ——— *against minor — Minor not properly represented—Irregularity—Minor, right of, to get decree set aside—Officer of Court appointed as guardian ad litem—Expenses, provision for.*

A suit was brought against a certain person and his minor nephews. The uncle refused to be the guardian of the minors alleging that they lived with their mother. The Court appointed the *amin* as the guardian *ad litem* of the minors, without giving

Ex parte decree—concld.

any notice to the minors or to their mother in whose care they were. The *amin* did not make any defence. An *ex parte* decree was made as against the minors. An application was made to set aside the *ex parte* decree on behalf of the minors by their mother. The application was refused. Subsequently a suit was filed for a declaration that the decree was null and void as against the minors:

Held, that the minors not being properly represented in the suit and the *ex parte* decree having been passed without notice to them or their natural guardian, they were entitled to the declaration which they sought in the suit.

Semble.—The appointment of an officer of the Court as guardian *ad litem* of minors in a suit without requiring the party at whose instance he is appointed to deposit the necessary funds to enable the guardian to defend the case, is little more than a farce. **A.** BHAGWAN DAYAL *v.* PARAM SUKH DASS, 13 A. L. J. 179 **623**

——— ——— ———, setting aside of—Proof of promissory note—Witness examined—Notes of evidence not on record—Decree, if valid **789**

Ex parte order, Court's inherent power to review **812**

Ex-proprietary rights, *claim for—Possession, actual, of sir not retained by vendor, effect of—Waiver—Purchase at public sale and not by deed executed by vendor.*

If the vendor transfers the actual possession of his *zamindari* and *sir* land to the vendee and waives, by his failure to enter into possession as a tenant, the statutory rights conferred by section 7A of the Oudh Rent Act, he cannot be deemed to be a tenant with such rights; but this principle of waiver does not probably apply to cases when the purchase is made at a public sale and not by a deed executed by the vendor. **U. P. B. R.** BADAL *v.* ABDUL WAHAB, 2 O. L. J. 71 **980**

——— ——— ———, *claim for—Sale of proprietary rights—Relinquishment of ex-proprietary rights, deed of, executed at same time as sale-deed—Possession retained by vendor, effect of.*

A deed of relinquishment of ex-proprietary rights executed on the same date as the deed of sale of proprietary rights, is void and inoperative, and the vendor retaining possession of the land can claim ex-proprietary rights in respect of it although the deed of relinquishment relates to that very land. **U. P. B. R.** MUHAMMAD ASHRAF *v.* GAYA PRASAD, 2 O. L. J. 42 **534**

——— ——— ——— *declaration of*—Dakhl-dihani *of proprietary rights does not amount to ex-proprietor's dispossession from his rights—Collection of rent from sub-tenants of ex-proprietor, whether amounts to dispossession—Possession by ex-proprietor, effect of—Mutation of names.*

A *dakhl-dihani* of proprietary rights cannot amount to dispossession of the ex-proprietor from his ex-proprietary rights in his *sir*, nor does the subsequent proprietor's collection of rent from the ex-proprietor's sub-tenants in possession of the *sir*, not by some overt act but in the background, amount to such dispossession.

Ex-proprietary rights—concld.

An ex-proprietor retaining possession of his *sir* since the date of sale of his proprietary rights can claim ex-proprietary rights in respect of the *sir* at the time of mutation proceedings, even though they take place after more than a year from the date of the transfer. **U. P. B. R.** BALRAJEE *v.* SABJU PRASAD, 1 O. L. J. 759 **20**

———, surrender of. *See* OUDH RENT ACT, s. 7A **586**

First report—Corroboration **764**

——— *No mention of offender therein—Subsequent assertion of his having been seen not reliable—Track evidence, value of.*

Where the first report makes no mention of the offender and the complainant when questioned named nobody as his assailant, and there is no assertion therein that any fugitive had been seen, the complainant's subsequent statement that he had identified the accused at the time of the attack and the evidence of his neighbours that they saw him running with the instrument of crime in his hands, cannot justly be relied upon.

The track evidence of a flimsy nature should not be believed without sufficient corroboration. **P.** RONKI *v.* EMPEROR, 10 P. W. R. 1915; 91 P. L. R. 1915; 16 CR. L. J. 222 **846**

Fishery right, suit for—Limitation—Fishery, money payable for, whether rent **614**

Foreclosure. *See* MORTGAGE.

Foreign judgment. *See* CIVIL PROCEDURE CODE, s. 13.

Forfeiture—Denial of landlord's title, whether sufficient **863**

——— ——— **of pardon.** *See* CRIMINAL PROCEDURE CODE, s. 337.

——— ——— ——— Practice **906**

Forgery, charge of—Sanction to prosecute, whether necessary **763**

Fraud, allegation of—Entry in Record-of-Rights, mistake as to, effect of **890**

——— ——— of party to case, effect of—Decree, when considered as nullity **587**

——— Purchaser, whether entitled to contest mortgage as fraudulent **238**

Fraudulent decree, *setting aside of—Court, power of—Inherent jurisdiction—Remedy—Review—Civil Procedure Code (Act V of 1908), s. 151, O. XLI, r. 19.*

A Court has not only power but it is its duty to set aside a decree obtained by fraud practised upon the Court, when it is apprised of it.

Where a decree-holder gets a consent decree fraudulently passed in his favour by suppressing the service of summons and by getting a false and fraudulent *vakalatnama* and a petition of compromise filed, the decree can be set aside on review and the fact that it is set aside under a wrong section is no ground of interference by a High Court.

A Court has inherent jurisdiction to correct its own procedure where it has been misled. **C.** PEARY CHOUDHURY *v.* SOKOORY DAS, 19 C. W. N. 419. **628**

Fraudulent transfer—*Suit for declaration—Fictitious proceedings—Equity—Fraudulent confederate, when entitled to retain property fraudulently transferred to him—Suit, if for specific performance—Limitation—Civil Procedure Code (Act XIV of 1882), s. 317, applicability of.*

To enable a fraudulent confederate to retain property transferred to him in order to effect a fraud, the contemplated fraud must be effected, then and then alone does the fraudulent grantor or giver lose the right to claim the aid of the law to recover the property he has parted with:

The plaintiff, in order to protect himself from a fictitious deed executed by him in favour of a third person, induced his landlord to institute a fictitious suit for rent. The suit was instituted and decreed and the property was sold and purchased by the landlord and formal possession was also given to him, but actually the plaintiff remained in possession. The landlord thereafter forcibly took away the crop. The plaintiff then sued for a declaration that the entire proceedings in the rent-suit were fictitious:

Held, that the plaintiff is not disentitled to protection in a Court of Equity and that as the suit is not for the specific performance of a contract, no question of limitation arises in it.

Section 317 of the Civil Procedure Code, 1882, contemplates a real sale in execution of a real decree in a real suit and does not bar a suit for possession of a property purchased in a fictitious sale held in execution of a fictitious decree in a fictitious suit. **C.** AKHIL PRODHAN *v.* MANMOTHA NATH KAR, 18 C. W. N. 1331 **230**

Further Inquiry. *See* CRIMINAL PROCEDURE CODE, s. 437.

——————————Discretion **558**

Gift. *See* WILL.

——*Construction of deed—Property gifted to wife for her life only—Reversion, right of, transfer of—Expectancy of succession—Transfer, validity of.*

A *hiba* gift-deed executed by a Hindu in favour of his wife for her maintenance and performance of *debsheba*, without any words indicating inheritance or power of alienation usually contained in a deed of absolute gift, is a gift only for life of the donee and the right of ownership means the right of the donee, to enjoy the property for her life remains in the donor. The reversion, which remains vested in the donor in such a case, is different from a mere expectancy of succession as in the case of a reversioner of a Hindu widow, and is, therefore, descendible to and transferable by his heirs. **C.** PRIYAMBADA DASI *v.* RAM GOPAL **407**

Good-will, transferee of, right of—Licensee—Estoppel **483**

Government grant, *free of payment of land revenue, sale of, in execution of a mortgage decree—Government refusing sale—Suit against Secretary of State, the judgment-debtor and the subsequent transferee, maintainability of—Specific Relief Act (I of 1877), s. 42—Jurisdiction of Civil Court—Hearing of case on merits, necessity of, before granting declaration.*

The plaintiff-appellant obtained a mortgage decree entitling him to bring to sale certain lands held by the mortgagor under the terms of a Government grant free of payment of land revenue. In execution of the mortgage decree the plaintiff-appellant applied for sale of the land, but the Local Government refused sanction to the sale, on the ground that in view of the terms of the grant the property was inalienable. The plaintiff-appellant then instituted the present suit against the Secretary of State, the judgment-debtor and a subsequent transferee praying for a decree against the Secretary of State, declaring that the right, title and interest of the other defendants in the land in question were liable to be sold in execution of his decree, and that the judgment-debtor had an alienable interest in the property. The Subordinate Judge dismissed the suit, holding that the Civil Court had no jurisdiction to take cognizance of such a suit, that the suit was not maintainable and that he should not in the exercise of his discretion give such a declaration:

Held, that although the Local Government as an executive authority had an unfettered discretion to refuse sale in such a case, yet the declaration made by it in the same order as to the terms of the grant must be treated to have been made in its capacity of a grantor and could be challenged, and the suit was maintainable in respect thereof;

Held, further, that the Civil Court had jurisdiction to hear the suit;

Held, also, that the question of discretion possessed by the Court in the matter of granting declarations could not be considered until the case had been heard upon its merits. **C.** AMAR CHAND PAL *v.* SECRETARY OF STATE, 17 C. C. 369 **354**

Government Notification No. 1692, VI-545 A-9 **553**

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Grant—Mining lease—Maintenance grant for life without any provision as to opening mines—Grantee, whether has power to grant mining lease—Construction of lease—Conduct of parties—Mine, when open—Intention—Damages, measure of **471**

Grantor, right of, against grantee **982**

Grove. *See* OUDH RENT ACT, s. 107H.

————, character of—Proprietor of grove, not necessarily owner of land as well—Assessment of rent, suit for, landlord's rights as to—Undivided holding, effect of **974**

———— entered as "*maurosi*" in column "of tenants' groves"—Under-proprietary right, accrual of **120**

———— *losing its character as such and brought under cultivation, resumption of—Ordinary tenant land—Trees still standing on land previously grove, right of grove-holder as to.*

A grove-holder becomes an ordinary tenant in respect of the grove-land losing its character as such and brought under cultivation, but retains his right in the trees that still remain standing thereon. **U. P. B. R.** RAM DAS *v.* MUHAMMAD ABDUD HAQ, 1 O. L. J. 695 **94**

Guarantee-broker. *See* CONTRACT ACT, s. 128.

Guardian—Minor, guardian *ad litem* of, appointment of—Appointment without consent of person appointed, validity of—Mortgage decree, sale under—Reversal of decree—Stranger purchaser, effect on—Party purchaser, liability of—*Cessante ratione legis, cessat et ipsa lex*, applicability of—Reversal of sale—Party, who is a necessary—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 4—Decree, form of, whether can be modified—Inherent power 139

——— ——— of minor, whether can take Probate 749

——— ——— **ad litem.** *See* MINOR.

——— ——— ——— ——— Officer of Court—Expenses, provision for 623

Guardians and Wards Act (VIII of 1890)—*Guardianship—Female minor—Muhammadan Law—Sister's husband and maternal uncle—None but* mahram *to be appointed.*

No male has a right to the custody of a Mussalman female child unless he is a *mahram*, that is, stands to her within the prohibited degrees of relationship and cannot under any circumstances marry her.

The sister's husband of a girl is not entitled to be appointed guardian, specially in the presence of a person who is competent under the Muhammadan Law, for instance, the maternal uncle of the minor. **C.** HARUNNESSA, *In the matter of*, 18 C. W. N. 853 74

——— ——— **ss. 11 (a) (iv), 13, 17**—*Civil Procedure Code (Act V of 1908), s. 115—Guardianship of person and property of minor, application for—Person, interested, not made party—Revision, right to, of person not party to case.*

Although a person who is not made a party in an application made under section 10 of the Guardians and Wards Act and to whom notice ought to have been issued under section 11 (*a*) (i) of the Act as a person interested in the result of the application, cannot, under section 47 (*a*) of the Act, file an appeal from the order passed on the application, yet he can file a petition for revision of that order under section 115, Civil Procedure Code.

Sections 13 and 17 of the Guardians and Wards Act are wide enough to cover an inquiry into any of the matters which can legitimately form the subject of opposition to the grant of a certificate of guardianship to a particular individual. **O.** JHANDESHUR *v.* BAIJ NATH, 1 O. L. J. 761 121

——— ——— ——— **ss. 13, 17** 121

——— ——— ——— ——— **s. 24** 381

——— ——— ——— ——— **s. 24**—*Marriage of minors—Court's duty.*

It is no part of a Court's duty under the Guardians and Wards Act to assume direct responsibility for the marriage of a minor of whose person a guardian has been appointed. It would be better if the Court simply declines to either sanction or prohibit the marriage of the minor to a particular person and leaves the parties concerned to settle their disputes among themselves. **P.** LAL SINGH *v.* SHAM LAL, 98 P. R. 1914 381

——— ——— ——— ——— **s. 25**—*Guardian and ward—Custody of minor—Welfare of minor only to be considered—Practice—Enquiry—Court, duty of.*

Guardians and Wards Act—*concld.*

In deciding the question of custody of a minor, the welfare of the minor alone is to be considered.

In such a case all the Court has to do is to satisfy itself what is best in the interests of the minor, and is not bound to make a protracted inquiry. **P.** JUGGO KAUR *v.* DURGA DAS, 249 P. L. R. 1914, 159 P. W. R. 1914 257

——— ——— ——— **ss. 34, 47**—*Order fixing amount of maintenance etc. of ward, whether appealable—Statute, interpretation of.*

No appeal lies from an order under section 34 of the Guardians and Wards Act fixing the amount to be applied for the maintenance, education and advancement of the ward and of the persons depending on him.

Where the Legislature has specifically omitted a certain section in providing for appeals, a High Court cannot allow an appeal from that section by giving a wide effect to the general words in an another section or because appeals have been allowed from certain minor matters. **M.** GOPAMMAL *v.* V. SREENIVASA IYENGAR, 28 M. L. J. 96 921

——— ——— ——— **ss. 39, 42**—*Removal of guardian—Grounds of removal—Appointment of successor—Appeal.*

Section 42 of the Guardians and Wards Act can only come into operation when a guardian is properly removed. Therefore, where the point in issue is whether he has been so removed, the order of removal is appealable.

Where there is nothing on the record to show the grounds of the removal, the case should be remanded in order that the District Judge may deal with the matter properly under section 39 of the Act **C.** MAHADEO MONDAL *v.* BIDHI CHAND MONDAL, 20 C. L. J. 296 28

——— ——— ——— ——— **s. 42** 28

Guardianship. *See* MUHAMMADAN LAW.

Hat, right of holding on fixed days—Interference, when restrained 647

Hindu Law. *See* CUSTOM.

——— **Adoption**—*Adoptee not a lineal descendant of his natural father—Occupancy holding, succession to—Right of brother adopted in another family—Agra Tenancy Act (II of 1901), s. 22.*

Once a boy has been adopted into another family, he ceases to be a "lineal descendant" of his natural father; and, therefore, cannot succeed to the occupancy holding of his brother by the natural father. **A.** THAMMAN SINGH *v.* DAL SINGH, 12 A. L. J. 1231; 37 A. 7 24

——— ——— ——— Mitakshara *system—Adoption by junior widow with consent of majority of sapindas—Consent of senior widow not obtained—Validity of adoption.*

Under the *Mitakshara* system of Hindu law an adoption made by a junior widow of a deceased Hindu without the consent of the senior widow is invalid even though the adoption was made with the consent of the majority of *sapindas*, as the senior widow has a preferential right to make an adoption. **M.** KAKERLA CHUKKAMMA *v.* KAKERLA PUNNAMMA, 16 M. L. T. 612; 2 L. W. 24; (1915) M. W. N. 19; 28 M. L. J. 72 775

Hindu Law—contd.

——— **Adoption**—*Right of widowed daughter-in-law—Consent of mother-in-law in whom estate rested.*

Under Hindu Law a widowed daughter-in-law, that is to say, the widow of a pre-deceased son, can make a valid adoption with the contemporaneous consent of her mother-in-law in whom the estate of the last full owner is vested as an heir. **B.** SHIDAPPA BAPU BIRADKAR *v.* NINGANGAUDA SIDDANGAUDA, 16 BOM. L. R. 663 **51**

——— ——— ——— *Twice-born classes*—Dattahoma—*Adopted child of same gotra.*

Among the twice-born classes *dattahoma* is not essential when the adoptive father and the adopted child belong to the same *gotra*. **C.** KATKI *v.* LAKPATI PUJARI, 20 C. L. J. 319 **39**

———, *validity of—Question involved in suit to recover immoveable property not raised*—Res judicata—*Limitation Act* (*IX of* 1871), *Sch. II, Art.* 129.

Where in a suit instituted against a widow to recover possession of immoveable property, a ground of defence as to the invalidity of an adoption was open to her but was not raised, she must be held to have raised it and the question as to adoption deemed to be *res judicata* in any subsequent suit between the reversioners to her husband's estate and the alienees.

Under the Limitation Act of 1871 it was imperative that a suit for the recovery of immoveable property which involved the displacement of an adoption should be filed within 12 years from the date of the adoption or at the option of the plaintiff, from the death of the adoptive father.

Where, therefore, a suit to set aside an adoption open to a widow is not brought within the period of limitation, a reversioner or any other member interested to dispute the validity of the adoption cannot file a suit after the period of limitation is over, as the right of suit cannot be revived. **M.** VENKOBA ROW *v.* THUNIA NATARAJA CHETTIAR, (1914) M. W. N. 903 **109**

——— ———*Widow, when can adopt to her deceased husband—Widows of two persons, whether can adopt same person—Evidence Act (I of 1872), s. 94—Document not exclusively relied upon—Admissibility of oral evidence*

A widow can adopt a son to her late husband only when she has been authorised by the latter to make the adoption, or possibly where her late husband's kinsmen assent to the adoption and there has been no express or implied prohibition by her husband.

It is not competent to the widows of two persons, even if brothers, to take the same person in adoption, either at the same time or at different times.

Where it appeared that a certain Hindu and his branch of the family left their ancestral home in Bikanir and settled down in Delhi:

Held, that succession to their property must be determined (in the absence of any proof that they were governed by some family custom) by the principles of their personal law.

Where the plaintiff put in a certain document of which the language was found to be "absolutely plain and unambiguous," but the plaintiff himself was no party to the document and did not rely upon it exclusively as establishing his title to the property and the plaint as well as the plaintiff's statement before the framing of the issues were very vague:

Held, that under the circumstances the plaintiff was not debarred from adducing oral evidence in support of his contention. **P.** GOPI KISHEN *v.* GOPI KISHEN, 27 P. W. R. 1915; 57 P. L. R. 1915 **704**

——— ——— **Alienation** *by uncle and mother of a minor acting as his guardian—Minor and his uncle, members of an undivided Hindu family—Mother not the legal guardian—Limitation Act* (*IX of* 1908), *Sch. I, Art. 44, if applicable.*

Where a minor and his uncle were members of an undivided Hindu family and certain joint family property was sold by the uncle and the mother of the minor, who was put forward as his guardian:

Held, that, as the undivided paternal uncle was the guardian in law of the minor and not the mother, a suit to set aside the sale would not fall under Article 44 of the first Schedule to the Limitation Act **M.** KATHAPERUMAL THEVAN *v.* RAMALINGA THEVAN, 17 M. L. T. 188 **695**

——— ——— **Ancestral property** — Property ancestral *qua* grandson if it descends to son **393**

——— ——— **Daughters**—Dayabhaga *School—Survivorship—Limitation Act* (*IX of* 1908), *s.* 28, *Sch. I, Art.* 141—*Applicability of s.* 28—*Adverse possession—Extinguishment of title.*

A Hindu governed by the *Dayabhaga* school at his death left two daughters (his heirs) and a daughter-in-law, widow of a pre-deceased son. The daughter-in-law took possession of the estate to the exclusion of the daughters, who were living at their husbands' houses. The possession continued for more than 12 years:

Held, that the possession of the daughter-in-law was adverse and that under section 28 of the Limitation Act it extinguished the right of the daughters; and that the survivor of the two daughters came in on the death of her sister within 12 years of the suit, not by way of inheritance as reversioner, but by right of survivorship, and consequently Article 141 of the first Schedule of the Limitation Act would not apply. **C.** SACHINDRA KISHORE DEY *v.* RAJALI KANT CHUCKERBUTTY, 18 C. W. N. 904 **250**

——— ——— **Debt**—*Son's liability to pay money due under indemnity bond of his father—Debt not tainted with immorality—Liability of ancestral property in hands of son*

It is the pious duty of a Hindu son to pay the money due under an indemnity clause provided in a sale-deed, not tainted with immorality, executed by his father. The ancestral property in the hands of the son is liable to discharge the debt. **A.** RAGHUNANDAN PRASAD *v.* CHHM RAM **95**

——— ——— **Impartible zemindari** — *Maintenance allowance, whether charge—Intention of parties—Heir taking as donee under a gift*—Santhathi Puramparayai—*Annuity in nature of personal estate—Assignment of heir's rights.*

Where a suit for the recovery of a certain *zemindari* was compromised and the plaintiff agreed to receive a sum of Rs. 700 monthly for himself and his heirs from the then and future holders of

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the *zemindari* and on the allowance falling into arrears, the son of the grantee instituted a suit for the amount and obtained a decree, but the decree was held to be not executable by his heirs, who were referred to a regular suit, which was duly brought.

Held, (1) that the grant was chargeable on the *zemindari* and enforceable by the descendants of the original grantee;

(2) that the fact that the defendant took the estate as a gift from his father did not take away the liability which would have devolved on him if he had succeeded to the property as son and heir;

(3) that the words "*Santhathi paramparayai*" clearly showed that the annuity was intended to be descendible to the heirs of the grantee generally and not limited to his lineal descendants.

Per *Seshagiri Aiyar, J.*—The language of the grant makes the grantor's heirs liable for all time to come.

No special language is necessary to create a charge, it depends upon the intention of the parties, and in the present case the maintenance allowance made payable under the deed of compromise was intended to be a charge upon the *zemindari*.

The principle that where property is given by Will to a person who would otherwise be entitled to it as heir the character of the property is not changed, is also applicable where the transfer is *inter vivos*.

Per *Wallis, C. J.*—The grant is analogous to maintenance allowances payable by the proprietor of an impartible estate to the junior members of his family for maintenance, which are not deemed to be charged on the estate as a whole.

The words used are not sufficient to impose a charge on the *zemindari*, but merely create an annuity in the nature of a personal estate that may be made descendible in the same manner as real estate.

Where the heir of a deceased person executed a deed in favour of another which, after reciting that there was some question whether he or the other person was the next reversioner, provided that in consideration of a payment of Rs. 1,000, the former should give up in favour of the latter his claim as heir of the deceased and all rights connected therewith and that the latter should enjoy the estate with all rights of ownership and that the executant and his heirs should have no claim to it:

Held, that this was a valid transfer of the heir's rights, which accrued to the transferee and could be lawfully enjoyed by him. **M.** RAJARAJESWARA DORAI *v.* SUNDARAPANDIYASWAMI THEVAR, 27 M. L. J. 654 **283**

——— **Joint family**—*Alienation by manager—Adult co-parceners, when bound by alienation by manager—Consent, implied—Co-parcener not benefited by transaction affected by other co-parcener, not bound by transaction.*

No alienation by one co-parcener, even if he is a managing member of the joint Hindu family, will bind the other adult co-parceners, unless their consent to the alienation is either expressed or may be implied from their conduct.

Consent to an alienation would necessarily be inferred where a co-parcener with full knowledge of all the facts takes possession of and retains that which has been purchased with the proceeds of the property alienated.

A co-parcener not benefited by a transaction entered into by the manager of the joint Hindu family can plead that he is not bound by that transaction on the ground that he derived no benefit from it and that it has not been entered into for any legal necessity. **O.** KANTA *v.* BHAGIRATH, 2 O. L. J. 80 **517**

——— **Joint family**—*Family business carried on—Debt contracted for family business—Creditor not bound to inquire as to purpose of loan—Manager, implied authority of.*

Where a joint Hindu family carries on a business or profession, and maintains itself by means of it, the member who manages it for the family has an implied authority to contract debts for its purposes, and the creditor is not bound to inquire into the finances of the business, as long as that business forms the purpose of the debts, in order to bind the whole family thereby, because the power to contract debts is incidental to the carrying on of the business, from which the family derives its means of subsistence and support. **O.** BABA DIN *v.* BANSRAJ **567**

——— ——— , *manager of—Family arrangement—Minor—Mutation proceedings—Registration, whether necessary.*

Under ordinary circumstances and in the absence of fraud or collusion, the managing member of a joint Hindu family is entitled to transact the business of the joint family and represent the members of it.

A family settlement come to in a mutation proceeding and creating rights in immoveable property does not require registration. **A.** DAYA SHANKAR *v.* HUB LAL, 13 A. L. J. 21; 37 A. 103 **497**

——— ——— ——— Managing member, representation by, whether on behalf of family **795**

——— **Maintenance**, *agreement embodied in decree or order, effect of—Compromise affecting immoveable property neither registered nor incorporated in decree, value of—Agreement creating future interest in favour of unborn persons, whether valid.*

A compromise affecting immoveable property cannot be given effect to, if it is neither registered nor incorporated in a decree or order of a Court.

An amount provided as maintenance for a member of a family does not lose its character of being increased or decreased under a change of circumstances as a maintenance allowance by being embodied in an instrument or a decree.

An agreement which creates a future interest in immoveable property in favour of persons unborn, imposes a restraint upon alienation contrary to the principles of Hindu Law and is, therefore, invalid. **M.** VENKATAPPA NAYANIM VARU *v.* THIMMA NAYANIM VARU, 27 M. L. J. 656; (1914) M. W. N. 900 **379**

——— ——— **Nattukkottai Chettiers**—*Family property and trade assets, whether distinct.*

In the case of Nattukkottai Chettiers, their family property should be treated as trade assets; and no distinction should be made between the family property and the trade assets. **M.** CHARTERED BANK *v.* VELLAIAPPA CHETTY, 27 M. L. J. 654 **376**

Hindu Law—contd.

———— **Partition**—*Agreement to divide income only, whether estops division by metes and bounds—Plea of impartibility, how maintained—Agreement to divide conclusive as to status.*

The plea of impartibility of a *zemindari* can succeed only if the parties prove that such a custom existed in the family before the family acquired the *zemindari* lands. A provision in a deed between the members of a family that only the income of the *zemindari* is to be divided does not estop them from claiming a division by metes and bounds: such an agreement is not binding on the other members of the family, as it is opposed to the ordinary incidents of joint property.

Where a deed recites that there is no community of property or interest between the parties, it operates as a final deed of division and no Court should go behind it. M. MUTHUSAMI NAICKER v. MUTHUSAMI NAICKER **3**

———— ———— *Status—Intention to divide—Presumption when one co-parcener divides.*

If the male members of a joint Hindu family wish to become divided in status they are at liberty to agree to do so, and on their so agreeing, they become divided in status even though the properties are not actually divided between them by metes and bounds. A definite and unambiguous expression even by one member of his intention to separate himself and enjoy his share in severalty may amount to separation. A definite partition of properties by metes and bounds is not essential to constitute a definite division in status between co-parceners. The presumption, when one of several co-parceners becomes divided, is that the others also have become divided in status. M. BALKRISHNA MUDALIAR v. RAJU MUDALIAR, 16 M. L. T. 610; (1915) M. W. N. 17 **736**

———— **Succession**—Land held on service tenure—Rent-free grant **720**

———— ———— ———— *Mitakshara School—Brother's widow excludes first cousin.*

Under the *Mitakshara* School of Hindu Law the widow of a brother would be the next reversioner in preference to the first cousins.

The only essentials of a good legal acceleration are that it should be to the next in reversion and that it should cover the whole life-estate. No consent of reversioners is needed, still less any proof of necessity. B. BASANGAUDA NAGANGAUDA v. BASANGAUDA DODANGAUDA, 16 BOM. L. R. 699; 39 B. 87 **167**

———— ———— ———— Right of convert's son to inherit—Exclusion of *kafir* under Muhammadan Law—Burden of proof—Admission on point of law—Caste Disabilities Removal Act (XXI of 1850) **357**

———— **Temple**—*Murasikar or turn archaka and miras archaka, rights of, to perform new pujas—Navavarana puja, what is—Trustees, right of, to have new pujas and archanas performed by miras archaka.*

Trustees of Hindu temples will be acting contrary to their duty if they refuse to accept voluntary contributions offered by devotees for the performance of new *pujas* and festivals, provided they are not inconsistent with the object of the institution and the necessary funds are forthcoming from the devotees.

Hindu Law—contd.

Non-*murasikar* (non-turn-holder) *archakas* are entitled to perform for their clients special acts of worship, such as *navaviana puja*, without prejudice to the *mamool* worship being performed during the usual hours by the *murasikars* or the turn-holders.

Per *Sadasiva Aiyar, J.*—*Archana* is not distinct from *puja* and is a portion of it; the latter is a general term meaning ceremonial worship, the former term being applied to the placing of pure leaves or flowers on the idol during the course of recitation of the names of the god or goddess, as the case may be. *Archanam* is connected more with vocal respect and praise and *pujanam* with mental attitude.

Navavarana puja is one in which the *saktis* of the five ordinary aspects of the god (*Brahma, Vishnu, Rudra, Eswara* and *Sadasiva*) and the four higher aspects (*Bindu, Nadda, Sakti* and *Siva*) are worshipped. M. AMRITHESWARA PANDITHAR v. MUDUGAPPA CHETTIAR, 2 L. W. 127 **886**

———— **Widow,** *alienation by—Suit by remote reversioner for declaration that it was not binding on reversioners—Extent of reversionary heir's right to bring such suit—Reversionary heir's failure in one suit does not preclude him from suing again in respect of subsequent alienation.*

The right to bring a suit for a declaration that a conveyance by a Hindu widow is only good for her life but is not good as an absolute conveyance of the property thereby dealt with against the reversioners of her deceased husband, is limited, and, as a general rule, belongs to the presumptive reversionary heir. But if the nearest reversionary heir has precluded himself in some way by his own act or conduct from suing—as by collusive action with the widow—a reversioner in a more remote degree may be allowed to prosecute such a suit.

The presumptive reversionary heir of a deceased Hindu, who has failed in his action against the alleged widow of the deceased for possession of the property left by him, has not thereby precluded himself from again suing the widow for a declaration that a conveyance made by her after the former suit was only binding for the period of her life, and, consequently, a reversioner in a more remote degree has no right to bring such a declaratory suit. P. C. JHANDU v. TARIF, 19 C. W. N. 197; 17 M. L. T. 10, 21 C. L. J. 26; 2 L. W. 118; 17 BOM. L. R. 44; 37 A. 45; 28 M. L. J. 453 **892**

———— ———— ———— , *alienation by—Legal necessity*—Onus probandi—*Consent of reversioners—Alienation by nearest contingent reversioner, effect of—Evidence of consent.*

To be valid as against the reversioners, or to affect their reversionary rights, a charge created by a Hindu widow or an alienation effected by her can be supported only by proof *aliunde* that such debt was contracted or alienation was made for valid and legal necessity, and the onus of establishing such necessity rests heavily on the person who claims the benefit of transactions with a Hindu widow or other females taking similar estates. The requirements of the law as to valid and legal necessity may, however, be fulfilled by proving the consent or concurrence of the reversioners to or in the transactions. But the mere

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attestation by a relative even though he might be the sole contingent reversioner, does not necessarily import concurrence. When a stringent equity arising out of an alleged consent by the reversioners is sought to be enforced against them, such consent should not be inferred from ambiguous acts or be supported by dubious oral testimony, but must be established by positive evidence that upon an intelligent understanding of the nature of the dealings they concurred in binding their interests; and the kindred in such case must generally mean all those who are likely to be interested in disputing the transaction, or at all events there should be such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one and one justified by Hindu Law. **P. C.** HARI KISHEN BHAGAT *v* KASHI PARSHAD SINGH, 17 M. L. T. 115; 19 C. W. N. 370, 13 A. L. J 223; 2 L. W. 219; 21 C. L. J. 225; 28 M. L. J. 565; 17 BOM. L. R. 426 **674**

——— —— **Widow,** decree against, when binding on reversioners—Compromise decree—Limitation Act (IX of 1908), Sch. I, Art. 141—Adverse possession—*Thak* and survey map, presumption relating to **954**

——— ——— ——— *Pious obligation to pay her husband's debts, whether applicable to debts repudiated—Agreement by husband on certain conditions to re-convey within certain time property purchased—Conditions not fulfilled—Husband denying obligation to re-convey—Widow, whether bound to fulfill the agreement—Alienations by widow upheld—Legal necessity.*

In 1869 *A* sold his property to *B*, who passed a contemporaneous agreement to re-convey it to the vendor, if the latter paid him Rs. 100 every year for six years. So matters stood till after the death of *B*. In 1883 his son *D* was sued by the representatives of *A*. The suit took the form of a redemption suit, and he, in his written statement, denied that the agreement had been complied with, or could now be enforced, and at the same time alleged that the transaction was not a mortgage. The defence succeeded and the suit was dismissed In 1894 after the death of *D* his mother, who was in life enjoyment of the estate, was again sued for redemption. The suit again failed as barred by the rule of *res judicata*. Shortly after this the widow sold the property to the representatives of *A*.

Held, (1) that the widow was under no pious obligation to do for the last male-holder of the estate what he had emphatically declined to do for himself;

(2) that the alienation was not justifiable and ought not to be sustained against the reversioners;

(3) that the only solid ground upon which alienations by a widow are justified and made good against reversioners is legal necessity. **B.** BHAGWAT BHASKAR *v* NIVRITTI SAKHARAM, 16 BOM. L. R. 788; 39 B. 113 **356**

Hindu Wills Act (XXI of 1870), s. 2 **739**

Hire and purchase system—Sewing machine purchased on instalment system—Suit for return of machine—Non-payment of instalments—Limitation **637**

Hundi payable after certain period—Days of grace—Date of maturity **608**

Husband and wife—*Liability of husband for misappropriation by his wife.*

A husband is not liable for the acts of misappropriation committed by his wife during the course of her service which he had allowed her to take up. **A.** C. SIMPSON *v.* MRS. E. BACHMAN, 13 A. L. J. 56 **622**

Ijara—*Non-payment of rent—Possession without payment after expiry of lease—Limitation—Assessment of rent.*

Where a certain *Mouza* was given in *ijara* to the predecessor-in-title of the appellants who excavated a tank there with the permission of the superior landlord and did not pay any rent therefor even after the expiry of the lease, on a suit for khas possession or in the alternative for assessment of rent:

Held, (1) that the *ijara* constituted a good answer to the plea of limitation;

(2) that the appellants should be treated as *raiyats* holding at fixed rates. **C.** ALAB-UD-DIN *v* BIRENDRA KISHORE MANIKYA BAHADUR. **31**

Immoveable property—Growing crops **935**

Impartible estate, alienability of **982**

Impartible zemindari: *See* HINDU LAW.

Improvement, right of tenant to claim compensation for **361**

Inam—*Service* inam—*Title-deed in grantee's name—Services connected with temple—Alienation by grantee—Trustee's suit for possession, maintainability of.*

The title-deed for an *inam* orginally granted to a dancing woman for performing certain services in a temple was issued in her name by the Government. She subsequently alienated the *inam*. The services having been neglected, the trustees of the temple sued for possession of the *inam*.

Held, that the suit by the trustees was not maintainable. **M.** MATTA SARAYYA *v* VEPPARATHI VYDIYANATHAM, 1 L. W. 490, 27 M. L. J. 57 **163**

Incorporeal right. *See* ADVERSE POSSESSION.

Incumbrance—Sale for arrears of revenue, effect of **258**

——— created by tenant, effect of, upon landlord. *See* BENGAL TENANCY ACT, s. 86 (6).

Inference—Landlord and tenant—Rent-free title—Possession for long series of years without payment of rent—Absence of proof of having been ever realized—Inference **12**

Inherent jurisdiction—Fraudulent decree, setting aside of—Court, power of—Remedy—Review—Civil Procedure Code (Act V of 1908) s. 151, O. XLI, r. 19 **628**

Inherent power—Decree, whether can be modified **139**

———, exercise of—Stay of suit—Abuse of process of Court **455**

Inheritance. *See* CUSTOM.

——— *Suit by some heirs of deceased person against stranger—Their claim limited only to extent of their own individual shares—Estoppel—Evidence Act (I of 1872), s. 115.*

Where some of the heirs of a deceased person sue to get possession of the deceased's property, they are restricted to their own individual shares if such shares can be ascertained, and they have no right to recover whole of his property even if the remaining heirs have distinctly declined to make any claim. This rule equally applies whether the contest is between two sets of the reversioners, or reversioners and a stranger who is unable to establish any *prima facie* right at all.

An heir is not estopped from claiming the rest of the property of a deceased person in the hands of a stranger by reason of his redeeming from him (stranger) a small portion of that property P. BUTA SINGH *v.* LAL SINGH 565

Injunction—Mortgagor and mortgagee, right and liability of—Mortgagor, right of, to enhance rent of tenant—Reduction of mortgage-debt—Suit for declaration and injunction, maintainability of 697

———, power of Probate Court to grant 617

———, *suit for—Plaintiff what has to show to succeed in such a case—Purchaser of lessee's right in coal mine, rights of, to take entire coal—Barrier to pen back water, right of—"Instroke and outstroke", meaning of—Instroke, right of, when exercised—Fraud, ground for injunction—Support, right of.*

A man who seeks the aid of a Court by an injunction must show that the act complained of is in fact a violation of his right or at least is an act which, if carried into effect, will necessarily result in a violation of the right. The mere prospect or apprehension of injury or the mere belief that the act complained of may or will be done is not sufficient.

In order to succeed in such an action the plaintiff must show a strong case of probability that the apprehended mischief will, in fact, arise.

The plaintiff must show the existence of an intention on the part of the defendant to do the act complained of; but direct evidence of such intention may be unnecessary, if a man insists on his right to do or begins to do or threatens to do or gives notice of his intention to do an act which must, if completed, give a ground of action.

Where, therefore, a purchaser of the rights of a lessee of a coal mine claims the right to take away the entire coal, the Court is competent to grant an injunction if it is established that what the purchaser asserts he has a right to do, would constitute a breach of contract between the lessor and the lessee.

An owner of a lower mine must, if he wishes to guard against the natural flow of water from the mines of his neighbours, have a barrier in the upper part of his mine to pen back the water and the lessee of such a mine may be held liable for any damage done by breaking down the barrier between the mines.

It is, however, not obligatory upon the lessee to leave a barrier of coal merely to prevent communication with adjoining mines and, therefore, where the object of a plaintiff is only to prevent communication an injunction cannot be issued.

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The right of instroke is the right of conveying minerals leased to the surface through a pit or shaft in an adjoining mine; it is the converse right to that of outstroke, which is the right of conveying minerals from an adjoining mine to the surface through a pit or shaft in the mine leased.

A lessee is *prima facie* entitled to work by instroke, but not by outstroke.

Where it can be assumed that the lessee has the right to work by instroke, he cannot be permitted to exercise that right fraudulently to the detriment of his lessor but where no fraud is established, an injunction cannot be granted.

Prima facie the owner of the surface has a right of support and the lessee is not entitled to work the mine so as to cause a subsidence, and an injunction will be granted if the Court is satisfied that injury is imminent and certain to result from the defendant's acts or where the defendant claims the right to do acts which must inevitably cause subsidence. C. RAMJAS AGARWALA *v.* BEJO MOHAN, 20 C. L. J. 538; 19 C. W. N. 887 244

———, temporary—Execution proceedings—Suit to remove obstruction 56

———, *temporary, grant of, when allowed—Hat, right of holding on fixed days—Interference, when restrained.*

Under colour of a temporary injunction a Court cannot be asked to give the relief which forms the cause of action in the suit.

But where the defendants put forward a claim of right which is incompatible with the right upon which the plaintiffs sue and where it appears probable that the claim is sought to be exercised in a wholly unnecessary manner upon motives of spite and ill-feeling, the Court will interfere by way of injunction.

A party is entitled to hold a *hat* in his own village on any day he likes subject to his committing no offence against public tranquility, but where by holding a *hat* on particular days he violates the legal rights of the other party to hold his *hat* on those days, he will be restrained from holding his *hat* on such days. C. BROJENDRA KISHORE ROY CHOWDHURY *v.* ABDUS SODHAN CHOWDHURY 647

In pari delicto, rule of 1008

Insolvency, notice of, effect of 102

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Interest, high rate of—Powers of Courts 715

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——— payable on *kattubadi* amounts 937

———, penal—Court, power of, to grant relief—Penal stipulation as to interest, test of—Unconscionable or extravagant bargain, how determined—Stipulation for accelerating payment, when penal—Domination of Will—Undue influence 815

———, *rate of, stipulated in mortgage-bond—Period between date fixed for payment and date of realization—Interest, at what rate to be allowed.*

A decree-holder in a mortgage suit is entitled to recover interest at the Court rate for the period

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between the date fixed for payment and the date of realization of the money, and not at the rate stipulated for in the mortgage-bond. C. SAHIBZADA SINGH v. HAZARI SAHU 522

Interlocutory order—Revision 640

Interpretation—Enactments regulating procedure 625

——— —**of covenant** 800

———————**of Statute**—Act, whether retrospective 688

——— ——— ———Fiscal enactment 731

Inventions and Designs Act (V of 1888), ss. 20, 29 (4)—*Infringement—Defence—Want of subject-matter—Want of novelty—Difference between Acts of* 1888 *and* 1911—*English and Indian Law—Patents and Designs Act (II of* 1911).

Under the Inventions and Designs Act of 1888 a defendant in an action for infringement is allowed to set up by way of defence all the grounds on which the grant of the patent could be opposed, grounds which are to be found in section 20 of the Act. A defendant is not allowed to set up the defence that the invention was not new, unless the defendant or some person through whom he claims has, before the date of the delivery of the application for leave to file the specification, publicly or actually used in some parts of British India or of the United Kingdom the invention with respect to which the privilege is alleged to have been infringed.

The Indian Acts do not intend, as in England, that there should be any separate defence to the grant of a patent on the ground of want of subject-matter as distinguished from want of novelty.

The defendant cannot raise the defence of want of subject-matter as distinguished from want of novelty and the restrictions imposed by section 29 (4) are binding in both cases All the statutory grounds for opposing the grant of a patent, which can be pleaded in answer to an action for infringement of a patent under the Act of 1911, cannot be pleaded in a suit instituted before the Act, as it is not applicable. M. BHATHEY SUNDARARAYAN v. KUPUSAMI IYER, (1914) M. W. N. 817; 27 M. L. J. 573 996

Issue—Jurisdiction—*Res judicata*—Title—Parties 917

———, *object of framing of—Judge, discretion of—Issue, when not necessary—Failure to frame—Error of law.*

Where a Judge considers that the determination of an issue is necessary for the right decision of a suit, it is his duty to frame such an issue, but where it is not necessary to frame the issue he does not err in law in not framing it. C. GIRDHAR DAS v. SITARAM NAIK 578

——— whether property remitted—Suit for redemption—What should mortgagor prove 35

Joint decree. *See* EXECUTION.

Joint family. *See* HINDU LAW, PARTNERSHIP.

Joint promisors. *See* CONTRACT ACT, s. 43.

——— ——— ——— Promisee's discretion to sue some or all 94

Joint tenancy. *See* CONTRIBUTION.

Joint trial—Association in same offence 200

——— ———Public Gambling Act (III of 1867), ss 3 and 4—Keeping gaming house and being present in it—Offence 844

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Judicial proceedings—*Registrar of Presidency Small Cause Court, inquiry by, as to service of summons, whether judicial proceeding—Power to grant sanction—Oaths Act (X of* 1873), *s.* 13—*Omission to administer oath or affirmation, effect of.*

As the Registrar of the Presidency Small Cause Court is authorized to decide the question of service of summons and is, therefore, entitled to take evidence, the proceedings before him in such matters are in the nature of judicial proceedings and he is competent to grant sanction for prosecution.

An omission to administer an oath or affirmation to a deponent is an irregularity which is cured by section 13 of the Oaths Act.

C. BAL CHAND v. TARAK NATH SADHU, 18 C. W. N. 1323; 16 Cr. L. J. 151 215

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——— ——— Criminal Procedure Code (Act V of 1898), ss. 88, 386, 439—Attachment under s. 386—Revision incompetent—Claim, determination of Criminal Courts, jurisdiction of 550

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——— ——— Document not in existence—High Court, power of, to give opinion 501

———————, *Ecclesiastical and Civil, in Lower Burma—Civil Procedure Code (Act V of* 1908), *s.* 9—Kathanabaing.

The Civil Courts in Lower Burma have jurisdiction to entertain and try suits of Ecclesiastical nature.

The Government has recognised the authority of *Kathanabaing* in Upper Burma, but not in Lower Burma. L. B. WISAYA v. ZAW TA 112

——————— Enhancement of rent—Special Judge—Appeal 446

——— ——— Oudh Rent Act (XXII of 1886), s. 107H—Grove brought under cultivation—*Bilatafia*, land held as—Under-proprietary rights accrual of—Presumption 165

Jurisdiction—contd.

——— ——— *Imprisonment.*

A Magistrate is not competent to impose a sentence of imprisonment to take effect in continuation of a period of sentence which the accused is undergoing in default of furnishing sufficient security M. GANDELLA RAMUDU, *In re.* (1914) M. W. N. 500, 16 Cr. L. J. 137 **201**

——— ——— Maintenance—Suit based on agreement—Claim not made by maintenance-holder **824**

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——— ——— Mutation—*Mamlatdar* holding inquiry, whether Revenue Court—Record-of-Rights—Production of forged Will—Sanction to prosecute **147**

——— ——— Notice, whether necessary in all suits against Secretary of State for India in Council—District, meaning of—Acquiescence in jurisdiction, wheth r presumed from defendant's failure to apply for transfer **232**

——— ——— Order under s. 144, Criminal Procedure Code, directed to public at large—Operation not confined to particular place **146**

——— ——— Pre-emption decree—Application for extension of time for payment **419**

——— ——— Provincial Small Causes Courts Act (IX of 1887), s. 28—Bengal, Assam and N.-W. P. Civil Courts Act (XII of 1887), s. 13 **751**

——— ——— Bengal Tenancy Act (VIII of 1885), s. 106, suit under—Question of title, whether determined in suit under s. 106—Civil Court, jurisdiction of **883**

——— ——— Record-of-Rights, when to be questioned in Civil Courts—*Zemindar* or other proprietor—Suit for declaration of title in a share of a *shikmi ghatwali khorposh* grant, whether cognisable by Civil Court **5**

——— ——— *Res judicata*—Conduct of party to be bound by *res judicata*—Previous decision, when conclusive between parties **954**

——— ——— ——— *Small Cause Court—Suit registered as ordinary suit—Tried as Small Cause Court suit—Civil Procedure Code (Act V of 1908), O. XLVI, r. 7—Reference to High Court—Discretion—Decision on merits.*

A suit valued at Rs. 90 was instituted in the Court of a Munsif having Small Cause Court power only up to Rs. 50. It was registered as an ordinary suit but was tried subsequently as a Small Cause Court suit by the successor of the former Munsif who had Small Cause Court power up to Rs. 100:

Held, considering the merits of the case, that it was not a fit case to direct that the suit be re-heard in the regular form, on the ground that the Court of Small Causes had erroneously held the suit to be cognizable by it.

Held, further, that the High Court had full power in such a case to consider the matter on the merits, so as to do substantial justice without putting the parties to the expense of a fresh suit.

A Court of Small Causes cannot be expected to consider whether the suit before it is one which it has jurisdiction to entertain independently on whether an actual plea is not taken to that effect. C. PARAMESWARI *v.* JAGAT CHANDRA DAS, 21 C. L. J. 141; 19 C. W. N. 900 **972**

Jurisdiction—contd.

——— ——— Succession certificate, revocation of—Succession certificate granted by Subordinate Judge—District Judge, whether can revoke—Regulation V of 1799—Intestate—Succession—District Judge, power of **821**

——— ——— ——— Suit between rival claimants to tenancy—Cognizable by Civil Court—*Res judicata* **913**

——— ——— ——— ——— Title—Issue—Parties **917**

——— ——— **of Civil Court**—Equitable estoppel, whether creates jurisdiction **11**

——— ——— ——— ——— Government grant free of payment of land revenue, sale of, in execution of a mortgage decree—Government refusing sale—Suit against Secretary of State, the judgment-debtor and the subsequent transferee, maintainability of—Specific Relief Act (I of 1877), s. 42—Hearing of case on merits, necessity of, before granting declaration **354**

——— ——— ——— Occupancy right, relinquishment of, by ex-proprietor—Agreement, voluntary, validity of—Ex-proprietary tenancy converted by ex-proprietor into rent-free holding for life—Ejectment—Trespasser—Oudh Rent Act (XXII of 1886), s. 7 A. cl. (4) **376**

——— ——— **of Civil or Revenue Court**—*Claim by one proprietor against another for establishing occupancy rights—When decree of Civil Court cannot be registered in Revenue Court—Return of plaint—Punjab Tenancy Act (XVI of 1887), ss. 77, 100.*

A suit by one of the proprietary body against another for declaring that the former is the occupancy tenant of land belonging to the latter falls under section 77 (3) (d) and is consequently triable only by a Revenue Court. It is immaterial whether the dispute has arisen out of partition proceedings about the land. When a suit of this nature has been decided by a Munsif having no Revenue powers his decree cannot be registered as that of a Revenue Court by the Chief Court. The ordinary course in such a case is to return the plaint for presenting it to a competent Revenue Court. P. KIRPA RAM *v.* KIRPA RAM, 156 P. W. R. 1914, 282 P. L. R. 1914 **89**

——— ——— ——— ——— *Mortgage with possession—Landlord and tenant, relationship of—Second appeal—Finding of fact.*

A finding to the effect that a certain person is the mortgagee and has paid consideration of the mortgage cannot be challenged in second appeal.

The mere fact that a land is mortgaged with possession and the mortgagors hold it under the mortgagee, does not create the relationship of landlord and tenant, and consequently a suit for possession of such a land is cognizable by a Civil and not by a Revenue Court. P. SHADI BEG *v.* AHMED KHAN, 168 P. W. R. 1914 **446**

Jurisdiction—concld.

——————— of Magistrate to ignore acquittal and proceed with case—Acquittal on date not fixed for hearing—Nullity **212**

——————— of Small Cause Court —*Suit for accounts—Consent of parties.*

A Small Cause Court has no jurisdiction to entertain suits for accounts, and consent of parties does not give a Court jurisdiction which it has not got. **L. B.** ABDUL KARIM *v.* BURRAY SAIB **803**

——————— of Subordinate Judge to hear appeal—Appeal—Suit filed in Subordinate Judge's Court but heard and decided by Munsif **874**

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Kabuliat. *See* LANDLORD AND TENANT.

Kaligbat palas. *See* CUSTOM.

Karmakari tenure **889**

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Kattubadi amounts, rate of interest payable on arrears of **937**

Kidnapping. *See* PENAL CODE, s. 361, 366.

Kudivaram interest. *See* MADRAS ESTATES LAND ACT, s. 6.

Laches. *See* LIMITATION ACT, s. 5.

Land Improvement Loans Act (XIX of 1883), ss. 7, 12—*Certificate—Suit for balance of loan—Charge on land for improvement of which advance made—Charge, enforceability of—Sale, validity of—Estoppel.*

Section 7 of the Land Improvement Loans Act (XIX of 1883) gives various means by which the Collector may, on behalf of the Government, recover the moneys that have been advanced According to it the land for which the advance is made is a security to the Government for the purpose of securing the re-payment of the improvement charge.

Where the certificate executed by the Collector at the time of the granting of the loan, and registered under section 12 of Act XIX of 1883, stated that for the re-payment of the loan with interest, the immoveable property specified in the margin in addition to the land on which the improvement was to be made, was hypothecated to the Government, the Government obtained under the terms of the Statute read along with the certificate, a perfectly good charge on the land that was hypothecated by the certificate and was entitled to enforce that charge by sale in the ordinary manner.

It would be wrong to say that because the word mortgage was put in the plaint, the rights of the Government are gone. **C.** SECRETARY OF STATE *v.* LALIT MOHAN BOSE **391**

Landlord and tenant, agreement between, interpretation of—Occupancy tenant liable to all incidences attaching to him as such **385**

——————— *Contribution, right of, founded on justice, equity and good conscience—Principle—Contribution for excess over one's share—Liability limited only to one's share — Over-payment good defence—Suit for contribution—Decree, how to be framed.*

The right of contribution has its foundation in and is controlled, by the principles of justice, equity and good conscience. It does not arise from contract, although it has sometimes been based on the theory of an implied contract for contribution supposed to exist between parties jointly liable *ex contractu*. The principle is that one who has discharged a common liability can recover from his co-obligors only for the excess that he has paid over his share, and each co-obligor is liable to contribute only in proportion to his share of the common debt or obligation. No contribution can be claimed against a person who paid more than his share of the debt. It is not necessary that the entire debt should have been satisfied by the plaintiff, but he must establish that he has paid more than his share of the joint liability. In a suit for contribution, the liabilities of the different parties, plaintiffs and defendants, must be separately ascertained: a joint decree cannot be made in favour of the plaintiffs against the defendants.

X, *Y*, and *Z* are co-sharer landlords, each of whom collects his share of the rent separately, *X* obtains a decree for rent against *A*, *B*, and *C*. Similar decrees are obtained by *Y* and *Z* against the same set of tenants. *A* satisfies the decree of *X*, *B* that of *Y*, and *C* that of *Z*. In a suit for contribution brought by *A* against *B* and *C* in respect of payment made by him to satisfy the decree of *X*, it is open to *B* and *C* to plead non-liability on the ground that they have discharged a liability which would otherwise have fallen upon *A* under the decrees of *Y* and *Z*. **C.** MATUNGINI DEBI *v.* BROJESWAR BANERJEE, 20 C. L. J. 205 **22**

——————— ——— ——— *Eviction of tenant from part of demised lands—Abatement of rent—Cause of action—Res judicata—Finding of fact not to be questioned in second appeal even if based upon evidence on remand.*

Where the question for abatement of rent had been raised in a previous litigation between the parties and by mutual consent it was left open for consideration by the Court, which was quite competent to do so, the matter would not be *res judicata* in a subsequent suit for rent.

A claim for rent, as it accrues due from year to year, is a recurring claim, and to each of such recurring causes of action, the defendant is entitled to interpose his claim for abatement of rent.

The parties in a second appeal are not entitled to call in question the accuracy of findings of fact, even if such findings are based upon additional evidence taken for the first time by the Court of Appeal below on remand from the High Court.

A lessee is entitled to abatement of rent in proportion to the loss of lands through eviction by title paramount.

To justify the inference that the tenant would continue liable for the entire rent even after such loss, there must be a clear and unambiguous provision in the lease to that effect. **C.** RASH MOHINEE DASSEE *v.* NAFAR CHANDRA PAL **265**

Landlord and tenant—contd.

———————Kabuliat *never acted on, effect of—Land, rights and liabilities as regards, when not affected by* kabuliat *in respect of it.*

A *kabuliat* never given effect to does not affect the rights and liabilities otherwise existing with regard to the land mentioned in it. **U. P. B. R.** MAREY *v.* UMRAO SINGH, 1 O. L. J. 766 **108**

———————Land belonging to Government transferred by lease—Government declaring its right and granting it to lessor—Determination of tenancy **785**

———————*Lease, land once held under —Presumption*—Fazendari *tenure, meaning of.*

There is a strong presumption that land once shown to be held under a written instrument of lease continues to be held under it as long as it is occupied by the same tenant, unless the contrary is shown by evidence of a cogent nature.

The word *"fazendari"* is used with reference to tenants holding under a private landholder to indicate, sometimes, an indefeasible right to hold in perpetuity on payment of a small quit or ground-rent, and sometimes any kind of tenure agreed upon between the parties. **B.** PARMANANDDAS *v.* ARDESHIR FRAMJI, 16 BOM. L. R. 723 *note* **512**

———————*Lease of land for purposes of building over—Ejectment—Terms of agreement—Mere non-payment of rent, effect of*—Fazendari, *meaning of*

A tenant took a piece of land for building a house thereon on the condition that so long as the *wadi*, of which the said piece of land formed a portion remained in the possession of the landlord, the tenant would occupy the land, but when the *wadi* ceased to be in the landlord's possession and the land was required, the tenant was to be paid the valuation of the house and to vacate:

Held, (1) that the landlord whose possession was contemplated in the agreement must include both the landlord and his assigns, and in the same way the tenant would include his assigns;

(2) that the tenant could not be ejected according to the terms of the agreement while the landlord remained in possession of the *wadi* and the land was not required by any one else;

(3) that the mere non-payment of rent by a tenant, if the tenancy is not determined, does not give him a right to the property as against his landlord.

The word *"fazendari"*, even though indicating the nature of the rent, does not necessarily decide the nature of the tenure which depends upon the agreement between the parties. **B.** YESHWANT VISHNU NENE *v.* KESHAVRAO BHALJI, 16 BOM. L. R. 720 **523**

———————*Lease—Reversionary lease, whether can be granted—Trustee of* devastanam *granting lease at low rental—Right of tenant—Improvement, right of tenant to claim compensation for.*

The grant of a reversionary lease is always objectionable and can be justified only in exceptional cases.

Where a trustee of a *devastanam*, just before his retirement from office, granted a lease for the long period of 40 years, at a time when nine years of the previous lease for the like period had still to run, at an advance of only Rs. 25 a year in spite of the fact that there had been materially a very great increase in the price of produce since the date when the previous lease was granted:

Held, that, having regard to the prevailing conditions, the lease must be deemed to have been granted at an under-value and the tenant was not entitled to compensation for such improvements as he was bound to do under the terms of the previous lease. **M.** MANGALASAWMI THEVAR *v.* RAJAH OF RAMNAD, 1 L. W. 1074 **361**

———————*Malabar Law* — Kudima *tenure—Ejectment, right of, when arises—Failure to perform services—Forfeiture—Denial of landlord's title, whether sufficient.*

The mere denial of the landlord's title will not work a forfeiture of that tenancy.

A landlord's power to recover the land and to oust the tenant in *kudima janmam* demises, is limited to cases in which the tenant omits to perform the services for the performance of which the grant was made **M.** THEKKILLATH TARAWAD KARANAVAN *v.* VADAKKA CHATHIBIKATH MANCHU NAIR, 2 L. W. 102 **863**

———————, relation of, proof of—Presumption, rebutting of—Burden of proof—Rental agreement, inadmissible in evidence—Oral evidence, whether admissible **804**

———————, relationship of—Jurisdiction of Civil and Revenue Court—Mortgage with possession—Second appeal—Finding of fact **446**

———————, relationship of—Landlord parting with his proprietary right, whether entitled to sell tenant's holding under section 65—Civil Procedure Code (Act V of 1908), O. XXI, rr. 89 to 96—Court, power of, not to confirm sale **601**

———————, *relationship of—Rent assessed—Collection of rent, failure in, effect of.*

If rent is once assessed on land, failure to collect it does not destroy the relationship of landlord and tenant which has once been established. **U. P. B. R.** RAMESHAR DAT *v.* SHYAMA KUMAR SINGH, 1 O. L. J. 764 **102**

———————*Rent-free title—Possession for long series of years without payment of rent—Absence of proof of rent having been ever realised—Inference.*

Possession of lands for a long series of years without payment of rent, in the absence of proof that rent has ever been realised in respect of the lands, leads to the inference that they are held under a rent-free title. **C.** BIRENDRA KISHORE MANIKYA *v.* BHOIRAB CHANDRA CHAKRABARTI, 20 C. L. J. 206 **12**

——————— Suit by former for ejectment and rent—Stamp duty paid on one year's rent—Competency of Court to inquire into title—Transfer of Property Act (IV of 1882), ss. 58 and 83—Mortgage by conditional sale—Sale and rental agreement—Document of even date containing an undertaking to re-convey under certain conditions—Deposit in Court—Refusal to receive money—Whether subsisting relation of landlord and tenant affected by deposit **162**

Landlord and tenant—concld.

——— ——— ——— ——— *Tenancy, permanent or not —Burden of proof—Question of fact—Tenancy of homestead land, created before Transfer of Property Act, 1882, transferability of.*

In the absence of a written instrument containing the terms and conditions of a tenancy, the burden of proving that a tenancy is a permanent one is on the person who alleges it.

Such a question is primarily one of fact. The incident of non-transferability is common to tenancies from year to year of homestead lands created before the passing of the Transfer of Property Act, 1882, in the absence of a custom to the contrary. **C.** KALURAM SRIMAL *v.* PURAN CHAND NAHAR **500**

——— ——— ——— *Under-raiyati holding, not transferable—Tenure, when can be transferred—Bengal Tenancy Act (VIII of 1885), s. 49, applicability of—Relinquishment or abandonment—Transfer of the whole holding—Landlord, right of, to eject.*

An under-*raiyati* holding is not transferable. Where a tenure or holding, apart from the Transfer of Property Act, is not transferable, it cannot become so unless it is expressly made so by some other Statute.

Where a transfer of the whole holding has been made, the landlord is ordinarily entitled to enter on the holding and a relinquishment of the whole holding without any proof of payment of rent or any arrangement made to pay the rent is a relinquishment in fact, which would entitle the landlord to eject the tenant. Section 49 of the Bengal Tenancy Act does not apply to such a case.

What is relinquishment or abandonment depends on the substantial effect of what has been done in each case. **C.** AMINUNNISA *v.* JINNAT ALI, 19 C. W. N 43; 20 C. L. J. 548 **271**

Lease. *See* MINING LEASE.

——— *for certain purpose—Lessee's act in pursuance of purpose of lease—Landlord bound by lessee's act.*

Where a lessee holds land from the landlord for a certain purpose and does any act in pursuance of that purpose the landlord is bound by that act, although that particular act may not be mentioned in the lease as one which the lessee is entitled to do **U. P. B. R.** SHEORAJ KOER *v.* FAKHRUDDIN, 1 O. L. J. 739 **21**

———, construction of **432**

———, construction of—Fishery right, suit for—Limitation—Fishery, money payable for, whether rent **614**

———Landlord and tenant—Reversionary lease, whether can be granted—Trustee of *devastanam* granting lease at low rental—Right of tenant—Improvement, right of tenant to claim compensation for **361**

— — Transfer of Property Act (IV of 1882), s. 52, applicability of—Partition proceedings—Subsequent agricultural lease void **940**

Lease-hold property, whether heritable—Lease for a term of years—Death of tenant before expiry of term—Right of son to hold lease—Suit for ejectment—Notice to quit **45**

Legacy, assent to, effect of **849**

Legal necessity. *See* HINDU LAW.

——— ——— ———Mortgage by guardian of minor **859**

Legal Practitioners Act (XVIII of 1879), s. 13, cl. (f)—*Pleader retaining in his service suspected tout—Making false statement—Professional misconduct.*

A Pleader, who after having given a very clear promise to the Bar Council to dismiss *N*, whose name had been entered in the list of suspected touts and to whom notice had been issued to show cause why he should not be proclaimed as a tout, retained *N* in his service and made a distinctly false promise in order to escape the further action of the Council and broke that promise, and subsequently when an inquiry was made from him, deliberately made a false statement, false to his knowledge, regarding the employment and notice, etc, of the dismissal of *N*, is guilty of professional misconduct under section 13, clause *(f)*, of Act XVIII of 1879 and is liable to be either dismissed or suspended for a certain period. **P.** MR M., FIRST GRADE PLEADER, *In the matter of*, 29 P. W. R. 1914 Cr; 16 Cr L J. 108 **156**

——— ——— ——— ——— **s. 28**—*Promissory note for out-fees disbursed by Pleader, suit on—Note not filed in Court—Dismissal of suit no bar to fresh suit on original cause of action—Note operates as acknowledgment of liability—Interest at stipulated rate not recoverable.*

A promissory note obtained by a Pleader from a client in respect of out-fees disbursed by him is invalid, if not filed in Court under section 28 of the Legal Practitioners Act, XVIII of 1879, but that does not estop the Pleader from obtaining a decree for the sums actually spent by him.

A promissory note, even though it cannot be sued upon on account of not having been filed in Court, may still operate as an acknowledgment of liability and the dismissal of a suit on the note does not bar a fresh suit on the original cause of action, but interest at the rate specified in the note cannot be recovered. **M.** NATESA MOOPPAN *v.* RAMACHANDRA IYER, 27 M. L. J. 728, 1 L. W. 1070 **116**

Legal representative, *appointment of—Account—Commissioner not knowing characters in which accounts are kept, appointment of, whether allowable—Objections to report not taken in first Court or not raised in grounds of appeal before lower Appellate Court, whether allowed in second appeal.*

In the presence of the widow and the mother of a deceased, the widow of deceased's cousin should not be added as a legal representative and her name, if added, should be struck off.

A Local Commissioner appointed by consent of parties, cannot be superseded simply on the ground that he is incompetent to go into the accounts as he cannot himself read the characters in which such accounts are kept.

The objections against the report of the Local Commissioner not raised in the original Court, or those against the said report and decree of that Court not put forward in the grounds of appeal before the lower Appellate Court and, therefore, not dealt with by the latter Court, cannot be allowed to be raised for the first time in the further appeal before the Chief Court. **P.** MUNSHI RAM *v. Mussammat* MIARI, 9 P. W. R. 1915; 70 P. L. R. 1915 **598**

Legal representative—concld.

———————, right of, to continue suit **396**

———————, who is—Admission by legal representative **861**

Lessor and lessee, estoppel between **785**

Lessor and under-lessee—Privity of contract, whether exists between lessor and under-lessee—Covenant by tenure-holder not to excavate tank—Breach of covenant by *raiyat*—Tenure-holder, liability of—No actual damages suffered—Infringement of right—Nominal damages **397**

Letters of Administration—Property held in capacity of *mohunt*—*Mohunt*, whether entitled to letters **24**

Limitation. *See* EXECUTION.

——————Adverse possession—Eleven years five months, possession for—Practice of Settlement Department—Judicial procedure—Possession follows title—Presumption, when raised **802**

—————— Appeal—Award, filing of **31**

——————Appeal re-heard on application for review—Second appeal **732**

—————— *Exclusion of time spent in obtaining conciliator's certificate—Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 48—Mode of computation.*

The plaintiff's possessory suit in the *mamlatdar's* Court having been dismissed on the 28th September 1906, he applied on the 24th September 1909 for a conciliator's certificate which was issued to him on the 24th August 1910. He then filed the present suit to recover possession of the land

Held, that in computing the period of limitation the time to be excluded according to section 48 of the Dekkhan Agriculturists' Relief Act, 1879, must be reckoned by days, and that even excluding the days between the day of the application and the day of the grant of the certificate, the plaintiff's suit was barred by time. **B.** APPAJI BHARMAPPA *v.* THALEGAUDA SATYAPPA, 16 BOM. L. R. 661 **101**

—————— Hundi *payable after certain period—Days of grace—Date of maturity—Negotiable Instruments Act (XXVI of 1881), ss. 22(2), 24*

Every bill of exchange *(hundi)* made payable a certain number of days after date of its execution is at maturity on the third day after the day on which it is expressed to be payable under section 22 (2) of Act XXVI of 1881, and the day of that date is also to be excluded as is laid down in section 24 of the Act. Thus a *hundi* payable on 28th January falls due on 31st of that month. **P.** NANAK SINGH *v.* KESHO DAS, 1 P. W. R. 1915, 34 P. L. R. 1915 **608**

—————— *Ijara*—Non-payment of rent—Possession without payment after expiry of lease—Assessment of rent **31**

—————— Mortgage—Application for personal decree **770**

—————— *Mortgage—Preliminary mortgage decree—Application for sale of mortgaged property—Transfer of Property Act (IV of 1882), ss. 88, 89—Limitation Act (IX of 1908), Sch. I, Art. 183.*

Limitation—concld.

Where a High Court in the exercise of its ordinary original civil jurisdiction passes a preliminary mortgage-decree under section 88 of the Transfer of Property Act, 1882, an application under section 89 of the Act for an order absolute for sale of the mortgaged property made after twelve years from the date of the preliminary decree is barred by Article 183 of Schedule I of the Limitation Act, 1908. **P. C.** MUNNA LAL *v.* SARAT CHUNDER, 17 M. L. T. 120; 21 C. L. J. 118, 2 L. W. 282; 19 C. W. N. 561; 17 BOM. L. R. 408 **683**

—————— special. *See* BENGAL TENANCY ACT SCH. III, ART. 6.

—————— Agra Tenancy Act (II of 1901), s. 199—Suit for ejectment—Defendant set up lease—Direction of Revenue Court to file suit for declaration of title in Civil Court within three months—Suit filed after expiration of three months **511**

Limitation Act (IX of 1871), Sch. II, Art. 129 **109**

Limitation Act (XV of 1877), Sch. II, Art. 141, *scope of—Succession vesting jointly in two female heirs—Suit by one on death of another, nature of.*

A left him surviving two married daughters *B* and *C* and one daughter-in-law *D*, widow of his predeceased son. *D* continued to hold certain *jote* lands left by *A* to the exclusion of *B* and *C* for more than 12 years and then sold the *jote* to the father of the plaintiff, who in his turn, having got himself recognised as an incoming tenant by the landlord, remained in possession and also the plaintiff after him, until on the death of *D* the plaintiff was dispossessed by *C* and her two sons. The plaintiff brought a suit for recovery of possession:

Held, that as there was no partition between *B* and *C*, Article 141 of the Limitation Act, 1877, could not bar the suit so long as *C* was alive.

Where succession vests jointly in two female heirs, between whom no partition of the property is made, the suit by one on the death of the other for the property cannot be said to be one for recovery of possession. **C.** SAGHINDRA KISHORE DEY *v.* RAJANI KANTA CHAKRABARTY **83**

Limitation Act (IX of 1908), s. 5—*Appeal—Admission of appeal presented after time—Discretion of Court—Discretion must be legal and regular—Presentation of appeal to wrong Court, whether sufficient cause.*

Discretion when applied to a Court of Law means discretion guided by law. It must not be arbitrary, vague and fanciful but legal and regular.

The presentation of an appeal to a wrong Court through a mistake in ignorance of law is not a sufficient cause for admitting an appeal after time.

In an appeal filed after time the appellant should state in his memorandum of appeal the grounds on which he asks the Court to admit it after time. **U. B.** NGA PO KAN *v.* NGA SHWE DAT, 7 BUR. L. T. 250 **967**

—————— s. 5—*Appeal filed late by Advocate—Laches—Sufficient cause.*

Limitation Act—(1908)—contd.

Where the appellant sent the costs and fees to his Advocates' firm by money order in the name of one of the members of the firm who happened then to be absent, and where despite the knowledge that the required costs and fees had been despatched, the Advocate present in the firm did not advance the Court-fees to present the appeal in time, the laches cannot be excused specially when the appellant could have sent the copies and the money far earlier than he did. **L. B.** MA KYA NYA *v.* MG. TUN HLA, **639**

——— ——— ——— **s. 5**—*Civil Procedure Code (Act V of 1908), O. XX, r. 1—Appeal filed beyond time, admissibility of—Court's negligence to observe procedure—Sufficient cause.*

A party is not bound to make inquiries as to when a judgment will be delivered, but is entitled to rely on the Court obeying the express provisions of law and giving notice to his Pleader of the date fixed for delivery of judgment, and if an appeal is barred entirely through the negligence of the Judge in following the procedure, the appellant cannot be held responsible for it and the appeal should be admitted. **L. B.** MA ME THIN *v.* MAUNG SAN LUN **784**

——— ——— ——— **ss. 5, 14, Sch. I, Art. 11**—*Civil Procedure Code (Act V of 1908), O. XXI, r. 63—Removal of attachment—Appeal and revision—Advocate's act, how far binding on his client—Agent—Negligence.*

Under Order XXI, rule 63, Civil Procedure Code, an order on the application for removal of attachment is conclusive, subject to a regular suit to establish the right to the attached property, and under Article 11 of the Limitation Act one year is allowed for such a suit. Therefore, it would be culpable negligence on the part of an Advocate to file an appeal or revision notwithstanding the plain provisions of Order XXI, rule 63, Civil Procedure Code, and the time spent in such appeal or revision cannot be excluded under section 14 of the Limitation Act, as the plaintiff would be bound by his Advocate's negligence under the ordinary rule that, if a person employs an agent, he is bound by what his agent does in the course of his employment.

Section 5 of the Limitation Act leaves it to the discretion of an Appellate Court to exclude the time, whereas section 14 obliges a Court to exclude time if it finds a certain state of facts. **L. B.** MG TUN U *v.* PALLANIAPPA CHETTY **829**

——— ——— ——— **s. 6**, applicability of **865**

——— ——— ——— **s. 6**—*Privilege, personal and not transferable—Minor, assignee from, position of.*

The privilege conferred by section 6 of the Limitation Act is personal and not transferable, so that an assignee from a minor, whether during the continuance or after the cessation of his disability, must file the suit within the ordinary period provided for the suit or on the date of the transfer, if the transferor's right subsists till that date. **O.** IMAMUDDIN *v.* MUMTAZ UNNISA, 1 O. L. J. 747; 188 O. 34 **118**

——— ——— ——— **s. 10**, *applicability of—Composition deed—Absolute transfer of property by debtor to trustees—Resulting trust—Suit for surplus moneys.*

Limitation Act—(1908)—contd.

Section 10 of the Limitation Act has a very limited application and has no reference to trusts which are merely founded on an unexpressed but implied intention of the party creating them, or to trusts which are raised by construction of Equity without any reference to the intention of the parties.

Where, therefore, certain debtors entered into a composition deed with their creditors whereby they transferred absolutely to trustees all their property for the benefit of the creditors in order to obtain a discharge from all liabilities:

Held, that no resulting trust was created in favour of the debtors and that they had no cause of action to sue for surplus moneys.

Obiter dictum.—Where property is vested in a trustee under a Will, he holds it as express trustee, not only for the devisees and legatees named therein, but as regards any undisposed of residue, for the heir-at-law and next-of-kin, the trust is said to arise on the face of the instrument itself. **S.** LEKHRAJ VISUMAL *v.* ASSAMAL TARUMAL, 8 S. L. R. 132 **332**

——— ——— ——— **s. 14** **144, 829**

——— ——— ——— **s. 14**—*One suit for pre-emption of several properties sold on different occasions to separate vendees—Plaint restricted to one—Subsequent institution of other suits after time.*

Where several portions of a property have been sold to separate vendees on different occasions, but the pre-emptor in good faith sues all the vendees jointly and the suit is restricted to only one of the sales, section 14 of the Indian Limitation Act IX of 1908 applies in computing the period of limitation for the other suits subsequently instituted in respect of the sales of rest of the property. **P.** AHMAD *v.* SULTAN, 26 P. W. R. 1915; 87 P. L. R. 1915 **927**

——— ——— ——— **s. 19**—*Suit on promissory note—Endorsement of payment—Body in plaintiff's handwriting—Endorsement signed by debtor—Sufficient acknowledgment of liability*

Where an endorsement on the back of a promissory note written by the plaintiff and signed by the debtor ran as follows: "Rs 164-5-0 was paid in respect of the promissory note:"

Held, that the endorsement was a sufficient acknowledgment of liability under the promissory note within the meaning of section 19 of the Limitation Act. **M.** JAGANADHA SAHU *v.* RAMA SAHU, 17 M. L. T. 80 **747**

——— ——— ——— **s. 19**—*Suit to recover balance of principal and interest due on registered lease—Part payment by lessee accompanied by letter—Letter, whether acknowledgment.*

A registered lease provided that the rent was payable in four instalments on the 15th days of November and December 1901 and January and February 1902. The lessee made a payment of Rs 20 on the 15th of February 1905, when he wrote to the plaintiff asking that the sum be credited to the account on the lease. The plaintiff sued on the 20th April 1910 to recover the balance of the principal and interest:

Held, that the letter of the 15th of February 1905 contained a clear admission that the rent was then due, from which an implied promise to pay

Limitation Act—(1908)—contd.

whatever was actually due might be inferred, and was sufficient to save the bar of limitation. **M.** VISVANATHA SANTHASINGARO *v.* RAMACHANDRA MARDRAJA, 17 M. L. T. 78 **744**

——— **s. 28** **250**

——— **s. 91** **687**

——— **Sch. I, Art. 11** **829**

——— **art. 29** —*Growing crops, whether moveable property—Wrongful attachment—Suit for damages.*

The Law of Limitation must be strictly interpreted and applied. That is to say, no right or remedy is to be regarded as barred unless it is clearly shown to be shut out by the enactment.

Growing crops until severed from the soil are immoveable property within the meaning of the Limitation Act; the attachment of such crops is not a seizure of moveable property for the purposes of Article 29 of the Act and a suit for damages arising out of such seizure is not governed by that Article. **N.** MURLIDHAR *v.* MULU, 11 N. L. R. 18 **935**

——— **art. 44** **687, 695**

——— **art. 49**—*Hire and purchase system—Sewing machine purchased on instalment system—Suit for return of machine—Non-payment of instalments—Limitation.*

The mere non-payment of rent for a sewing machine taken on the hire and purchase system would not amount to wrongful taking or wrongful detention of the machine within the meaning of Article 49 of the Limitation Act. There must be some overt act or demand for the machine by the hirer and refusal by the purchaser. **A.** SINGER MANFG. Co. *v.* E FELIUN, 13 A. L. J. 81 **637**

——— **art. 62** **807**

——— **art. 62,** *applicability of—Money had and received—Suit by some heirs on mortgage—Decree in favour of them and property purchased by them—Other heir, right of, to realize his share—Limitation.*

M, a Muhammadan, died leaving his widow *N*, and other heirs. The other heirs brought a suit on a mortgage in favour of the deceased, making *N* a defendant. They obtained a decree and in its execution purchased the properties themselves.

Held, that the suit by *N* against those heirs who had recovered the mortgage-debt to realize her share of the debt was governed by Article 62 of the Limitation Act, as the suit was one for money received and had by the defendant for the plaintiff's use. **A.** AMINA BIBI *v.* NAIMUNNISSA BIBI, 13 A. L. J. 255, 37 A. 238 **712**

——— **art. 62**—*Suit to recover money from person appointed to realize assets of a deceased—Money had and received—Limitation.*

The defendant was appointed to sell the stock-in-trade of a deceased, to realize debts due to him and pay debts due to others by the deceased, pending the settlement by arbitration of disputes between the relatives of the deceased as to their shares. The defendant realized the assets of the deceased and paid certain debts. The arbitration proceedings meanwhile fell through. The plaintiff, a sister of the deceased, sued to recover her share.

Held, that the plaintiff was only entitled to recover under the form of action known as a claim for "money had and received by the defendant for the use of the plaintiff" and as the suit was brought more than three years after the latest item was received, it was barred by Article 62 of the Limitation Act. **A.** MASIH-UD-DIN *v.* IMTIAZUNNISA BIBI, 12 A. L. J. 1256; 37 A. 40 **533**

——— **art. 68** **849**

——— **art. 85**—*"Mutual, open and current account," meaning of—Settled account, opening of.*

For an account to be mutual, it is necessary not only that one of the parties has received money and paid on account of the other, but that each of the two parties has received and paid on the other's account: each party should be able to say to the other "I have an account against you."

Where an account has been settled up to a certain date, it lies on the party desiring to re-open that account to aver some specific error in the account and to prove it. **L. B.** EBRAHIM AHMED MEHTER *v.* S. ABDUL HUQ **879**

——— **art. 89** **807.**

——— **art. 120** **607, 807**

——— **art. 120** —*Punjab Limitation (Ancestral Land Alienation) Act (I of 1900)—Suit for declaratory decree setting aside a Will, incompetent during life-time of testator—Limitation—Six years.*

A suit will not lie for a declaratory decree setting aside a Will during the life-time of the testator.

A declaratory suit for setting aside a Will is governed by Article 120 of the Indian Limitation Act, 1908. The Punjab Limitation (Ancestral Land Alienation) Act, 1900, does not apply to such suits **P.** NUR KHAN *v.* BAKHTAWAR, 80 P. L. R. 1915 **574**

——— **art. 132** —*Further charge, deed of, suit for recovery of money due on—Mortgagor not to redeem prior mortgages without first discharging further charge—Mortgagee to enforce at any time payment of money due on deed of further charge—Limitation, starting point of.*

Where a deed of further charge provided that the mortgagor should not be at liberty to redeem the prior mortgages without first redeeming the deed of further charge and that if in the meantime the mortgagee desired to recover his money she should be at liberty to realise it whenever he wished, and more than 20 years after the execution of the deed of further charge a suit was brought for recovery of money due on it

Held, that the money became due from the date of the execution of the deed and that the suit was time-barred under Article 132, Schedule I, of the Limitation Act. **O.** GAJRAJ SINGH *v.* RAGHUBAR, 2 O. L. J. 46, 18 O. C. 86 **540**

——— **art. 141** **250, 95**

Limitation Act—(1908)—contd.

——— ——— ——— **art. 142** — *Possession within 12 years of suit—Undisturbed possession—Discontinuance of possession.*

In a suit for ejectment of a trespasser from certain land allowed to remain fallow for many years by the owner, the defendant pleaded that the land had been waste land for 40 years and he cleared the jungle with the permission of the Thugyi and was in occupation.

Held, that the suit was governed by Article 142 of the first Schedule of the Limitation Act and the plaintiffs must prove that they were the rightful owners and were in possession at some time within 12 years before the suit.

Discontinuance of possession means an abandonment of possession by one person followed by the actual possession of another person. **U. B.** NGA PO *v.* NGA SO PE, 7 BUR. L. T. 255 **981**

——— ——— ——— ——— **art. 144** **610**

——— ——— ——— ——— **arts. 144, 44, 91**—*Sale by one member of joint Hindu family—Suit to set aside sale and for possession—Limitation.*

A suit to set aside a sale executed by one member of a joint Hindu family, and for possession of the property is governed by Article 144 of the Limitation Act and not by Article 44 or 91. **A.** KALYAN SINGH *v.* PITAMBAR SINGH, 13 A. L. J. 94 **687**

——— ——— ——— ——— **art. 158**—*Application to set aside award—Commencement of period of limitation—Material irregularity—Erroneous decision on point of law.*

The period of limitation prescribed by Article 158, Schedule I, of the Limitation Act, 1908, for an application to set aside an award commences to run from the date of submission of the award to the Court, and not from the date of service of the notice.

To give an erroneous decision on a point of law is not necessarily to act illegally or with material irregularity. **S.** KALIANBARTHI *v.* ROCHANBAI, 8 S. L. R. 190 **371**

——— ——— ——— ——— **art. 160**—*Application to re-admit petition for review—Extension of time—Illness of co-petitioner, whether sufficient ground—Absence of co-petitioners and their Pleader.*

The illness of one of the petitioners for restoration of a petition for review is no ground for extending the period provided by Article 160 of Schedule I of the Limitation Act, 1908, specially when the absence of the petitioner's Counsel and of the other co-petitioner is not explained. **P.** KALU *v.* SOWARIA, 16 P. W. R. 1915; 68 P. L. R. 1915 **703**

——— ——— ——— ——— **art. 164**—*Application to set aside ex parte decree—Summons not served—Sufficient time—Defendant, rights and liabilities of.*

A defendant who has been duly served cannot get an *ex parte* decree set aside unless he can show that he acted diligently and was prevented from appearing at the adjourned hearing, and he is barred by Article 164 of Schedule I of the Limitation Act, 1908, if he fails to make proper use of the 30 days following the decree. There is no justification for construing "duly served" in Article 164 as excluding a case where a summons was not served in sufficient time. **S.** KASARCHAND KESHAVJI *v.* LAKHAMSI RAISI, 8 S. L. R. 153 **351**

Limitation Act—(1908)—concld.

——— ——— ——— ——— **art. 180**—*Sale in execution—Application for delivery of possession.*

Where an auction-sale was confirmed before the Limitation Act of 1908 came into force but the application for possession of purchased property was made after the operation of the Act, it is governed by Article 180 of Schedule I of the Limitation Act of 1908 and is barred, if not brought within three years from the date when the sale became absolute. **C.** HUSSEIN BUX *v.* BEOHA **420**

——— ——— ——— ——— **art. 182, cls. (5) and (6)**—*Step-in-aid of execution—Decree-holder accompanying peon to identify judgment-debtor—Ex parte decree, effect of—Judgment-debtor, not having notice, right of.*

The mere fact that one of the decree-holders went along with the serving peon to identify the judgment-debtors, is not itself a step-in-aid of execution within the meaning of either clause (5) or clause (6) of Article 182 of the Limitation Act.

An *ex parte* decree passed by a Court is a good decree; but, if the decree is made in the absence of and without notice to the other party, that decree does not bind the other party or does not stand in his way of showing what were the true facts of the case.

Therefore, a judgment-debtor, not having any notice of an order of the Court admitting a previous application for execution as not time-barred, is entitled to show that the application was barred on that date. **C.** JUGOL KISHORE *v.* CHINTAMONEY, 18 C. W. N. 1288 **225**

——— ——— ——— ——— **art. 182**—*Step-in-aid of execution—Application for execution of mortgage-decree wrongly returned as defective, not re-presented—Civil Procedure Code (Act XIV of 1882), s. 238.*

An application for execution of a mortgage-decree for sale, wrongly returned for want of a certificate under section 238 of the Civil Procedure Code, 1882, although not re-presented is a step-in-aid of execution within the meaning of Article 182 of Schedule I of the Limitation Act. **M.** MOOTHA *v.* KANDAM VITTIL SANKUNNI NAIR **811**

——— ——— ——— ——— **art. 183** **683**

Lunacy Act (XXXV of 1858), inquiry under **459**

Madras Abkari Act (I of 1886), s. 22—*License to sell toddy, transfer of—Promissory note given in consideration, legality of.*

A promissory note given in consideration of the transfer of a right to sell toddy prohibited under section 22 of the Madras Abkari Act (I of 1886) is unenforceable, as being for an illegal consideration. **M.** SADHU KONDAYYA *v.* KOSAGANI PEDASWAMY, (1915) M. W. N. 25 **919**

Madras Civil Courts Act (III of 1873), s. 24—*Evidence—Affidavit sworn to in Munsif's Court—Affidavit sworn to before Head Clerk in absence of Nazir, admissibility of*

An affidavit sworn to in the Court of a District Munsif is a declaration which a Court of Justice is bound to receive as evidence of the facts stated in it, and it has nonetheless this character because it was sworn to before the Head Clerk of the

Madras Civil Courts Act—concld.

District Munsif's Court, who was performing the Deputy Nazir's duties during his absence under the District Munsif's order in accordance with section 24 of Act III of 1873. **M.** KOTAYYA PILLAI. *In re*, 16 CR. L. J 111 **159**

Madras Estates Land Act (I of 1908), ss. 3, 8, 185—*Private land, meaning of—Conversion of ryoti into private land—Degree of proof*—Onus—*Letting lands as kambattam, whether amounts to conversion—Landlord cultivating lands himself—Presumption*

Per *Wallis, C J*—Section 8 of the Estates Land Act does not impose retrospectively an absolute prohibition of the conversion of *ryoti* into private land not to be found in the definition, or in the section specially dealing with evidence as to what is private land. It is necessary that an actual conversion should be proved by clear and satisfactory evidence.

Merely calling the lands *kambattam* and letting them on terms which negative occupancy rights, with a view to prevent the assertion of such rights, is not sufficient to convert them into private lands within the meaning of the definition.

The burden is on the *zemindar* to show that the suit lands come within the definition in section 3 as forming part of his domain or home-farm lands Though the fact that the lands have been let as *kambattam*, is evidence under section 185 that they are private lands and though the provisions of section 183 do not apply to Civil Courts, still the fact that the lands really were at some time domain or home-farm lands must be strictly proved

Per *Seshagiri Aiyar, J*—The object of the Act is to prevent the conversion of *ryoti* into *kambattam* land. The definition section and section 8 clearly show that the Legislature demands the strictest proof of a land being *kambattam*.

The proviso to section 185 is not in the nature of an exception and raises the irrebuttable presumption in favour of a landlord who has by his own servants or by hired labour cultivated the land for 12 years preceding the Act that it should be regarded as his home-farm land. **M.** ZEMINDAR OF CHELLUPALLI *v.* RAJALAPATI SOMAYYA. 27 M. L J. 718, 16 M. L. T. 376; (1915) M W N. 1, 2 L W 17 **77**

——— ——— ——— ss. 4, 12—*Custom not to pay rent for land remaining fallow—Term in patta that no rent is chargeable on lands allowed to lie fallow, whether improper—Tax on palmyras, when payable.*

A tenant is bound to pay rent upon every portion of his holding, whether he cultivates it or not, but is subject to any custom which may be proved to exist in particular localities

Where, therefore, a custom not to charge any rent for the lands which are allowed to lie fallow by the tenants exists, a term in a *patta* to that effect is not improper.

Prima facie, a tenant who pays rent for a land should not be taxed twice over for trees standing on the land unless he derives special benefit from them

Therefore, a separate tree tax on palmyras should be levied only when they are tapped for toddy, and not when they merely put forth spathes. **M.** UDAYAL *v.* ARUNACHALA CHETTIAR, 2 L. W 145; (1915) M. W. N. 190 **872**

Madras Estates Land Act—contd.

——— ——— ——— ss. 6 (1), 8—*Holding sold in rent auction—Ryot in possession on date Act came into force, whether still ryot—Kudivaram interest, right to, whether affected by s. 6—Landlord purchasing Kudivaram interest, right of.*

A person in possession of *ryoti* land professing to hold it as a *ryot* on the date of the passing of the Madras Estates Land Act, gets a permanent right of occupancy.

Therefore, a *ryot* whose holding was sold away in a rent auction before the Madras Estates Land Act came into force but who continued in possession of such land at the commencement of the Act, obtained a permanent right of occupancy in the holding under section 6, clause (1), of the Act.

The rights to the *kudivaram* interest as between the rival claimants thereto (other than the landlord who is debarred by section 8 from claiming such interest) are not affected by section 6, clause (1). **M.** SIVAPADA MUDALI *v.* PITTY THAYAGARAJA, 27 M. L J. 665 **383**

——— ——— ——— ——— s. 8 **77, 383**

——— ——— ——— ——— s. 12 **872**

——— ——— ——— s. 13 (3), *scope of—"Contract to the contrary" in s. 13, cl. (3), meaning of—Interpretation of Statute—Act, whether retrospective—Improvement by tenant—Payment of higher rent, when enforced—Contract before Act, effect of*—Sadelwar *and* Madiri Kasuvu, *whether illegal cess.*

Per *Kumaraswami Sastri, J*—The words "contract to the contrary" in section 13, clause (3), of the Madras Estates Land Act refer only to contracts made after the passing of the Act and the section has no retrospective operation in cases where rent claimed was payable under a contract which would have been legally enforceable under the Rent Recovery Act or any other law in force at the time of the passing of the Estates Land Act

Per *Kumaraswami Sastri and Napier, JJ*.—Section 3, clause (3), of the Madras Estates Land Act does not enable a tenant to claim exemption from liability to pay a higher rate of rent for crops raised with the help of improvements made at his sole expense, where the improvements had been effected before the Act came into force and where there had been a contract entered into between him and the landlord before the passing of the Act for the payment of such enhanced rent.

An Act is always prospective in its operation, and to make it retrospective stronger words than those found in section 13, clause (3), of the Estates Land Act are necessary.

Sadasiva Aiyar, J, (dissenting)—Clauses (1) and (2) of section 13 of Act I of 1908 merely declare the existing law and do not create new rights, and there is no reason to hold that section 13, clause (3), is intended to apply only to prospective improvements made by the tenant

A landlord is not entitled to increase the annual assessment by the addition of a second crop assessment.

Sadelwar and *Madiri Kasuvu* are part of rent and not illegal cesses.

Per *Sadasiva Aiyar and Napier, JJ*—In the case where the payment of higher rate of rent for

Madras Estates Land Act—concld.

crops raised with improvements effected by tenants has gone on for over 60 years, consideration for agreement to pay at the higher rate should be presumed. **M.** VENKATA PERUMAL v. RAMUDU **688**

——— ——— ——— **s. 13, cl. 3,** *if retrospective—Enhanced rent, contract to pay, if presumable from 40 years' payment—Wells dug at tenant's expense—Site of wells given free of rent by landlord—Consideration—Enhanced rent, if claimable.*

Section 13, clause (3), of the Madras Estates Land Act I of 1908, has no retrospective operation.

A valid contract to pay rent at enhanced rate can be presumed from payments at that rate for 40 years.

Where a landlord set apart a considerable area of land for the digging of wells for irrigating the lands in respect of which enhanced rates are claimed and charged no rent for the area so set apart, he must be deemed to have contributed to the cost of the wells dug by tenants on that area, though at their expense, and such contribution is sufficient consideration for a contract to pay rent at enhanced rate. **M.** GOVIND DOSS v. GURRAM CHINNAPPA NAIDU, 2 L. W. 142, 28 M. L. J. 136 **869**

——— ——— ——— **s. 73** **937**

——— ——— ——— **ss. 112, 113, 189**—*Sale under the Act—Suit to contest sale—Jurisdiction—Civil suit barred both before and after sale*

Section 189 of the Madras Estates Land Act precludes a Civil Court from taking cognizance of a suit for declaration that no valid sale can be effected and therefore a party is not entitled to contest in a civil suit, the validity of a sale under the said Act, and it makes no difference whether the suit is brought before or after the sale. **M.** RAMANATHAN CHETTY v. RAMASAMI CHETTY **409**

——— ——— ——— **s. 185** **77**

——— ——— ——— **s. 185**—*Private land—Determination*—Onus—*Evidence.*

Section 185 of the Madras Estates Land Act enacts rules to determine whether any particular land is private land. The presumption is that it is not and in determining the question the Court is to have regard to the local custom and to the question whether the land was before the 1st day of July 1898 specifically let as private land, and to any other evidence that may be produced. Letting as private land after 1st July 1898 is not to be taken into account. **M.** CHINTAM REDDI SANYASI v. RAJASAGI APPALA NARASIMHA RAJA GARU, (1914) M. W. N. 497 **50**

——— ——— ——— **s. 189** **409**

——— ——— ——— **s. 189**—*Ryoti land—Jurisdiction of Civil Court—Equitable estoppel, whether creates jurisdiction.*

Where the jurisdiction of a Civil Court is barred by section 189 of the Madras Estates Land Act, the fact that the defendant is equitably estopped from raising such an objection cannot give jurisdiction. **M.** G. NARAYANASWAMI NAIDU, *In re* **11**

Madras General Clauses Act (I of 1891), s. 18 **937**

Madras Hindu Transfers and Bequests Act (I of 1914), retrospective effect of **298**

Madras Local Boards Act (V of 1884), s. 51—*Trust, powers as to, transferred from Board of Revenue—Suit for recovery of trust property, when maintainable by local body.*

The local body to which the powers of the Board of Revenue are transferred under section 51 of the Madras Local Boards Act, 1884, is invested with the rights of management as well as superintendence of a trust property and is entitled, where there is no trustee, to sue for the recovery of trust property. **M.** BHIMAYARAPU BUCHI REDDI v. PREDT., T. B, GUNTUR, 27 M. L. J. 284 **1001**

——— ——— ——— **s. 73**—*Mortgagee with possession, whether an intermediate landholder—Tenant's right to pay cess to him.*

A mortgagee with possession is as much a landholder as any lessee and is intermediate between the ultimate landlord and his tenants within the meaning of section 73 of the Local Boards Act, and the tenants' right to pay him, recognised in that section, cannot be abrogated by a contract to which they were not parties.

Section 73 in its amended form confers on the tenant a right to pay the cess to the intermediate landholder, irrespective of the question whether the intermediate landholder is bound to reimburse the landlord or not.

Per *Tyabji, J*—The question whether if the mortgagee became entitled to collect half of the cess in his capacity as intermediate landholder he was at liberty to retain it himself or was bound to pay it or account for it to the mortgagor, is not relevant to the rights and liabilities existing between the landholder and the tenant.

The notion of transfer of property is not an ingredient in the notion of an intermediate landholder whose right to collect the cess from the tenant is not dependent on his paying to his landlord, that might form the subject of an express or implied contract. **M.** PUCHAKAYALA JAGANNAIKULU v. MANAGER OF NANDIGAM ESTATE, (1914) M. W. N. 939, 28 M. L. J. 154 **122**

Madras Proprietary Estates Village Service Act (II of 1894), s. 18—*Madras Rent Recovery Act (VIII of 1865), s. 37—Kattubadi amounts, rate of interest payable on arrears of, whether 6 per cent. or 12 per cent—Interpretation of Statute—One Act repealed and another enacted—Applicability of provisions of old and new Acts—Madras General Clauses Act (I of 1891), s. 18—Madras Estates Land Act (I of 1908), s. 61—Custom, if can be proved by a single witness—Contract Act (IX of 1872), s. 73, applicability of.*

The rate of interest payable on arrears of *kattubadi* amounts is only 6 per cent. and not 12 per cent.

Section 18 of Madras Proprietary Estates Village Service Act, II of 1894, only extends the *procedure* enacted in section 37 of the Madras Act VIII of 1865 (Rent Recovery Act) to proceedings for the recovery of arrears of *kattubadi*. The substantial provision declaring the rate of interest claimable on arrears of rent has not been extended to arrears of *kattubadi*.

In construing section 18 of Madras Act II of 1894, in respect of arrears of *kattubadi* which fell due after the repeal of Madras Act VIII of 1865, reference must, under section 18 of Madras General Clauses Act, I of 1891, be made to the corresponding

Madras Proprietary Estates Village Service Act—concld.

provision of the Madras Estates Land Act, I of 1908, *viz.*, section 61.

A recognised and enforceable custom cannot be proved by the evidence of a single witness as to the practice.

Quære:—Whether section 73 of the Indian Contract Act applied to the case? **M.** NARAYANASWAMI NAIDU *v.* BALIJEPALLI SUNDARARAMIAH, 2 L. W. 194 **937**

Madras Rent Recovery Act (VIII of 1865), s. 37 **937**

Madras Revenue Recovery Act (II of 1864), s. 59 **274**

Maintenance. *See* CRIMINAL PROCEDURE CODE, s. 488; DIVORCE ACT, s. 37.

———. *See* HINDU LAW **379**

——— **allowance,** whether charge—Intention of parties **283**

Majority Act (IX of 1875), s. 3 **553**

Malabar Law—Anubhavam *tenure—Alienation to stranger, effect of.*

Alienation by an *anubhavam* tenant to a stranger puts an end to the tenure, and the land reverts to the grantor, even without an express clause in the grant providing for a re-entry. **M.** UKKANDATH *v.* PULIYAKOT KUNHI KUTTAN **10**

——— ——— Landlord and tenant—*Kudima* tenure—Ejectment, right of, when arises—Failure to perform services—Forfeiture—Denial of landlord's title, whether sufficient **863**

——— ——— Melcharath *executed prior to expiry of* kanom, *validity of—Family necessity—Successor, whether bound.*

A *melcharath* executed without family necessity before the expiry of a prior *kanom* in respect of the same property is not binding on the successor of the *karnavan* whether the *karnavan* did or did not survive the expiry of the prior *kanom*. **M.** CHAMBOKIL MOIDIN KUTTI *v.* ACHUTANDAL KUNHI KOYAN MUTH, 27 M. L. J. 691 **1007**

——— ——— ———*Redemption of* kanom *mortgage, suit for—Previous suit against mortgagor and mortgagee deciding title to property—*Res judicata*—Estoppel—Covenant for title, breach of—Damages, measure of—Transfer of Property Act (IV of 1882), s 72 (c)—Expenses incurred in supporting title of mortgagor, reimbursement for—Compensation for trees of spontaneous growth—Malabar Tenants Improvements Act (I of 1900), ss. 5 (11), 10.*

Where in a suit for redemption of a *kanom* mortgage by a *janmi* who had paid off a previous mortgagee with compensation for improvements, it appeared that the title to the property had been decided against the plaintiff in a previous suit brought in the District Munsif's Court by a third party against himself and the mortgagor:

Held, (1) that the matter was *res judicata* though the former suit was brought in a Court which had no jurisdiction over the present suit;

(2) that even if it was not *res judicata* the defendant and the plaintiff in the present suit having been parties to the former suit, the plaintiff was equitably estopped by reason of the finding in the previous suit from raising the contention that the properties disputed in that suit belonged to him,

(3) that as the plaintiff included the disputed lands in his demise to the defendant, he must be deemed to have given a covenant for title,

(4) that the defendant's statutory right given by the breach of covenant could not be taken away except by an express release of such rights by him or by acquiescence of such a very long duration that a release could be safely presumed;

(5) that no question of limitation arises as between the mortgagors and mortgagees when accounts are taken at the time of redemption,

(6) that the damages which the defendant sustained by being unable to get possession of those lands should be calculated on the basis of the present *pattom* income *minus* a reasonable interest on the sum which he would have had to pay for the improvements;

(7) that the defendant could not claim any reimbursement for expenses incurred in supporting the title of the mortgagor, as it is only "in the absence of a contract to the contrary" that such a claim can be successfully brought;

(8) that the defendant was entitled to compensation for improvements under sections 5 (11) and 10 of the Malabar Tenants Improvements Act. The compensation due to the defendant's predecessor in the *kanom* right now vested in and was claimable by him irrespective of the fact that under the old law no compensation was payable for trees of spontaneous growth and the defendant was not obliged to pay anything to the prior *kanomdars* for those trees **M.** THEKKEMANNENGATH RAMAN *v.* KAKKESSERI PAZHIYOT MANAKKAL, 28 M. L. J. 184, 2 L. W. 438 **989**

Malabar Tenants Improvements Act (I of 1900), ss. 5 (11), 10 **989**

Malicious prosecution—*Plaintiff accused of theft of electricity and acquitted—Dishonest conduct—Suit for damages—Liability of defendant, when arises—Malice in law—"Mains," use of, effect of—"Dishonestly" in s 39, Electricity Act, meaning of—Electricity Act (III of 1903), s. 39—Penal Code (Act XLV of 1860), s. 370.*

The plaintiff made certain alterations in the electric wires on his estate, which had the result of conducting the current directly from wires conveying the current supplied by the Municipality without passing through the meter supplied for the purpose of measuring the amount of energy consumed on his estate. The Chairman of the Municipality charged him for theft of electricity under section 39 (5) of the Electricity Act, but he was acquitted of all charges. He then sued the Chairman of the Municipality for damages for malicious prosecution.

Held, that the plaintiff may have been honestly mistaken in his views of law, but he cannot as a reasonable man have been ignorant of the fact that his alteration of the wires would cause wrongful loss to the Municipality and that on the principle that a man's intention should be held to be the reasonable and probable consequence of his acts, his conduct was dishonest within the meaning of the Indian Penal Code.

Malicious prosecution—contd.

Held, further, that as the defendant had reasonable and probable cause for directing the prosecution of the plaintiff, there was no malice in law in his conduct and he was not liable for damages.

The use of the word "mains" for the words "any electric supply-line through which energy is supplied by the licensees" in section 39 of the Electricity Act in a notice issued by a Municipality Engineer to an accused, would operate as an admission against the Municipality and would be a good defence to a criminal charge under section 379, Indian Penal Code.

Where the word "mains" is qualified by such words as "outside your metre," the accused gets full notice that he must not take current except through the metre.

The word "dishonestly" as used in section 39 of the Electricity Act is a legal expression having the same sense as that in which it is used in the Penal Code. **C.** CARL FORSTMANN v. H. T S FORREST **591**

——— *Prosecutor, whether defendant must be proved to be—Mental distress—Bodily discomfort—Damages.*

In order to succeed in a suit for damages for malicious prosecution, it is not necessary for the plaintiff to prove that the defendant was in fact his prosecutor in the proceedings before the Criminal Court.

The plaintiff was proceeding from the Jaunpur Railway Station to his home when the defendant ran up from behind and arrested him The plaintiff was eventually put upon his trial on a charge of theft but was acquitted On plaintiff's suit for damages for malicious prosecution

Held, that in taking upon himself to arrest the plaintiff, the defendant took upon himself a responsibility far greater than he would have done if he had merely made a report or complaint alleging the commission of an offence of theft before an authority competent to take action in the matter;

(2) that the prosecution of the plaintiff before the Criminal Court was substantially the work of the defendant and that he was, therefore, liable for damages, and

(3) that the plaintiff was entitled to claim damages for his mental distress and bodily discomfort resulting from his arrest and detention in the lock-up. **A.** BALDEO SHUKUL v. BALBHADAR SINGH **410**

——— ——— *suit for—"Prosecution" and "prosecutor," meaning of—Proceeding for furnishing security maliciously taken, ground for suit for damages—Person setting machinery of criminal law in motion, liability of—Prosecution, when commences.*

The term 'prosecution' should not be interpreted in the restricted sense in which it is used in the Code of Criminal Procedure. Therefore, a proceeding maliciously taken against a person to compel him to furnish surety to keep the peace may be made the foundation of a suit for damages for malicious prosecution.

If a person maliciously and without reasonable and probable cause sets the machinery of the criminal law in motion, he is responsible for the consequences, and cannot escape liability on the ground that the action by the Court was such as he did not intend or was erroneous in law.

Malicious prosecution—concld.

The point of commencement of a prosecution is independent of the result of the prosecution. The prosecution commences when a complaint is made to a Magistrate.

A prosecution exists where a criminal charge is made before a Judicial Officer or Tribunal, and any person who makes or is actively instrumental in the making or prosecuting of such a charge, is deemed to prosecute it and is called a prosecutor. **C.** BISHUN PERGASH NARAIN SINGH v. FULMAN SINGH, 20 C. L. J. 518 **449**

Manager. *See* HINDU LAW.

Material irregularity—Erroneous decision on point of law **371**

Merger—*Putni*, purchaser of—New tenancy, creation of—Transferee, right of—Bengal Rent Act (X of 1859)—*Khudkasht* rights, nature of, before and after the passing of Act X of 1859 **928**

Mesne profits—*Decree declaring liability of defendants, inoperative until extent and quality of liability determined—Amendment of decree once refused bars subsequent applications—Change of circumstances after decree—Remedy of decree-holder.*

A decree declaring in general terms the liability of the defendants to pay mesne profits does not become operative till after the amount has been ascertained by the Court and the Court-fee prescribed by section 11 of the Court Fees Act has been paid by the decree-holder

A decree to be operative must define the extent and quality of the liability of the defendants for mesne profits.

When an application for the amendment of a decree has once been refused on the merits, the decision is conclusive between the parties.

Where the amendment of a decree is required on the ground of subsequent change of circumstances, the decree-holders are not entitled to have it amended by an application to the Court which passed it, but may have their remedy in a suit appropriately framed to set aside the decree. **C.** JITENDRA NATH ROY v. RASIK LAL SEN **300**

——— ——— ———, decree for, when passed **788**

Mining lease—*Grant—Maintenance grant for life without any provision as to opening mines—Grantee, whether has power to grant mining lease—Construction of lease—Conduct of parties—Mine, when open—Intention—Damages, measure of.*

Where a deed of grant is one for maintenance for life of the grantee and does not contain any express provision which authorises the grantee to open new mines and use the minerals thereof, the grantee has no right to grant a mining lease for the purpose of opening and working new mines.

Only in the case of ancient grants whose terms are ambiguous, reliance may be placed on the conduct of the parties to ascertain the intention of the grantor

"Whether a mine is open or not," is a question of intention. A mine is said to be open when it has been devoted, by the person lawfully entitled to do so, to the purpose of making a profit by the working and sale of the minerals therein

The measure of damages is the value of the minerals wrongfully abstracted as at the date of

Mining lease—concld.

abstraction *minus* the expenditure of converting them into chattel and of carrying them to the pit's mouth. **C.** CHRISTIAN *v.* TEKAITNI NARBADA KOERI, 20 C. L. J. 527; 19 C. W. N. 796 **471**

Minor, assignee from, position of **118**

——— Conveyance in favour of minor, validity of —Contract and conveyance, distinction between—Transfer of Property Act (IV of 1882), s. 127—Gift in favour of minor, validity of—Rulings, construction of **733**

——— *Ex parte* decree against minor—Minor not properly represented—Irregularity—Minor, right of, to get decree set aside—Officer of Court appointed as guardian *ad litem*—Expenses, provision for **623**

——— *guardian* ad litem *of, appointment of—Appointment without consent of person appointed, validity of—Mortgage decree, sale under—Reversal of decree—Stranger purchaser, effect on—Party purchaser, liability of*—Cessante ratione legis, cessat otipsa lex, *applicability of—Reversal of sale—Party, who is a necessary—Civil Procedure Code* (*Act V of* 1908), *O. XXXIV, r. 4—Decree, form of, whether can be modified—Inherent power.*

A Court is not competent to appoint a person without his express consent as a guardian *ad litem* of a minor.

Where, therefore, a guardian *ad litem* is appointed without his express consent, the minor is not properly represented before the Court and is in no way bound by a decree passed against him and a sale held under such a decree does not pass the right, title and interest of the minor in the property sold.

A stranger purchaser of property in execution of a decree is not affected by the subsequent cancellation of the sale on reversal of the decree, as he cannot be expected to go behind the judgment to inquire into irregularities in the suit; it is sufficient for him to know that the Court had jurisdiction and exercised it and that the order, on the faith of which he purchased, was made and did authorize the sale. But this does not apply when the purchaser is himself a party and has notice, or at least opportunity of knowledge, of all the proceedings therein, on the principle of *cessante ratione legis, cessat otipsa lex.*

It is essential for the reversal of a sale that the person whose property has been sold must be a party to the proceeding.

Order XXXIV, rule 4, of the Civil Procedure Code, 1908, contemplates a sale of the mortgaged properties but where a sale of the mortgaged properties be impossible, as where the mortgaged properties have been sold for arrears of revenue or of rent or in execution of some decree, the decree must be suitably modified and a Court is competent, in the exercise of its inherent powers, to give appropriate directions for the disposal of the fund which represents the property. **C.** KRISHNA CHANDRA *v.* JOGENDRA NARAIN, 20 C. L. J. 499 **138**

——— Civil Procedure Code (Act V of 1908), s. 48—Extension of period of limitation—Limitation Act (IX of 1908), s. 6, applicability of **865**

——— *Mortgage by guardian—Legal necessity—Alience of minor's rights in property entitled to challenge the mortgage.*

Minor—concld.

An alienee who has acquired the rights of a minor in property is entitled to challenge a mortgage granted by the guardian of the said minor, and make the mortgagee establish legal necessity for the loan, or to show the same was for the minor's benefit. **N.** DALCHAND *v.* CHAND KHAN, 11 N. L. R. 1 **859**

——— *Mortgage suit—Guardian* ad litem *of infant defendants not appointed—Decree—Sale in execution—Decree-holder purchaser, whether acquires infant's title—Father representing interest of infant son, unknown to mortgagee.*

A decree-holder, purchaser of a property brought to sale in execution of a mortgage decree, does not acquire the right, title and interest in the property of an infant for whom no guardian *ad litem* has been appointed in the suit.

In a mortgage suit the interest of an infant of whose existence the mortgagee had no knowledge, is represented by his father and passes to the purchaser at an auction-sale. **C.** HALLI JHA *v.* LAL SINGH, **425**

——— Mutation proceeding—Compromise by mother on behalf of minor sons—Suit by minor for setting aside compromise—Leave of Court not obtained **97**

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——— , whether can be share-holder—Receipt of dividends—Estoppel by conduct—Estoppel—Registered holder of Company's share, rights and liabilities of **335**

——— suing to recover certain property as his by survivorship despite a Will of his father—Suit, abatement of—Death of minor—Legal representative, right of, to continue suit **396**

Mohunt—*Document appointing successor to* gaddi, *whether Will—Property held in capacity of* mohunt *—Letters of Administration—Probate—Question of title.*

Letters of Administration cannot be granted in respect of properties held by a person in his capacity of *mohunt*

Where a *mohunt* executed a document purporting to appoint a successor to the *gaddi* and making over to him as *mohunt* all the properties of the *asthal* and the right of performing the *debshaba:*

Held, that the document was not a Will and therefore its probate could not be granted.

Obiter.—On a *bona fide* application for Probate or Letters of Administration the Court will not go into questions of title, with reference to the property of which the deceased purported to dispose or in respect of which he died intestate. **C.** MADHUSUDAN DAS *v.* JAGADINDRA NATH ROY, 20 C. L. J. 307 **24**

Mortgage *See* BUDDHIST LAW; REDEMPTION.

——— Alienation of a religious office, when permissible—Essentials of a valid custom—Immemorial existence of custom—Presumption—Reasonableness of custom—Inconsistency with general law—Mortgagor setting up title of third person **400**

——— ——— *by administrators erroneously appointed by competent Court, if operative and binding on estate—Probate and Administration Act (V of 1881) s. 90—Interest, high rate of—Powers of Court—Interest not specified in petition for sanction of mortgage.*

Mortgage—contd.

All acts done by an executor or an administrator in the due and legal course of administration are valid and binding, even though the letters issued by the Court are afterwards revoked or the incumbent discharged from his trust

A mortgage granted by the administrators, though erroneously appointed as such with the sanction of the District Judge, to satisfy a debt of the estate which the executor himself was compellable to pay, is operative and binding on the estate.

Where in an application by an administrator to the District Judge for sanction to mortgage a property the principal amount required was mentioned, but no mention was made about interest and when the deed was executed, the administrator covenanted to pay compound interest at 30 per cent per annum:

Held, that the claim for payment of interest at such a high rate was unreasonable.

Section 90 of the Probate and Administration Act (V of 1881) authorizes an administrator to grant a mortgage of the immovable property vested in him *only* with the previous sanction of the Probate Court, and this implies a sanction by the Court of all the essential elements of the mortgage transaction. **C.** SAILAJA PROSAD *v.* JADU NATH BOSE, 19 C. W. N. 240; 21 C L. J. 88 **715**

——— ———Benamidar, *whether can sue—Presumption—Mortgagor, whether can object to such institution.*

A suit instituted by a *benamidar* should be presumed, in the absence of any evidence to the contrary, to have been instituted with the full authority of the beneficial owner, and any decision made in such a suit is as much binding upon the real owner as if the suit had been brought by the real owner himself.

A mortgagor, who received money from the beneficial owner but chose to contract with the *benamidar*, cannot object to the institution of the suit on the mortgage by the *benamidar* nor can his sons when bound by the mortgage-bond raise any such plea. **C.** KIRTIBASH DAS *v.* GOPALJEE THAKUR, 18 C. W. N. 814 **136**

——— ——— *Co-mortgagors—Purchaser of portion of mortgaged property, position of—One co-mortgagor redeeming whole mortgage, right of—Contribution—Charge.*

When one of several mortgagors redeems the whole mortgage, he acquires a charge on the share of each of his co-mortgagors for his proportion of the expenses properly incurred in the redemption of the property

The purchaser of a portion of a mortgaged property is in the same position as one of the co-mortgagors and if he redeems the property, he is entitled to a charge for such sum as the owner of the rest may be called upon to contribute.

A decree obtained on a mortgage does not extinguish the security, though the security may be merged in the decree, and the judgment recovered in any form of action is still but a security for the original cause of action until it be made productive in satisfaction to the judgment-creditor,

Mortgage—contd.

The right to claim contribution is the same, whether the mortgage is redeemed in the usual way or whether the debt is realized by a forced sale of the property of one of several owners of the equity of redemption. **C.** DILKESWAR PROSAD SINGH *v.* HARIHAR PROSAD NARAINSINGH, 21 C. L. J. 104 **780**

——— ———, *conditional sale—Foreclosure suit—Decree nisi—Time from when begins—Six months allowed for redemption—Decree absolute—Decree-holder put in possession—Restitution—Transfer of Property Act (IV of 1882), s. 86—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 2—Judicial orders, construction of.*

A decree *nisi* in a foreclosure suit on the basis of a conditional mortgage may either direct an account to be taken of what will be due to the plaintiff or declare the amount due. Where the Court orders that an account be taken of what would be due to the plaintiff, the day to be fixed by the Court under section 86 of the Transfer of Property Act (IV of 1882) rule 2, Order XXXIV, of the Code of Civil Procedure (Act V of 1908) is to be within six months not from the date of the order *nisi*, but from the date of declaring in Court the amount due.

In construing judicial orders, wherever practicable, they should be so interpreted as to be consistent with and not in contravention of law.

Where a decree-holder has obtained possession of the mortgaged property through Court on the basis of the decree absolute which was erroneously made, he is bound to make restitution to the mortgagor. **C.** KARTIK CHANDRA SARKAR *v.* HARA GOBIND GHOSH, 21 C. L J. 75 **813**

——— ——— *Conditional sale—No independent covenant for payment of interest—Post diem interest allowed*

Where a mortgage-deed contained a stipulation to the effect that in case of failure of payment of the principal and interest in 17 months, the deed would take effect as a sale out and out from the date of the expiry of the above-mentioned period and the terms of the deed did not show that the covenant for payment of interest was an independent one, on a suit for possession by redemption:

Held, (1) that interest should not be allowed to the mortgagee for the full period from the date of the mortgage up to the date of the suit, there being no independent covenant for the payment of interest after the period fixed for redemption;

(2) that the stipulated rate of interest could not be allowed for the period for which *post diem* interest at the rate of 9 per cent. per annum had been granted by the lower Appellate Court. **P.** KISHNA MAL *v.* MUHAMMAD BAKHSH, 52 P L. R. 1915 **616**

——— ——— *Contemporaneous documents—Sale and agreement to re-convey—Intention to create mortgage.*

Where parties execute two documents within an interval of a few days of each other, one purporting to be a sale and another an agreement to re-convey, the intention is rather to create a mortgage than a sale. **M.** MUTHUKARUPA PILLAI *v.* MARUDACHALAM CHETTI **436**

Mortgage—contd.

——— *Contract brought about by fraud—Concealment of prior mortgage—Rescission of contract—Contract Act (IX of 1872), ss. 19, 65—Obligation of mortgagee to return mortgage money.*

A contract of mortgage brought about by concealing fraudulently from the mortgagee the existence of a prior mortgage is voidable at the option of the mortgagee.

Where a mortgagor sues for the cancellation of a mortgage document he must pay over to the mortgagee the amount paid by the latter under the contract of mortgage. **M.** KIZHAKOT PARATHAT MARIKAMMA *v.* NANDANASSERI ILLATH GANAPATHI MUSSAD **130**

——— — *Foreclosure suit—Preliminary decree—Mortgagor failing to redeem—Mortgagee failing to obtain decree absolute—Fresh suit for redemption—Civil Procedure Code (Act V of 1908), ss. 11, 47.*

If a mortgagee does not apply in a foreclosure suit for a decree absolute, he does not get rid of the relationship of mortgagor and mortgagee.

Therefore, in such a case a mortgagor or his representative who was allowed in the suit six months' time to pay the decretal amount, is not barred by reason of section 47, Civil Procedure Code, from filing a fresh suit for redemption, nor is his suit barred by section 11 of the Code; but he cannot go behind the decree in the mortgagee's suit in so far as it settles the amount of the mortgage-debt up to the date of that decree.

Obiter dictum.—A dismissal for want of prosecution of a mortgagor's action for redemption does not prevent the mortgagor from bringing a fresh suit for redemption. **B.** RAMA TULSA MAHAR *v.* BHAGCHAND MOTIRAM, 16 BOM. L. R. 687, 39 B. 41 **249**

——— by guardian - Minor—Legal necessity—Alienee of minor's rights in property entitled to challenge the mortgage **859**

——— —Limitation—Preliminary mortgage decree—Application for sale of mortgaged property—Transfer of Property Act (IV of 1882), ss. 88, 89—Limitation Act (IX of 1908), Sch. I, Art. 183 **683**

——— — Malikana *rights—Agreement not to reclaim property till satisfaction, effect of—Hypothecation—Mortgagee, right of, to a decree for sale.*

Where a superior proprietor mortgages with possession his *malikana* rights of a village in lieu of a money-debt, and covenants not to claim the mortgaged property till satisfaction of the debt, the agreement amounts to a hypothecation of the property and the mortgagee is entitled to a decree for sale of his proprietary rights. **N.** RAM GULAM *v.* BALA PRASAD, 10 N. L. R. 185 **493**

——— —*Mortgagee in possession—Mortgage to terminate ipso facto on a certain date—Mutation of redemption—Suit for possession by mortgagee—Condition making mortgagor liable for rent due from village tenants, meaning of.*

A mortgage-deed executed on the 25th February 1895, contained an express stipulation to the effect that the mortgagees should remain in possession up to the 15th July 1907, on which date the mortgage was to determine, without the payment of any further sum, and that the mortgagors should be liable for any amount of rent left due to the mortgagees from the village tenants. In 1908 the Revenue Tahsildar at the instance of the mortgagors ordered a mutation of redemption. On the 7th June 1909, the plaintiffs-mortgagees instituted a suit for possession of the mortgaged area, on the allegation that no redemption could be made until the sum due by the mortgagors on account of arrears of rent had been made good to them.

Held, (1) that the mortgage-deed did not contemplate that rent due from the mortgagors as tenants should be secured upon the mortgaged property and that as a large portion of the sum claimed by the plaintiffs was made up of rent alleged to be due not by the village tenants, but by the mortgagors themselves in their capacity of tenants of the mortgagees, the plaintiffs could not get a decree for possession on the strength of the stipulation in the mortgage-deed;

(2) that the accounts put in by the plaintiffs had not been proved and the suit must, therefore, be dismissed. **P.** *Muhammad* RUKIA *v.* DUNGAR MAL, 56 P. L. R. 1915 **710**

Mortgage—contd.

——— ———Mortgagor and mortgagee, right and liability of—Mortgagor, right of, to enhance rent of tenant—Reduction of mortgage-debt—Suit for declaration and injunction, maintainability of **697**

——— — Prior mortgagee, *ex parte* decree on subsequent mortgage against—Interest of prior mortgagee, whether can be declared subsequently—Application to prevent execution by such prior mortgagee, whether under s. 47 **164**

——— ———Prior mortgagee of property sold at auction—Right to set aside sale **831**

——— ———, *prior and subsequent—Prior mortgagee's suit decreed—Mortgaged property sold in execution and purchased in part by prior mortgagee—Subsequent mortgagee, suit by - Redemption, piecemeal and partial.*

The prior mortgagee, without impleading the subsequent mortgagee, brought a suit and got a decree for sale of the properties mortgaged to him, *viz.* A, B and C. In execution some properties were purchased by the prior mortgagee himself and some by another auction-purchaser. Thereafter the subsequent mortgagee brought a suit for sale of the properties included in his mortgage, *viz.*, B, C and D, making the prior mortgagee a party to his suit:

Held, that the subsequent mortgagee was entitled to a decree for sale of the properties B, C and D, conditionally on his at first redeeming B and C by paying off the proportionate amounts due on each of them on account of the prior mortgage as calculated by the respective values of B and C. **O.** SURAJ KISHAN *v.* AJUDHIA PRASAD SINGH, 2 O. L. J. 73 **960**

——— ——— Properties mortgaged—Ownership of mortgagor—Suit between mortgagee and third party—Burden of proof **478**

——— ——— Razinama *by mortgagor and complementary* kabuliat *by mortgagee—Equity of redemption, transfer of.*

A *razinama* executed by a mortgagor in favour of his mortgagee relinquishing occupancy rights in the mortgaged land and the complementary *kabuliat*

Mortgage—contd.

given by the mortgagee operate to transfer the equity of redemption from the mortgagor to the mortgagee. B. DAGON v. SAKHARAM, 16 BOM. L. R 719 *note* 594

——Razinama *by mortgagor and complementary* kabuliat *by mortgagee—Transfer of equity of redemption.*

A *razinama* executed by a mortgagor in favour of his mortgagee relinquishing occupancy-rights in the mortgaged land and a complementary *kabuliat* given by the mortgagee operate to transfer the equity of redemption from the mortgagor to the mortgagee. B. VENKAJI NARAYAN KULKARNI *v.* GOPAL RAMCHANDRA, 16 BOM. L. R. 718, 39 B. 55 613

——, recovery of balance due on, separate decree for—Preliminary decree 72

——— *Redemption of mortgage without payment of deeds of further charge—Deeds of further charge, payment of—Transfer of Property Act (IV of 1882), ss.* 60, 62.

Section 62 of the Transfer of Property Act is a special section supplementary to the general provisions of section 60. It provides a summary remedy which is available to a mortgagor in two special cases of usufructuary mortgage: (*a*) where the mortgagee is authorised to pay himself the mortgage-money from the rents and profits of the mortgaged property, (*b*) where the mortgagee is authorised to pay himself from such rents and profits the interest of the principal money It cannot apply to cases where from the conditions contained in the mortgage, accounts have to be made up between the parties.

It contemplates the existence of only one transaction and does not at all touch the case where a usufructuary mortgage having been executed, other mortgages by way of further charge have been executed by the same mortgagor. O. ZAHID ALI *v.* KEDAR NATH. 17 O C. 388 427

——— *Sale of portion of mortgaged property—Subsequent sale of remainder to mortgagee—Suit to recover balance of mortgage-money—Right to redeem entire mortgage.*

Where out of a house-site and a field mortgaged to the plaintiff the house-site was sold to the defendants who thereby acquired a right to redeem the whole property and the plaintiff subsequently purchased the field and set off the purchase-money *pro tanto* against the mortgage-debt, and sued to recover the balance by sale of the house-site:

Held, that as the sale to the plaintiff was subsequent to the acquisition of the house-site by the defendants and was without their privity or consent, they had not been deprived of their right of redemption which had been in existence since they purchased the house-site. B. MAHMADALI KAMRUDDIN *v.* ABDULALI KARIMBHAI, 16 BOM L. R 645 38

——— Several mortgages upon same property—Necessary parties to suit - Two mortgages in favour of same person—Suit on later mortgage—Subsequent suit on former mortgage, whether maintainable 1005

——— Simple mortgage—Court's power to enlarge time of paying mortgage amount—Civil Procedure Code (Act V of 1908), s 148, O. XXXIV, rr. 7 (1) (*d*), 8 (2) 708

Mortgage—contd.

——— Simple mortgage converted into usufructuary mortgage by subsequent arrangement—Mortgagee put in possession—Registration—Mortgagee, right of, to sue on original mortgage 430

——— *Sir*—Mortgage before 1st January 1902, effect of, upon *sir—Sir*, when ceases to be so—Ex-proprietary rights, how surrendered and extinguished—Abandonment, actual—Limitation for claim of ex-proprietary rights—Oudh Rent Act (XXII of 1886), s. 7A 586

——Suit for interest on bond executed after mortgage—Consideration—Abstention from suit—Suit to defeat provisions of any law 579

——— *Suit for redemption—What should mortgagor prove—Adverse possession, what amounts to—Issue, whether properly remitted.*

In a suit for redemption of a mortgage if the mortgagor proves that there is a subsisting mortgage affecting the property claimed by the other party as his and that the equity of redemption is vested in him (the mortgagor) he is entitled to a decree, but if he fails to prove a subsisting mortgage covering the property, he cannot succeed.

It is not necessary for the person who claims the property as his to prove that he or the person through whom he claims were in possession for 12 years.

A mortgagor must prove that he has been in legal possession of the property mortgaged within 12 years of the institution of the suit.

A man can be in legal possession either through his tenant, care-taker or mortgagee.

Per *Richards, J.*—(*Banerji, J.*, dissenting).—

Where the lower Appellate Court has found in a redemption case that the mortgage is not proved, a Judge of the High Court is not entitled to remit an issue to inquire whether the mortgagor has been in possession either personally or through others within 12 years.

Per *Banerji, J.*—If the ownership of the property was vested in the mortgagor and not in the party claiming adversely, the mortgagors are entitled to recover possession unless they have lost their title by reason of the adverse possession of some one for a period exceeding 12 years.

Possession to be adverse must be by a person who does not acknowledge the other's rights but denies them There must be an express or implied repudiation of the rights of the true owner and an open assertion by the person in possession of a claim of rights to hold the property on his own behalf. Unless possession is coupled with an express or implied claim of right inconsistent with the title of the lawful owner, it cannot be regarded as adverse to the true owner A. ASAD ALI *v.* ANAND SARUP. 12 A L. J. 1283 35

——, *usufructuary—Mortgagee's right to sell—Covenant to pay money, whether promise to pay on conditional statement—Terms in covenant, interpretation of—Presumption*

In an usufructuary mortgage the mortgagee has no right to recover the money by the sale of the mortgaged property unless there is a covenant to pay the money.

Where a mortgage-deed provided "When I or my heirs and representatives shall pay off in cash and in one lump Rs. 250, the amount

Mortgage—concld.

covered by this *surpeshgi* deed, on the 30th of *Magh* 1311 F. S. or on the 30th of *Magh* of any other year after the expiration of the deed, to the said *surpeshgidar* or his heirs and representatives, I shall take back this deed and enter upon possession of the lease-hold property, and I or my heirs shall not apply for redemption of the mortgages without paying off the *peshgi* money In security of the *peshgi* money I mortgaged and hypothecated the said lease-hold property."

Held, that there was no covenant to pay the money and the mortgagee could not give up possession and sue for sale of the property. C. BASAWAN SINGH v. MAHAMAD FARIZ **800**

———————**deed**—*Provision extinguishing right of redemption if right not exercised within two years, effect of*

A mortgage-deed provided that if the mortgagor failed to redeem within two years, the mortgagees had a right to treat the transaction as a sale, and further that if they did not wish so to treat it, they could call upon the mortgagor to redeem at once and that the mortgagor was bound to do so, but if he were unable to do so, the right of redemption would be extended indefinitely.

Held, that as soon as the two years had elapsed without the mortgagor exercising her right of redemption, that which was a mortgage in its inception became an absolute sale from the beginning, finally closing the transaction between the parties as in the case of an ordinary mortgage by conditional sale. L. B. MA NGWE v MA THA HLAY **868**

———————, *suit on—Covenant to pay—Personal decree, right of—Application for personal decree—Limitation*

Where in a document there is a covenant to pay a debt on a particular date, although followed by a direction that in default of payment the sum may be recovered from the hypothecated property, the mortgagee is nevertheless entitled to a personal decree.

An application for a personal decree can be made even after six years from the date of bond, provided the suit is filed within six years from the date of the bond M. ARSALWAR PERIA TIRUVADI AIYENGAR v. MUTHAMMAL JANAKI, 2 L. W. 66 **770**

Mortgagor and mortgagee—*Mortgagor purchasing* benami *in revenue sale—Subsequent mortgage sale, validity of—Right of* bona fide *lessee.*

The plaintiff mortgagee brought a suit on a mortgage and it was dismissed by the first Court and while an appeal against that dismissal order was pending, the mortgagor let the revenue of the mortgaged land fall into arrears and had it brought to sale by the Revenue Department for the recovery of such arrears and purchased the property himself in the name of the 2nd defendant The plaintiff succeeded in appeal and the property was sold and purchased by him but he failed to get actual possession as the judgment-debtor had let the lands to the first defendant. The plaintiffs then sued for possession of the land and the crops standing on it.

Held, that the sale under the mortgage decree was valid and conveyed the full title to the plaintiff as the 2nd defendant was only the *benamidar* of the

Mortgagor and Mortgagee—concld

plaintiff's judgment-debtor, who was the owner notwithstanding the revenue sale; and that the first defendant who was a *bona fide* lessee of the properties from the 2nd defendant was entitled to the crops raised during the continuance of the lease, and that the auction-purchaser could only get the rent during the remaining portion of the tenancy.

Section 59 of the Revenue Recovery Act has no application in a case where the mortgagor purchases the property at a revenue sale *benami* in another person's name and the revenue sale need not be set aside by a mortgagee suing on a mortgage M. NUKALAPATI RAMI REDDI v. VAVILLA VENKATHSAM. (1914) M. W. N. 910 **274**

Muafi. *See* OUDH RENT ACT, s. 107-H

Muhammadan Law—Dower *fixed at time of marriage—Dispute as to amount fixed—Wife unable to prove amount asserted by her—Decree according to admission of husband—Customary dower, when allowed—Verbal contract of dower—Evidence—Procedure.*

Where the wife alleges that her dower was fixed at the time of marriage, but she cannot prove the amount asserted by her, the Court is bound to pass a decree for the sum admitted by the defendant, inasmuch as the wife is entitled to the customary dower only in cases where admittedly no dower was specified at the time of the marriage

The rules of procedure and evidence laid down by the Muhammadan Law to be followed in deciding disputes as to dower between the husband and the wife which are at variance with the Statute Law on the subject, cannot be followed by Courts in British India

A verbal contract for a dower of a large amount can be admitted only if proved by most clear and satisfactory evidence. P. FAZL KHAN v. KARAM BEGAM, 105 P. R. 1914 **113**

———————**Guardianship**—Female minor—Sister's husband and maternal uncle—None but *mahram* to be appointed **74**

———————**Possession.** suit for—Mortgage by ostensible owner—Benefit to estate **621**

———————**Succession**—Muhammadan Law or custom—*Ahains* of Lahore depending on agriculture **577**

———————Right of convert's son to inherit—Exclusion of *Kafir* **357**

———————**Waqf**—*Dedication for religious purposes—Muharram, observance of, dedication for, whether valid*

Where a Sunni Muhammadan conveyed certain properties of his to his grand-daughter and grandson under a deed of *waqf* for the "service of Imam Hossain and Hassan and for religious purposes".

Held, that the deed was valid and operative as a deed of *waqf* and that the trustee under the deed could not alienate the property by sale or mortgage.

A dedication of property for the observance of the Muharram constitutes the service of man and the good of humanity, though to a limited section, as it entails the feeding of the poor and distribution of alms to the needy. C. RAM CHURN LAW v FATIMA BEGUM, 19 C. W. N. 33 **442**

Muhammadan Law—concld.

——————**Waqf**—Muhammadan dedicating properties for expenses of mosque and maintenance of family, how far valid—Mussalmans Waqf Validating Act (VI of 1913), retrospective effect of **96**

Murder. *See* PENAL CODE, s. 302.

Mussalmans Waqf Validating Act (VI of 1913), retrospective effect of **96**

Mutation of names—Possession by ex-proprietor, effect of **20**

Mutation proceedings—Family arrangement—Registration, whether necessary **497**

Mutt, kinds of **739**

Nankar, *cash, right to—Under-proprietary right—Ejectment, notice of, cancellation of*—Prima facie *case of under-proprietary rights to be established.*

A right to receive a cash *nankar* does not necessarily connote a right to possession of land as an under-proprietor, but may, when coupled with some other facts, go to establish a *prima facie* case of under-proprietary rights.

A notice of ejectment ought to be cancelled by the Revenue Courts in cases where a *prima facie* claim to under-proprietary rights has been established. **U. P. B. R.** LAL MUKESHAR BAKHSH SINGH *v.* SHAHZADA KHAN, 1 O. L. J. 733 **175**

Nattukottai Chettiers. *See* HINDU LAW.

Negligence. *See* TORT.

Negotiable Instruments Act (XXVI of 1881), ss. 9, 43, 118 (g)—*Endorsee from payee of* hundi—*Holder in due course—Presumption—Consideration, failure of.*

An endorsee from the payee of a *hundi* must be presumed until the contrary is proved to be a holder in due course within the meaning of section 9 by reason of section 118 (*g*) of the Negotiable Instruments Act and is unaffected by the failure of the consideration as between the drawer and the payee. **B.** SAKHARAM MANSARAM *v.* GOLABCHAND TARACHAND, 16 BOM. L. R. 743 **362**

——————————— **ss. 22 (2), 24 608**

——————————— **ss. 43, 118 (g) 362**

Northern India Canal and Drainage Act (VIII of 1873), s. 70, subsecs. (1) and (2)—*Preventing digging of water-course—Revision—Criminal Procedure Code (Act V of 1898), s. 439—Finding of fact based on inadmissible evidence.*

The preventing of the digging of a water-course for taking water from a canal does not come within the purview of section 70 of Act VIII of 1873.

A finding of fact based on no evidence or on inadmissible evidence is liable to be set aside on revision under section 439, Criminal Procedure Code, 1898. **P.** ATUBA *v.* EMPEROR, 7 P. W. R. 1915 Cr.; 16 Cr. L. J. 202; 94 P. L. R. 1915 **762**

Notice, whether necessary in all suits against Secretary of State for India in Council **232**

Nuisance. *See* CRIMINAL PROCEDURE CODE, s. 133.

Oaths Act (X of 1873), s. 13—Omission to administer oath or affirmation, effect of **215**

Occupancy holding, *right of—Testamentary disposition of occupancy holding, validity of—Statute, construction of—Right, whether conferred by mere implication—Estoppel—Testator and legatee—Heir-at-law of* raiyat, *whether estopped from questioning validity of gift by* raiyat—*Bengal Tenancy Act (VIII of 1885), ss. 26, 178 (3) (d)*

In the absence of proof of any local usage to the contrary a *raiyat* is not competent to make a testamentary disposition of his right of occupancy.

A right cannot be conferred by mere implication from the language used in a Statute; there must be a clear and unequivocal enactment to confer the right.

As between the testator on the one hand and the legatee or the executor on the other, there is not estoppel; therefore the heir-at-law of a testator *raiyat* is estopped from questioning the transfer of a holding made by a Will.

In every case of gift, the doctrine of estoppel does not apply as between donor and donee. **C.** AMULYA RATAN SARKAR *v.* TARINI NATH DEY, 18 C. W. N. 1290; 21 C. L. J. 187; 42 C. 254 **235**

——————————— *Transfer for value, validity of—Principles governing transfer—Sale in execution of rent-decree—Application to set aside sale—Transferee a representative of judgment-debtor—Civil Procedure Code (Act V of 1908), s. 47.*

The principles regarding the transfer for value of occupancy holdings apart from custom or local usage as based upon modern authority are:

1. The transfer of the whole or a part is operative as against the *raiyat*:

(*a*) where it is made voluntarily,

(*b*) where it is made involuntarily and the *raiyat* with knowledge fails or omits to have the sale set aside.

A sale is made involuntarily where it is in execution of a money-decree, but not of a decree founded on a mortgage or charge voluntarily made.

2. The transfer is operative as against the landlord in all cases in which it is operative against the *raiyat*, provided the landlord has given his previous or subsequent consent. Where the transfer is a sale of the whole holding, the landlord, in the absence of his consent, is ordinarily entitled to enter on the holding, but where the transfer is of a part only of the holding, or not by way of sale, the landlord, though he has not consented, is not ordinarily entitled to recover possession of the holding, unless there has been (*a*) an abandonment within the meaning of section 87 of the Bengal Tenancy Act, or (*b*) a relinquishment of the holding, or (*c*) a repudiation of the tenancy.

Whether there has been a relinquishment or repudiation or not, depends on the substantial effect of what has been done in each case.

3. The transfer of the whole or a part is operative as against all other persons where it is operative against the *raiyat*.

A person, who without the landlord's consent purchases from a *raiyat* a portion of an occupancy holding which is not transferable by local custom or usage is a person whose immoveable property has been sold and is a representative of the judgment-debtor within the meaning of section 47 of the Code of Civil Pro-

Occupancy, holding—concld.

cedure, 1908, and is entitled to have a sale of the holding in execution of a decree for arrears of rent set aside on the ground of fraud

Where a portion of an occupancy holding is transferred, the transferee can by suit recover possession from the landlord who has forcibly dispossessed him.

A right of occupancy, which is not transferable by custom or local usage, can be transferred.

A holding apart from the right of occupancy cannot be transferred. **C.** DAYAMOYI *v.* ANANDA MOHAN ROY, 18 C. W. N. 971; 20 C. L. J. 52; 42 C. 172 **61**

———, *not transferable by local usage or custom, usufructuary mortgage of a portion of —Registered document—Covenant not to surrender—Bengal Tenancy Act (VIII of 1885), ss. 86 (6), 88 —Encumbrance on part of holding, whether encumbrance on whole.*

Where a part of an occupancy holding not transferable by local custom or usage was usufructuarily mortgaged by a registered document with the covenant not to surrender, and the mortgagor surrendered it.

Held, that as the encumbrance is by a registered document and the surrender was without the consent of the plaintiff, the surrender is invalid under section 86 (6) of the Bengal Tenancy Act.

An encumbrance on a part of a holding is an encumbrance on the whole. **C.** RAM UDAR SINGH *v.* WILLIAM COX, 19 C. W. N. 268 **564**

———*Will—Custom—Bengal Tenancy Act (VIII of 1885), ss. 26, 188.*

An occupancy-*raiyat* has no power to bequeath by Will his holding unless a special custom to do so is proved. **C.** KUNJA LAL ROY *v.* UMESH CHANDRA ROY, 18 C. W. N. 1294 **352**

Occupancy rights, *claim for—Claimant's relatives under-proprietor, effect of—Ejectment case—Statutory tenant, status superior to that of, claimed —Inquiry to be complete*

Where a co-sharer in a holding has got a decree for under-proprietary rights, no occupancy rights shall be claimed in that holding; but a person can claim occupancy rights even though his relatives may have got under-proprietary rights in the village.

Ejectment cases in which rights superior to those of statutory tenants are claimed, should not be adjudicated upon without a complete inquiry being made. **U. P. B. R.** JAGADMBA SINGH *v.* BHAGWAN BAKHSH SINGH, 2 O. L. J. 65 **935**

———, claim for—Claimant's relative under-proprietor, effect of—Ejectment case—Statutory tenant, status superior to that of, claimed —Inquiry to be complete **935**

———————, *relinquishment of, by ex-proprietor—Agreement, voluntary, validity of—Ex-proprietary tenancy converted by ex-proprietor into rent-free holding for life—Ejectment—Trespasser—Jurisdiction of Civil Court—Oudh Rent Act (XXII of 1886), s. 7 A, cl. (4).*

A voluntary agreement entered into by an ex-proprietor before the enactment of section 7A of the Oudh Rent Act, to relinquish his occupancy rights

Occupancy rights—concld.

arising in respect of his *sir* land in consideration of his holding that land rent-free for his life-time, cannot be regarded as invalid or forbidden by law. The successors-in-interest of the ex-proprietor taking possession of the land after his death are liable to ejectment as trespassers through the Civil Court. **O.** VISHUNATH KUAR *v.* GAURI SHANKAR, 1 O. L. J. 710 **376**

Opium Act (I of 1878)—*Rules framed under s. 5—Rule 4 (iii) (c)—Ultra vires—Conviction based on, whether legal.*

Rule 4 (*iii*) (*c*) of the Rules framed by the Bombay Government under section 5 of the Opium Act is a rule of evidence as to the fact of possession, and not a rule as to the conditions of possession as contemplated by section 5, and as such is *ultra vires* of the section. Therefore, a conviction based on the rule is illegal **S.** GANDALAL MURARJI *v.* EMPEROR, 8 S. L. R. 138; 16 CR. L. J. 186 **200**

Oudh Laws Act (XVIII of 1876), s. 10 **420**

Oudh Rent Act (XXII of 1886), ss. 3 (3), 107B (b) and 107G—*"Land" includes fallow plots—Rent-free land liable to pay rent as provided by settlement decree—Proprietor of grove, not necessarily owner of land as well—Grove, character of—Assessment of rent, suit for, landlord's rights as to—Undivided holding, effect of.*

"Land," as defined in the Oudh Rent Act, includes plots remaining fallow.

Land held rent-free but liable to pay rent on breach of a condition annexed to it, as provided by the settlement decree, is not land held rent-free under a judicial decision as contemplated by section 107*B* (*b*) of the Oudh Rent Act.

A person recorded as proprietor of a grove is not necessarily a proprietor or under-proprietor of the land covered by the grove.

A land is not grove if only a portion of it remains grove.

A landlord has no right to sue for assessment of rent some only of the co-sharers in an undivided holding. **U. P. B. R.** MUHAMMAD BAQAR *v.* SHEO MOHAN SINGH, 2 O. L. J 88 **974**

——— ——— ——— **s. 7A** **586**

——— ——— ——— **s. 7A, cl. (4)** **376**

——— ——— ——— **s. 7A**—*Mortgage before 1st January 1902, effect of, upon sir—Sir, when ceases to be so—Ex-proprietary rights, how surrendered and extinguished—Abandonment, actual—Limitation for claim of ex-proprietary rights.*

A mortgage with or without possession before 1st January 1902 has no effect whatsoever upon *sir*, so that a *sir* thus mortgaged does not cease to be so.

A holder of *sir* when his proprietary rights are transferred cannot surrender his ex-proprietary rights except by actual abandonment.

If a *sir*-holder fails to take up his ex-proprietary rights, in Agra within six months, and in Oudh within a year, after their accrual, they are extinguished. **U. P. B. R.** SULTAN HUSAIN KHAN *v.* SEWAK SINGH, 2 O. L. J. 11 **586**

Oudh Rent Act—contd.

——— ——— ——— **s. 33**—*Enhancement of rent, claim for—Construction of document*—"Ziada sitani," *meaning of—Landlord and tenant, agreement between, interpretation of—Occupancy tenant liable to all incidences attaching to him as such.*

Where a landlord enters into an agreement with a tenant binding himself not to commit "*ziada sitani*," it simply means that there will be no unreasonable enhancement of rent, and not that no enhancement at all shall be made, and thus does not bar an enhancement warranted by the express provisions of the law.

A person declared to be an occupancy tenant must accept the incidences attaching to that tenure. **U. P. B. R.** MATA PRASAD *v.* SPECIAL MANAGER, COURT OF WARDS, UMRAINGAON, 1 O. L. J. 724 **385**

——— **s. 48**—*Heirs of a deceased tenant—Joint Hindu family, member of, claim of—Widow of deceased tenant, right of.*

A member of a joint Hindu family comprising himself and a deceased tenant, if not shown to be a co-tenant with the latter, cannot under section 48 of the Outh Rent Act succeed as heir to the deceased's holding, so long as the deceased's widow is alive. **U. P. B. R.** BHAGWAN BAKHSH SINGH *v.* SURAJ BALI SINGH, 2 O. L. J. 50 **561**

——— **s. 69** **407**

——— ——— **s. 107B (b)** **974**

——— ——— ——— **ss. 107G, 107H**—*Groves entered as "maurusi" in column "of tenants' groves"—Under-proprietary right, accrual of.*

Section 107G or section 107H of the Oudh Rent Act applies to plots entered at the time of the First Regular Settlement as "*maurusi*" in the column of "tenants' groves", if the landlord fails to establish his right to resume them. **U. P. B. R.** SULTAN SINGH *v.* CHANDRAPAL SINGH, 1 O. L. J. 600 **120**

——— ——— ——— **s. 107H** **120**

——— ——— ——— **s. 107H**—*Groves brought under cultivation*—Bila tasfia, *land held as—Under-proprietary rights, accrual of—Presumption.*

A person who was a former proprietor of a village and had got Settlement Court decrees for *sir* lands and under-proprietary rights in the village and had his claims at the time of the Settlement for large areas besides the *sir* dismissed in default, was in possession of some old groves. These groves having subsequently been brought under cultivation were recorded as land held *bila tasfia*, and the landlord sued for assessment of rent on that land.

Held, that the provisions of section 107H of the Oudh Rent Act applied to the land in suit, inasmuch as it could reasonably be inferred that the possession of the grove was not that of an ordinary tenant whose rights come to an abrupt conclusion when the land ceases to be grove. **U. P. B. R.** HUDRA PRATAB SAHI *v.* RAM CHARAN PANDE, 1 O. L. J. 751 **165**

——— ——— **s. 107H**—*Munafi, heritable but not transferable—Transferee from* munafidar, *right of—Under-proprietary rights, non-accrual of.*

Oudh Rent Act—concld.

A transferee from a *munafidar* who has only a heritable but not a transferable interest in the *munafi*, cannot claim under-proprietary rights under section 107H of the Oudh Rent Act. **U. P. B. R.** MANSA DIN *v.* THAKUR PRASAD, 2 O. L. J. 10 **585**

——— ——— **s. 108 (10)**—*"Illegally ejected," meaning of*—Res judicata, *temporary.*

The words "illegally ejected" used in section 108 (10) include an ejectment by a process of law if the ejectment was illegal.

A decision in a previous ejectment case under section 62 of the Oudh Rent Act as to under-proprietary rights operates as *res judicata* between the parties in a subsequent case for recovery of possession in the Revenue Court until there is a final adjudication of the question in the Civil Court. **U. P. B. R.** MAHESH SHUKLA *v.* RUDRA PRATAB SINGH, 2 O. L. J. 68 **525**

——— **s. 120A** **587**

——— ——— **ss. 152, 154**—Statutory liability to pay arrears of rent cast upon transferee and land that came into his possession—Pre-emptor's liabilities to pay arrears of rent recovered from vendee **420**

——— ——— **s. 154** **420**

——— **Ch. VII A** **532**

Pachete Raj—*Family custom—Maintenance grant, nature of—Impartible estate, alienability of—Equitable interest, value of*—Putnindar *under grantor of maintenance—Grantor, right of, against grantee—Transfer of Property Act (IV of 1882), s. 43, scope of.*

According to the family custom in the Pachete Raj, a maintenance grant to the members of the Raj is not absolute in its nature like gift, but lasts only for the life-time of the grantee, and it is entirely optional with the successor of the grantor to resume or confirm the grant.

It is only where a custom in restraint of alienation is not proved that an impartible estate is alienable.

If the transferor himself has once become entitled to a valid estate in the land, the transferee's equity would attach upon it in the hands of all persons claiming under the transferor otherwise than for a legal interest by purchase for value without notice.

The holder of the Pachete Raj, after having granted certain villages to the defendant for her maintenance, created a *putni* in favour of the predecessor of the plaintiff on the allegation that the grant had been resumed. The maintenance grant, after the death of the grantor, was not resumed by his successor The plaintiff filed a suit for ejectment of the defendant on the ground of trespass:

Held, that the suit was not maintainable for want of title, and that section 43 of the Transfer of Property Act was not applicable, inasmuch as the section recognised the doctrine of title by estoppel and applied only where a person erroneously represented that he was authorised to transfer certain immoveable property. **C.** CHOTA BAHIBA SAHEBA *v.* PURNA CHUNDER CHAUDHURI, 19 C. L. J. 144 **982**

Pardanashin lady, document executed by—Terms not explained to her—Suit by persons of unsound mind—Next friend, whether a party **459**

Pardanashin lady—concld.

——— *Power-of-attorney — Document executed by Agent, claim on basis of—Evidence—Burden of proof.*

When a claim is made against *pardanashin* ladies on the basis of a document executed by an Agent on behalf of them, the plaintiff must show not only that a power-of-attorney was actually signed by the *pardanashin* ladies, but also that they knew what they were doing, knew the nature of the document and the extent of powers they were conferring by such a document. L. B. ASRI JAN v. CHELLAPPA CHETTY **610**

Pardon, forfeiture of. *See* CRIMINAL PROCEDURE CODE, s. 337.

Parties—Jurisdiction—*Res judicata*—Title—Issue **917**

Partition. *See* HINDU LAW.

——— *Compromise by some of the parties—Consent decree, validity of—Appeal against consent decree, when maintainable—Suit to declare such consent decree inoperative, unnecessary—Dismissal for default, effect of.*

In a partition suit the defendants, who were not parties to the compromise effected between the plaintiffs and the other defendants, will not be bound by the terms of the compromise, and the decree based thereon would not have greater validity than the contract upon which it is based.

A partition of joint property cannot be effected on a compromise which binds only some of the co-owners, and, therefore, a consent decree based upon such a compromise cannot bind any of the parties to the suit.

Ordinarily an appeal does not lie against a decree made by consent, but an appeal may be preferred by persons who were not parties to the consent decree.

The dismissal for default of a suit for declaration that the consent decree was not operative cannot give greater efficacy to the consent decree than it really possesses. It is unnecessary for persons who are not parties to a consent decree to institute a suit for such a declaration. C. GOBIND CHANDRA v. BHAGABAT SARDAR **242**

——— ——— Discretion **417**

——— ——— Hindu Law—Status—Intention to divide—Presumption when one co-parcener divides **736**

———, *how established—Oral evidence—Circumstances, sufficient, for inference of partition—Adverse possession—Fallow land—Grazing of cattle, whether interrupts operation of adverse possession—Co-sharer, adverse possession of, when presumed—Hostile title.*

A partition may be occasionally established by oral evidence which, though not directly proving the *factum* of partition, may be of such a character as to justify the inference that a partition must have been made between the parties or their predecessors.

In a case where there were, *first*, transfer by one member of the family to another of cultivated lands in his occupation; *secondly*, long possession of specific parcels and sub-division among members of a particular branch; *thirdly*, reclamation and improvement of waste lands at considerable cost; *fourthly*, direct admission of parties that there had been a previous partition; *fifthly*, separate occupation of land, and collection of rent from the separate tenants and the institution of suits by the superior landlord against the members of the family as if they were separate tenants, and the separate enforcement of decrees so obtained:

Held, that the circumstances are sufficient to establish previous partition.

Where exclusive possession is taken of such lands as are cultivated during one season and left fallow during the two following seasons, and the owner is ousted, the mere fact that a stranger grazes his cattle during the period that the lands are not under cultivation would not interrupt the operation of adverse possession.

A co-sharer cannot be said to have been in adverse possession merely because he cultivated a larger area than what would fall to his share upon a distribution of all the lands.

In order to constitute adverse possession as against a co-sharer, there must be an assertion of hostile title for more than a period of 12 years before the commencement of the suit. C. KULADA PROSAD TWARY v. SADHU CHARAN, 20 C. L. J. 32 **412**

———, instrument of—Award **489**

——— ———, instrument of—Full duty paid—Second instrument affirming first with minor alterations—Duty payable—Interpretation of Statute—Fiscal enactment **731**

———, right of—Suit for recovery of possession—Person entitled to half share, whether can eject one from whole—Decree, nature of **228**

——— among superior landlords—Distribution of rent—Enhancement **49**

——— **Suit**—Agreement appointing trustees to hold plaintiff's share, whether reference to arbitration and adjustment of suit **369**

——— ——— ——— Court-fee — Actual or constructive possession not proved — Plaintiff not entitled to maintain suit—Proper remedy—Leave to amend plaint—Costs **465**

——— ——— ——— *Res judicata*—Compromise—Agreement not carried out—Second suit for partition, if barred—Continuing right **694**

Partnership business, sale of—Misjoinder of causes of action **344**

——— *for fixed term—Dissolution before expiry of term, whether allowed—Contract, breach of—Compensation for breach—Partner, liability of.*

The parties to the suit entered into a partnership in a contract which the defendants had obtained from the Municipal Committee, Delhi, for erecting stands on the central portion (*patri*) of the Chandni Chauk Street, Delhi, for spectators to watch the elephant procession in connection with the Coronation Darbar of 1903. On the 2nd December 1902, the defendants sent a registered notice to the plaintiff to the effect that as he had up to that date made no preparations to perform his part of the contract, the partnership between the parties was dissolved, and thereafter the defendants got the work of erecting stands done by their own workmen without reference to the plaintiff and appropriated the whole of the income

Partnership—contd.

that accrued from the sale of tickets. The plaintiff sued for rendition of accounts and his share of profits and also claimed compensation for a certain number of chairs which he had got made:

Held, that the plaintiff was not entitled to the compensation, for he had not carried out his part of the contract and the defendants could not be expected to wait indefinitely; but that he was entitled to his share of the net profits of the partnership as the partnership could not be legally put an end to by the defendants. P. MUHAMMAD ALI *v.* SHAM LAL, 6 P. L. R. 1915; 44 P. W. R. 1915 **650**

———*Joint Hindu family—Death of member of family—Partnership not dissolved—Contract Act (IX of 1872), s 253 (10)—Principle—Partnership continued after its determination by death—Limitation—Manager's statement as to date of dissolution—Estoppel—Surety bond to be read in conjunction with partnership deed.*

A partnership between certain individuals and a joint Hindu family is not dissolved by the death of a member of the joint family.

The principle of law embodied in section 253 (10), Contract Act, is based on the ground that partners cannot be expected to acquiesce in new partners being forced upon them. But this principle cannot apply when all that happens is that one of the existing partners becomes, by operation of law, entitled on the death of his co-parcener to a larger share in the partnership than he previously possessed in his individual capacity.

When a partnership is determined by death and the surviving partners continue to carry on the business, the statute of limitation is no bar to taking the accounts of the new partnership by going into the accounts of the old partnership which have been carried on into the new partnership without interruption or settlement.

Where the managing partner of a firm himself issues notices to its constituents informing them that the partnership had dissolved from a particular date, it is not open to him subsequently to contend that this was false and that the partnership had actually terminated sometime before.

A surety bond executed in connection with a partnership must be read in conjunction with the partnership agreement to which it makes express reference. A bond of this kind is to be construed strictly, and the liability of the surety cannot be extended beyond the period for which he was undertaking liability simply by showing that the partnership, which, according to the express provision of the partnership agreement, he was led to believe was to terminate within a specified period, was in fact, by subsequent mutual agreement of the partners to which he was no party, continued beyond that period. P. MAHARAJ KISHEN *v.* HAR GOBIND, 101 P. R. 1914 **69**

———*Suit for accounts—Counter-claim—Court-Fees Act (VII of 1870), Sch. I, Art. 1.*

In a suit for accounts and to recover money due on a dissolved partnership, the defendant's claim for decree on accounts, is not a counter-claim, and no Court-fee is leviable thereon until the amount has been ascertained. S FATEH MAHOMED HAJI SULEMAN *v.* RAMZAN KHAN, 8 S. L. R. 122 **316**

Partnership—concld.

———*Suit for accounts—Counter-claim—Court Fees Act (VII of 1870), Sch I, Art. 1.*

In a suit for accounts and to recover money due on a dissolved partnership, the defendants' claim for decree on accounts is not a counter-claim, and no Court-fee is leviable thereon until the amount has been ascertained.

A suit for partnership accounts is in the nature of a suit in Chancery, and a Court of Equity will not drive the defendant to a fresh suit if the balance turns out to be in his favour.

A set-off is a cross-debt on which a separate action may be sustained. S. JESSARAM DHANURAM *v.* IKARDASS, 8 S L. R. 124 **320**

———, suit for dissolution of—Jurisdiction **629**

——— **suit**—*Court competent to pass decrees for amount exceeding its pecuniary jurisdiction—Incompetency to order amendment of valuation according to amount found due after preliminary decree—Course of appeal to be determined by amended valuation.*

In a partnership suit the fact that the amount found due exceeds the pecuniary jurisdiction of the Court does not prevent it from passing a decree for the full amount.

After a preliminary decree under section 215 of the Civil Procedure Code, 1882, and an appellate decree confirming it has been passed, the plaint as such may well be regarded as merged in the decree, and the Court is incompetent to order amendment of the valuation of the plaint in accordance with its finding as to the amount due and then to return the plaint for presentation to the Court having jurisdiction over the suit thus valued.

If the order for amendment is complied with by the plaintiff, the course of appeal will be determined by the valuation of the amended plaint. N. SHRIRAM *v.* CHUNI LAL, 11 N. L. R. 13 **988**

Party—Suit by person of unsound mind—Next friend, whether party **459**

Patents and Designs Act (II of 1911) **996**

Penal Code (Act XLV of 1860), ss. 105 (2), 147, 304, 325—*Right of private defence of property, limitations of—Unlawful assembly—Common object—Death caused by some members—Liability of all members.*

The Penal Code does not give any right of private defence of property in regard to which an offence under section 403 or 411 of the Code has been committed.

Section 105 (2) of the Penal Code applies to cases of theft only. Where more than 25 persons went in a body to enforce the right or supposed right of one of them to an animal by removing it from the house of a third person, and after they had removed it and gone some distance, they were followed by that person, who was consequently attacked and beaten by some of them and died by a blow on the head:

Held, that the assembly was an unlawful assembly within the meaning of section 141, Penal Code, and the force used by some of them in beating the deceased being in prosecution of their common object, all were guilty of rioting, but all could not be convicted of an offence under section 304, Penal Code, as the offence could not be said to have been committed

Penal Code—contd.

in prosecution of the common object, nor was it such as the members of the assembly know to be likely to be committed in prosecution of that object.

Where a man receives only one blow on the head and dies, and there is no evidence to show which of the two persons attacking him gave that blow, neither of the two will be convicted under section 304 but both of them can be convicted of an offence under section 325 of the Penal Code. **P.** AGRA *v.* EMPEROR, 37 P. R. 1914 Cr.; 16 Cr. L. J 209 **833**

——— **ss. 114, 302**—*Abetment must be complete apart from presence of abettor—Public Prosecutor, duty of, in murder case—All available eye-witnesses, production of witnesses not called without sufficient reason, whether raises inference adverse to prosecution.*

A conviction for murder under section 302 of the Penal Code, read with section 114, cannot stand where the only abetment charged necessarily required the presence of the accused, for to come within section 114, the abetment must be complete apart from the presence of the abettor

It is the duty of the Public Prosecutor in a murder case to place before the trial Court the testimony of all available eye-witnesses.

The purpose of a criminal trial is not to support at all costs a theory, but to investigate the offence and to determine the guilt or innocence of the accused, and the duty of a Public Prosecutor is to represent not the Police, but the Crown, and his duty should be discharged by him fairly and fearlessly and with a full sense of the responsibility that attaches to his position.

Where witnesses are not called without sufficient reason being shown, the Court may properly draw an inference adverse to the prosecution. **C.** RAM RANJAN ROY *v.* EMPEROR, 19 C. W. N. 28; 42 C. 422; 16 Cr. L. J. 170 **554**

——— ——— **ss. 143, 341**—*Restraint, when amounts to offence.*

The restraint, to amount to an offence under section 341 of the Indian Penal Code, must be directed to a person and not to anything else **M.** KUMBOLA GURAVADU *v.* YERAGATIPALLI KRISTNA, 2 L. W. 185; (1915) M. W. N. 203; 16 Cr. L. J 176 **560**

——— ——— **s. 147** **833**

——— ——— **s. 176**—*Failure to report—"Intentionally," meaning of—Co-existent obligation of another no excuse.*

Where a person is under a legal duty to report certain facts and fails to report them, he must be presumed to intend to conceal them, unless he can show that he had reason to suppose that the authority to which the report was due had the information from other sources.

The mere fact that another person was also present at the time of the occurrence and was under a similar obligation to report does not justify omission to report. **M.** PAVALLIMANAKKAL NARAYAN NAMPUDRIPAD, *In re*, 17 M. L. T. 263; (1915) M. W. N. 276; 16 Cr. L. J 210 **843**

——— ——— **s. 182** **223**

——— ——— **s. 193** **218**

Penal Code—contd.

——— ——— **s. 193**—*Prosecution, direction of against a witness—Perjury, order to prosecute for while case still pending, whether proper.*

An order directing the prosecution of a witness under section 193, Indian Penal Code, while the case in connection with which he is said to have made a false statement is still pending in the Sessions Court, is improper. **C.** BIRENDRA NATH DAS GUPTA *v.* EMPEROR, 19 C. W. N. 478 **211**

——— ——— **s. 209** **218**

——— ——— **s. 211** **223**

——— ——— **s. 302** **554**

——— ——— ——— **s. 302**—*Murder—Circumstantial evidence—No direct evidence—Conviction, whether legal.*

In a murder case stress can be fairly laid on the absence of direct proof and the inferential nature of the prosecution case. But where the evidence points to the accused alone and admits of no reasonable doubt, the accused can rightly be convicted. **M.** MAHAMMAD KHASIM *v.* EMPEROR, (1914) M. W. N. 718; 16 Cr. L. J. 195 **755**

——— ——— **ss. 302, 307**—*Murder—Evidence—Prosecution, duty of, to prove their own story—Weakness of defence, effect of—Right of private defence—Benefit of doubt—Practice*

The prosecution are bound to prove their own story independently and cannot rely upon the weakness of that put forward by the defence.

The tenants of a *sahukar zemindar* went to his house in a body to make some sort of demonstration against him and perhaps to seize their cotton crop which the *zemindar* had taken possession of and stored in his house. Probably some of the tenants had weapons and the *zemindar*, apprehending that some hurt would be caused to him, fired off his gun in the direction of the crowd of villagers without any intention of killing any one or of doing more harm than was necessary for his own protection:

Held, that what the *sahukar* did was done in the exercise of his right of private defence and that he was, therefore, entitled to the benefit of any doubt which existed. **P.** LACHHMAN DAS *v.* EMPEROR, 16 Cr. L. J. 152; 14 P. W. R. 1915, 131 P. L. R. 1915 **216**

——— ——— **ss. 302, 369**—*Murdered child found in well indicated by the accused who disclaimed all knowledge—Fact of stripping the child of her ornaments established—Youth of accused.*

In a case of murder the facts clearly established were that the accused was last seen with the child alleged to have been murdered, and that he stripped her of most of her ornaments and sold them and that her body was next found in a well, and the accused disclaimed all knowledge of the matter, though he himself indicated the well:

Held, that the accused was guilty of a foul murder, which in spite of his youth called for the extreme penalty. **P.** WADHAWA SINGH *v.* EMPEROR, 16 Cr. L. J. 167 **551**

——— ——— **s. 304** **833**

——— ——— **s. 307** **216**

——— ——— **s. 325** **833**

Penal Code—contd.

——— ——— **s. 335**—*Nose-cutting—Act importing deliberate design—Grave and sudden provocation.*

When the particular act, such as nose-cutting, of which the accused is found guilty, is one which imports deliberate design, the plea of grave and sudden provocation or the excuse it implies will not have by any means the same effect as in the case of a man who in sudden and provoked anger strikes a blow, however serious that blow may be. **B.** EMPEROR *v.* BHAGWAN CHHAGAN, 17 BOM. L. R. 68; 16 CR. L. J. 168 **552**

——— ——— **s. 336**—*Temple—Place of public resort—Person in charge to take necessary precautions to ensure safety of visitors—Well not properly enclosed—Gross negligence—Endangering safety of people.*

On the occasion of a festival a temple becomes a place of public resort and it is the bounden duty of the person in charge to take all reasonable precautions necessary to ensure the safety of those crowding thither by his license and invitation. Therefore if he omits to enclose a well in the courtyard standing by the path which the pilgrims must necessarily take in order to reach the shrine, omits not only to indicate at night its position by lights, but also removes the light placed near the well at the instance of the officers on duty, and consequently a man falls into the well, his conviction under section 336 of the Penal Code will be upheld. **C.** NARSING CHARAN MAHAPATRA *v.* EMPEROR, 18 C. W. N. 1176; 16 CR. L. J. 181 **195**

——— **s. 341** **560**

——— ——— **ss. 361** (*Explanation*), **366**—*Passing out of keeping of natural guardian—Kidnapping—Offence, whether committed—Confinement, what constitutes.*

Where a little girl, who has no intention of starting life independently, leaves her house for the purpose of seeking refuge with another relation, she cannot be considered to have passed out of the keeping of her natural guardians within the meaning of the explanation to section 361, Indian Penal Code, until she has by some overt act passed into the keeping of some one else. Therefore, a person who induces her to accompany him shortly after she leaves her house is guilty of an offence under section 366 of the Penal Code.

Where a child of 12 is removed a very great distance from her home and has been deprived of all independent judgment or will power by threats and inducements, she is confined because she is not conscious of the desire to escape. **S.** MULO *v.* EMPEROR, 8 S. L. R. 182; 16 CR. L. J. 117 **181**

——— **s. 363**—*Minority—lawful guardian—Majority Act (IX of 1875), s. 3—Unmarried Muhammadan girl—Father not living—Mother, whether lawful guardian—Kidnapping, offence of, when completed question of, whether can be raised in revision for first time.*

According to Muhammadan Law the occurrence of puberty determines minority and the mother's right to custody, but for the purposes of section 363 of the Indian Penal Code, regard must be had only to the definition of minority in section 3, Act IX of 1875

Penal Code—contd.

Where the girl alleged to have been kidnapped was unmarried, and her father was not living, there could be no question of any guardianship other than her mother's as lawful.

The question at what stage the offence of kidnapping was completed is one of fact, and cannot be raised in the High Court for the first time **M.** MUTHU IBRAHI, *In re* 37 M. 567; 16 CR. L.J. 169 **553**

——— **s. 364** **551**

——— **s. 366** **181**

——— ——— **s. 366**—*Kidnapping girl from lawful guardianship—Child temporarily in custody of maternal uncle—Mother resuming custody—Taking with mother's consent, whether amounts to offence.*

Where the accused was charged with kidnapping a girl from the lawful guardianship of her maternal uncle and it appeared that the mother of the girl was present with the accused when he was leading the girl to a railway station, and consented to the girl's being so taken.

Held, (1) that the maternal uncle had ceased to have the girl under his guardianship and the mother had again taken custody of the girl as her guardian;

(2) that taking with her consent did not amount to an offence under section 366 of the Penal Code. **M.** NATESA PADAYACHI, *In re*, 16 M. L. J. 406, 1 M L. W. 403 **909**

——— **s. 379** **591**

——— **s. 395**—*Dacoity committed in Lucknow District—Trial by jury and not by assessors—Government Notification No. 1092,-VI-545 A-9.*

Under Government Notification No. 1092,-VI-545A-9, dated 10th December 1884, which is in force no person can be tried on a charge under section 395, Indian Penal Code, by the Court of Session in Lucknow, when such person has been committed to that Court by a Magistrate exercising jurisdiction in Lucknow District with respect to an offence of dacoity alleged to have been committed in Lucknow District, except by a jury. **O.** RAMADHIN *v.* EMPEROR, 16 Cr. L. J. 169 **553**

——— ——— **ss. 415, 419**—*Cheating by personation—Inducing muharrir of a fair to write false name in certificate of sale—Muharrir deceived—Evidence—Thumb impression—Expert opinion, value of.*

Two persons *A* and *L* persuaded a *muharrir* at a fair to write in a certificate of sale of a mare that *L* was the purchaser and one *S* the seller *A* affixed his thumb mark for *S*. It was found that (*i*) the mare was not stolen property, but (*ii*) it was come by in some doubtful fashion and that (*iii*) the *muharrir* was deceived.

Held, that for whatever reasons *L* and *A* did deceive the *muharrir* and did induce him to write a false certificate, they were guilty of cheating by personation.

The deliberate opinion of an expert that two thumb marks exactly agree is on quite a different plane from an opinion as to handwriting and is sufficient to conclude that the same thumb made both the marks. **P.** AHMADA *v.* EMPEROR, 9 P. R. 1914 Cr 16 Cr. L. J. 189 **203**

——— **s. 419** **203**

Penal Code—contd.

——— **ss. 420, 482, 486**—*Trade-mark and property mark, distinction between*—*"National Bank of India" stamped on gold bars, whether trade-mark or property mark*—*Counterfeit trade-mark*—*Interference in revision*—*Criminal Procedure Code (Act V of 1898), s. 439.*

Where the object of stamping the words "National Bank of India" on gold bars is to inform the public that the bars are the merchandise of the Bank, imported, sold and guaranteed by it, the mark is a trade-mark and not a property mark.

For the purposes of the Penal Code it is not essential that an imitation should be exact in order to be "counterfeit."

Where, therefore, the accused used marks on his bar likely to deceive an ignorant and unwary purchaser, but which would be obvious on ordinary observation by comparison with a genuine bar:

Held, that this was a case of using a false trade-mark and not a counterfeit one and the accused was not guilty of an offence under section 486, Indian Penal Code.

It is not usual for a High Court in revision, to interfere with any finding of fact, so far as it is a finding of fact pure and simple based on evidence on the record; but where the lower Courts have erred in their inferences from facts as found and have found applicants guilty of offences which are not constituted by such facts, the High Court will interfere in revision. **S.** LOKUMAL *v.* EMPEROR, 8 S. L. R. 199 **902**

——— **s. 482** **902**

——— ——— **s. 486** **902**

——— **s. 497**—*Evidence Act (I of 1872), s. 50*—*Actual fact of marriage must be proved*—*Conduct not sufficient.*

To justify a conviction under section 497 of the Penal Code, the actual fact of marriage must be proved in some way or another.

The evidence that the man and woman spoke of each other as husband and wife and that some of those who were acquainted with them spoke of them as man and wife, proves nothing more than conduct, and under section 50 of the Evidence Act conduct alone is not sufficient to prove marriage. **B.** BHAGU DHONDI *v.* EMPEROR, 17 Bom. L. R. 75, 16 Cr. L. J. 48 **837**

——— ——— **s. 498**—*Enticing away married woman*—*Discarded wife living in her father's house*—*Protection*—*Knowledge or belief of her being wife of another man*—*Revision*—*Criminal Procedure Code (Act V of 1898), s. 439.*

A husband who openly discarded his wife for many years and recognised her as a free agent, to go where she liked, has no ground for complaining under section 498 of the Penal Code even if she is enticed away by another man from her father's house where she lives.

In such a case it cannot be said either that her father has the care of her on behalf of her husband or the man enticing her away had the knowledge or belief of her being the wife of the complainant. **P.** PAHLWAN *v.* EMPEROR, 5 P. W. R. 1915 Cr.; 129 P. L. R. 1915; 16 Cr. L. J. 216 **840**

——— **s. 499** **657**

Penal Code—contd.

——— **s. 499, 521**—*Defamation*—*'Lowers'*—*'In the estimation of others'*—*'Good faith'*—*Imputation, when in good faith*—*Care and attention must relate to occasion and circumstances*—*Reason to believe a thing to be true*—*Conviction, legality of*—*Defamation, charge of, proof of.*

The accused felt aggrieved by an order made by the *Mamlatdar* complainant, and as he was entitled to do under the provisions of the Land Revenue Code, appealed to the Assistant Collector against the order praying that it may be reversed. In the petition of appeal it was stated that the *Mamlatdar* had acted towards the appellant unjustly and spitefully, that in passing the order appealed against he was actuated by personal ill-will and malice against the appellant and that the *Mamlatdar* had in acting as he had done exercised his authority with a view to cause harassment and loss to the appellant. The *Mamlatdar* charged the accused for defaming him:

Held by *Davar* and *Shah, JJ.*—That the accused was protected by exceptions 8 and 9 of section 499 of the Indian Penal Code.

Per *Davar, J.*—That as the *Mamlatdar* by his previous conduct had given ample reasons to the accused for believing rightly or wrongly that he was acting with personal ill-will against him, the imputation was made in good faith.

Per *Shah, J.*—The care and attention required by law must have relation to the occasion and the circumstances and the question as to what would be due care and attention must be determined with reference thereto:

Per *Davar, J.*—It is an elementary principle of law which Criminal Courts have always to keep in view that where a person is charged with having committed a criminal offence, the commission of that offence must be strictly proved against him, and every necessary ingredient of the section under which he is charged must be satisfied before an accused person can be convicted and punished.

To convict a man under section 499, Penal Code, it must be shown that the complainant has proved that the imputation *has* directly or indirectly *lowered* his moral or intellectual character or has *lowered* his character in respect of his calling or *has lowered* his credit in the 'estimation of others'. The words 'in the estimation of others', taken in conjunction with the word 'lowers' in Explanation 4 govern all clauses in that provision of section 499. It is not sufficient for the complainant merely to raise a presumption that the imputation may lower him or may lower his moral or intellectual character in the estimation of others, or that it may, in the estimation of others, lower his character in respect of his calling, or may lower his credit. These are matters that must be proved. There must be proof that the complainant has been lowered as to his character, credit, or calling, reputation or position in the estimation of some person or persons.

Per *Heaton, J.*—That the imputation was not made in good faith.

It does not constitute 'good faith' necessarily that the person making the imputation believed it to be true. 'Due care and attention' implies genuine effort to reach the truth and not the ready acceptance of an ill-natured belief.

Penal Code—contd.

Explanation 4 to section 499, Penal Code, like the other three merely describes the quality or nature of the imputation and not its actual effects. **B.** ANANDRAO BALKRISHNA *v.* EMPEROR, 17 Bom. L. R. 82, 16 Cr. L. J. 177 **657**

——— **s. 499, Excep. III**—*Privileged occasion—Substantial truth—Exaggeration—Interference in revision with a pending case—Criminal Procedure Code (Act V of 1898), s. 439.*

Where the occasion is privileged, it is not necessary to justify every detail of the charge, provided the gist of the libel is proved to be in substance correct and the details, etc., which are not justified produce no different effect on the mind of the reader than the actual truth would do.

Where in a newspaper report the main aspersion of the accused against the complainant is true, the fact that there is some exaggeration or departure from strict truth does not deprive the accused of the protection provided in Exception 3 to section 499, Indian Penal Code.

Mere exaggeration, or even gross exaggeration, does not make a comment unfair. Where the matter is of public interest, the Court ought not to weigh any comment on it in a fine scale and some allowance must be made for even intemperate language, provided, however, that the writer keeps himself within the bounds of substantial truth and does not misrepresent or suppress any facts.

As a rule, a Court of Revision does not interfere with a pending case, but where the real object of the complainant is, not to vindicate his own character or to exact from the defendant the substantive penalty for his own offence, but to subject him to heavy financial loss and very serious and long continued annoyance by the very process of the trial itself, the Court will quash proceedings. **S.** MURLIDHAR JERAMDASS *v.* NARAYENDAS, 8 S. L. R. 143; 16 Cr. L. J. 141 **205**

Pensions Act (XXIII of 1871), s. 6—*Suit relating to grant of land revenue—Certificate of Collector—Procedure, where certificate not obtained.*

A suit relating to a definite share in an *inam*, which consists in the enjoyment by the *inamdars* of 1rds of the revenue of a certain village, is a suit relating to a grant of land revenue and cannot be taken cognizance of without a certificate from the Collector under the Pensions Act.

Where the plaintiff has not obtained a certificate, the hearing of the appeal may be adjourned to enable him to procure the certificate. **B.** ANTAJI VASUDEV KELKAR *v.* VINAYAK KESHAV BHISE, 17 Bom. L. R. 153 **927**

Perjury. *See* PENAL CODE, s. 193.

Plaint. *See* AMENDMENT.

Pleader retaining in his service suspected tout—Making false statement—Professional misconduct **156**

Police report—Non-cognizable case reported by Police—Procedure **145**

Possession, *when becomes adverse against absentee owners—Suit for recovery of possession—Limitation Act (IX of 1908), Sch. I, Art. 144.*

Possession—contd.

It is the duty of persons possessing rights to keep an eye on those rights.

Any overt act of adverse possession by the person in possession of property starts adverse possession as against the absentee owner thereof.

Where, therefore, the plaintiff's step-mother mortgaged the property in suit on the 2nd December 1898, expressly declaring herself in the deed to be the sole owner and that the plaintiff had no concern with it, in a suit for possession brought on the 5th March 1912:

Held, that the step-mother's possession became adverse when she mortgaged the house and the plaintiff's suit having been brought more than 12 years afterwards was barred by time. **P.** KHUDA BAKHSH *v.* KARMUN, 49 P. L. R. 1915 **610**

——— ———*Evidence of title—Suit on ground of dispossession.*

Possession is a good title against all persons except the true owner.

In a suit for possession on the ground of dispossession, the plaintiff must show that there was no discontinuance of possession before the defendant's entry. **N.** GANAJI *v.* DHANSINGH, 11 N. L. R. 31 **977**

——— ———, *suit for—Assessment of rent—Addition to holding—Maintainability of suit—Bengal Tenancy Act (VIII of 1885), s 52.*

A suit for possession on the allegation of dispossession by the defendant, or in the alternative for assessment of rent, where the land in suit is not part of the original holding but is subsequently acquired and treated as an addition to the original holding, is not maintainable, as not being framed under section 52 of the Bengal Tenancy Act. **C.** HARA CHANDRA MAJUMDAR *v.* RADHA KISHORE MANIKYA BAHADUR, 20 C. L. J. 296 **19**

———, *suit for—Decree-holder purchasing share of judgment-debtor in an undivided house, right of—Judgment-debtor obtaining partition decree on certain condition—Decree-holder, whether can fulfil condition and obtain exclusive possession.*

B obtained a decree against *S* in execution of which he attached *S*'s one-sixth share in a house. *S* meanwhile sued *B* and others for partition of the house and obtained a decree on the condition to pay Rs. 237 into Court. *S* did not pay the money and the decree remained unexecuted. *B* brought to sale and purchased the specific share allotted to *S* in the partition suit. *B* paid Rs. 237 into Court and obtained possession. *R* sued for declaration of her right and that *B* was not entitled to possession of the house by virtue of his purchase.

Held, that *B* was not entitled to separate possession of any specific portion of the house by virtue only of his purchase at the execution-sale, as what passed to him was the right, title and interest of *S* in an undivided one-sixth share. **A.** RAM DULARI *v.* BALAKRAM, 18 A. L. J. 105; 37 A. 120 **696**

——— ———, *suit for—Mortgage by ostensible owner—Benefit to estate—Muhammadan Law.*

According to Muhammadan Law as between sisters and nephews, sisters are the sole heirs and, therefore, nephews have no right to mortgage the property, unless they act as sisters' agents.

Possession—concld.

A loan for the nephews' defence in a suit for possession by the sister-in-law is not for the benefit of the estate, as neither party has any right to the possession of the estate. L. B. MA NAN THE *v.* MI HMA MA YE 621

Possessory *right over channel—Right exercised for 40 years—Obstruction in enjoyment of right—Damages, right of.*

Where nothing more than a mere possessory right over a *chal* exercised for a period of forty years is proved, that of itself, is sufficient to entitle a person to claim damages for obstruction in the enjoyment of that right M. KUTHIARVATHATH PRABAKARAN *v.* SESHAN PATTAR 772

Post diem interest. *See* INTEREST 616

Practice—Admission of additional evidence on appeal—Appellate Court, duty of 33

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——*Madras High Court Original Side Rules, r. 48—Written statement, failure to file, in time—Delay, excuse of, if discretionary*—Ex parte *decree, setting aside of—Proof of promissory note—Witness examined—Notes of evidence not on record—Decree, if valid.*

Under rule 48 of the Original Side Rules a defendant is not entitled, until the leave of the Court is obtained, to put in a written statement after the date fixed in the summons served on him and the Judge has a discretion to grant or refuse such leave.

If, however, a written statement is filed after the due date without getting the leave of the Court, but an extension of time is afterwards applied for and obtained, the pleading already put in is not a nullity but can be looked into and accepted.

An *ex parte* decree will not be set aside merely for the reason that it does not appear from the record, *viz.*, (the Judge's notes) that the promissory note in suit had been properly proved, especially when the point had not been taken in the memorandum of appeal and where as a matter of fact it appeared from the statement of the Vakil for the respondent-plaintiff that an attestor of the note had been examined before the trial Judge. M. ARUNACHELAM CHETTY *v.* KOTHANDAPANI PILLAY, 2 L. W. 1 769

Pre-emption. *See* PUNJAB PRE-EMPTION ACT.

——*Custom—Instances in adjoining* mohallas*—Degree of proof required—Lahore City, Taksali Gate Bazar.*

In order to prove the custom of pre-emption instances of the enforcement of the right of pre-emption in the adjoining streets or *mohallas* are relevant.

The circumstance that a particular bazar is essentially a street of shops and prostitutes' lodgings cannot override the fact that pre-emption has been enforced as a matter of right in certain cases.

The mere fact that the property in suit has changed hands three or four times without any claim of pre-emption being made does not go to disprove the existence of the custom.

Where in a pre-emption suit it was contended on behalf of the vendee-defendant that four instances were not enough to prove custom and that compromises out of Court should not be relied on:

Held, (1) that extra-judicial compromises were valid instances of the existence of custom;

(2) that each case must be decided on its own facts and that in this case the custom of pre-emption was proved to exist. PS. JHANDA MAL *v.* SARDAR BEGAM 778

——*Oudh Laws Act* (*XVIII of* 1876), *s.* 10*—Decree for foreclosure in respect of under-proprietary lands—Oudh Rent Act* (*XXII of* 1886), *ss.* 152 *and* 154*—Statutory liability to pay arrears of rent cast upon transferee and land that came into his possession—Pre-emptor's liabilities to pay arrears of rent recovered from vendee.*

One M, a mortgagee, obtained a decree for foreclosure in respect of certain under-proprietary lands on the basis of his mortgage, but he failed to give the notice required by section 10, Oudh Laws Act. At the time of foreclosure there were outstanding certain arrears of rent, which inspite of his objections were realized from M by the *Talukdar*. Subsequently the appellants instituted a suit for pre-emption and claimed a decree on payment merely of the sum which was found to be due under the foreclosure decree.

Held, that after M had obtained the under-proprietary tenure by foreclosure, it was impossible for him to escape the statutory liability cast by sections 152 and 154 of the Oudh Rent Act both upon the transferee and upon the land which came into his possession:

Pre-emption—concld.

Held, further, that plaintiffs who were seeking to have themselves placed in the situation in which *M* had stood at the time he obtained foreclosure, could not avoid any liability to which *M* was then subject.

Held, also, that the payments made by *M* were in the nature of salvage made to save the property from sale, and on that principle also the plaintiffs were bound to pay the amount. **O.** HAZARI LAL *v.* RAM NARAIN, 17 O. C. 379 **420**

———*Rival pre-emptors—Collusion with vendee to be strictly proved before pre-emption suit dismissed.*

Before the suit of a pre-emptor is dismissed on the ground that he is acting in collusion with the vendee and in the latter's interest, it will have to be shown by the strictest evidence that his object is really to secure the property for the vendee. His motive to annoy and defeat his rival pre-emptors is not sufficient. **P.** AMAR SINGH *v.* KISHEN SINGH, 108 P. R. 1914 **93**

——— ——— One suit for pre-emption of several properties sold on different occasions to separate vendees—Plaint restricted to one—Subsequent institution of other suits after time **927**

——— ——— **decree**—*Jurisdiction of Court to extend period fixed for payment—Application for extension of time—Civil Procedure Code (Act V of 1908), s. 148.*

A Court has no jurisdiction to extend the period fixed for payment in a pre-emption decree, whether the application for extension is made before or after the expiration of the period permitted. **O.** HASIB-UN-NISSA *v.* MAHMUD-UN-NISSA, 17 O. C. 377 **419**

Preliminary decree, appeal from **135**

——— ——— ——— on mortgage suit—Decree, combined, in suit for sale of mortgaged property and for recovery of balance due on mortgage—Mortgage, recovery of balance due on, separate decree for **72**

Prescription Ouster—Adverse possession **1**

Presidency Towns Insolvency Act (III of 1909), ss. 49 (4), 103—*Offence under s. 103, essential element of—Inference—Conviction, when sustained.*

In order to constitute an offence under section 103 of the Presidency Towns Insolvency Act, the intent to give undue preference or diminish the divisible assets is essential and unless it is shown that that is the natural result of an accused person's action such [redacted] cannot be inferred.

[redacted] ogused (a member of a firm declared [redacted] under section

Presumption when one co-parcener divides **736**

——— ——— Document 30 years old **562**

——— ——— Endorsee from payee of *hundi*—Holder in due course—Consideration, failure of **362**

——— ——— Landlord and tenant, relation of, proof of—Burden of proof **804**

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——— ——— Nature of possession **506**

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——— ——— Record-of-Rights, entry in **478**

——— ——— Tenure-holder—Lease **432**

Principal and agent—*Misappropriation by agent—Termination of agency—Suit to recover money—Cause of action against agent and his legal representatives, whether same—Limitation Act (IX of 1908), Sch. I, Arts. 62, 89, 120.*

A suit to recover money alleged to have been misappropriated by the defendants' father, acting as the plaintiff's agent, is barred by time if brought more than three years after the termination of the agency and also after the amount due was ascertained by arbitration.

Where the defendants are sued as the representatives of their deceased father, the cause of action against them is the same as against their father; and if the suit would be barred against him if he had lived, it is also barred against them.

Article 120, Schedule I, of the Limitation Act is not applicable to a suit brought against the representatives of a deceased agent, and while Article 89 applies to a suit against an agent for acts committed during the continuance of his agency, the Article applicable in respect of money payable by him after the termination of his agency would be Article 62. **M.** ARUNACHELLAM CHETTY *v.* RAMAN CHETTY, 16 M. L. T 614; (1915) M. W. N. 23 **807**

——— ——— Promissory note—Partnership—Money deposited with manager of business not in course of business—Liability of proprietor—Estoppel **252**

——— **and surety**—Omission to pursue suit against principal on account of difficulty in service—Striking off his name—Surety not discharged—Civil Procedure Code (Act V of 1908), O. IX, r. 5, O. XXIII, r. 1, applicability of **65**

Privies, rights and liabilities of—Classes of pri- **[redacted]**

Probate and Administration Act —contd.

cutor to Probate—Guardian of minor, whether can take Probate.

Where the principal beneficiary under a Will and codicil was the testator's minor son and the codicil made the applicant guardian till majority of the person of the minor and gave all the property to his charge, directing him to pay off all testator's debts and to give maintenance to the testator's wife and where during the pendency of the probate proceedings the minor beneficiary died:

Held, (1) that both the Will and the codicil were genuine documents and the fact that they were not registered did not render them suspicious,

(2) that if the codicil did make the applicant executor, then he must have Probate irrespective of the possible effect of the minor's death,

(3) that the direction in the Will making the applicant guardian of the minor beneficiary did not make him an executor and was not sufficient for grant of Probate. P. ANUP SINGH *v.* SOHAN SINGH, 44 P. L. R. 1915 **749**

——— **s. 7** **749**

——— **ss. 19, 45, 78, 89**

—Administration, when comes to an end—Grant of Letters of Administration to Hindu widow—Her liability under an administration bond—Administrator of executor, whether a derivative executor—Executor, whether trustee—Assent to legacy, effect of—Suit on bond conditioned with performance of several acts—Limitation Act (IX of 1908), Sch. I, Art. 68.

As soon as an administrator has performed the duties imposed on him by the Probate and Administration Act, the administration must be deemed to be at an end and when the person entitled to the estate is the executor or administrator himself, subsequent possession and acts are attributable to him not as administrator but as heir.

Where a Hindu widow obtained Letters of Administration to the estate of her deceased husband and executed the usual administration bond under section 78 of the Probate and Administration Act:

Held, that her liability under the bond was confined only to such acts of waste and mismanagement as could be attributed to her as administratrix and not any such acts attributable to her as the widow in possession of her husband's estate under Hindu Law after administration was over.

The administrator of an executor is not a derivative executor. Where, therefore, an executor dies without having fully administered the estate the duty of carrying on the administration of that estate does not devolve upon the deceased executor or administrator's personal representative but on a person appointed for the purpose under sections 19 and 45 of the Probate and Administration Act.

An executor is not

Probate and Administration Act —concld.

In cases where a bond contains successive covenants each breach gives a separate cause of action, but the date of the last breach is the starting point of limitation in a suit on the bond when the bond is conditioned on the performance of several acts and the obligation to pay is enforceable till the last of the conditions is fulfilled.

Where the assignees of an administration bond executed by a Hindu widow in connection with the grant to her of the Letters of Administration to the estate of her deceased husband, sued for an account of the administration:

Held, that the suit was governed by Article 68 of the first Schedule to the Limitation Act and having been brought more than three years from the period when the conditions of the bond were broken, was barred by limitation. M. RAMANATHAM CHETTY *v.* RAGAMMAL, 17 M. L. T. 61 **849**

——— **s. 34** **617**

——— **s. 45** **849**

——— **s. 55** **617**

——— **ss. 78, 89** **849**

——— **s. 90** **715**

Procedure—*Confession by some of accused—Failure of Judge to record their conviction—Conviction along with others—Irregularity, effect of.*

If some of the accused in a Sessions trial plead guilty to the charge, their conviction should be recorded then and there; but if the Sessions Judge convicts them after he has taken evidence against the other accused and does not take into account their confession in passing sentence upon the others, he commits only a curable irregularity. A. SURJAN SINGH *v.* EMPEROR, 12 A. L. J. 1239; 16 Cr. L. J. 103 **151**

——— *District Judge adopting finding of Divisional Judge in another case on custom, legality of.*

Where a District Judge affirms a decree in favour of the plaintiff, following a finding as to custom arrived at by the Divisional Judge in another case relating to houses in the *abadi* of the village, he does not apply his mind to the point and his procedure is irregular. P. THUMAN *v.* BASANTI, 43 P. L. R. 1915 **980**

——— of Muhammadan Law, how far can be followed in British Courts **113**

——— Police report—Non-cognisable case reported by Police **145**

——— Principal and agent—Objection as to right of agent, whether can be taken for the first time in High Court

Professional misconduct

Promissory note—concld.

———————————*Principal and agent—Partnership—Money deposited with manager of business not in course of business—Liability of proprietor—Estoppel.*

The plaintiff sued the defendant, on a document which purported to be a receipt in favour of the plaintiff, for a certain sum of money as a deposit bearing interest. The amount was stated to be on account of plaintiff's one-third share deposited by his grandfather for the plaintiff during his minority. It was not signed by the defendant, but by a person who was alleged by the plaintiff to be the partner of the defendant in a business and who was admittedly acting as its manager. It was not shown that he had received the money and signed the document in the course of the business, but on the contrary, it was found that the money was advanced to the executant to buy up the business from the defendant who was its sole proprietor. It was urged on behalf of the plaintiff (1) that the document was a promissory note and (2) that the defendant had in correspondence described himself as part proprietor of the business.

Held, that the document could not be treated as a promissory note, that the plaintiff had no cause of action against the defendant and that the defendant was in no way estopped by merely describing himself as a part proprietor from showing the true nature of the transaction. **P.** DAYA KISHEN KAUL *v.* FRANK B. POOL, 247 P. L. R. 1914; 159 P. W. R. 1914 **252**

———————————*Recital as to execution by three persons—Execution by two alone—Enforceability—Question of fact.*

Where a bond, which contains a recital purporting to have been executed by three people, is executed by two persons alone, the question whether such a bond can be enforced against the actual executants is one of fact, depending upon the circumstances of each case.

Where the executant agreed to be liable under the bond notwithstanding that another person mentioned in the bond as a co-executant did not sign it:

Held, that the bond was enforceable against the executant. **M.** BANGARUSAWMY AIYANGAR *v.* SOMASUNDARAM CHETTIAR, 16 M. L. T. 102; 1 L. W. 584; 27 M. L. J. 176 **161**

———————————*Suit by assignee of promissory note—Right of assignee to sue, how far executant can question*

In a suit by the assignee of a promissory note to recover the money due under the note, all that the executant is entitled to have ascertained is that the plaintiff is the legal holder of the note, and able to give him a good discharge, he cannot question whether consideration was paid or not paid by the assignee. **A.** BALDEO SAHAI *v.* BEHARI LAL, 18 A. L. J. 19; 37 A. 99 **509**

Prosecution, when commences **449**

"Prosecution" and "Prosecutor" **449**

Provident Insurance Societies Act (V of 1912)—*Insurance Company, whether corporate or share-capital divided into shares—Registration under the Act necessary before carrying on business.*

An Insurance Society, whether it is a corporate company before or whether its share-capital is divided into shares or not, cannot carry on the business of life insurance unless and until it is registered under the Provident Insurance Societies Act (V of 1912). **C.** DEPUTY SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS *v.* SITAL CHANDRA PAL, 18 C. W. N. 1182; 16 Cr. L. J. 149 **213**

Provincial Insolvency Act (III of 1907), ss. 4, 6—*Appeal in insolvency proceedings—What parties entitled to notice—Annual Practice O. LVIII, r. 8—Limitation Act (IX of 1908), s. 14, applicability of.*

In an appeal against an order passed in an insolvency matter, only the parties affected by the order are entitled to notice.

As the Limitation Act is not applicable to proceedings under the Provincial Insolvency Act the time during which a petition in insolvency was pending in a Court not having jurisdiction cannot be allowed in computing the period for filing a petition under section 6 of the Act. **M.** TRASI DEVA RAO *v.* PARAMESHRAYA **144**

——————————**s. 16 (2) (b)**—*Application by creditor after declaration of insolvency.*

Once a person has been declared insolvent and a vesting order passed, no creditor can apply for any remedy against him without the leave of the Court. **M.** LINGAPPA CHETTIAR *v.* NARASIMHA CHARIAR **6**

——————————**s. 20, cl. (d)**—*Insolvent, whether can sue to set aside decrees against him.*

An insolvent is not prevented by reason of section 20, clause *(d)*, of Act III of 1907, from instituting, defending or continuing any suit or other legal proceeding relating to a decree against him. **A.** RAM NARAIN *v.* BEHARI, 12 A. L. J. 925 **876**

——————————**s. 43,** *proceedings under, nature of—Criminal proceedings—Procedure not followed—Insolvent, conviction of, whether sustained.*

Proceedings against insolvents under section 43 of the Provincial Insolvency Act are in the nature of criminal proceedings, and it is necessary that there should be a charge, a finding and a conviction as a foundation for the sentence and these should be strictly and accurately pursued and if on any of these three points a substantial defect should appear, it would be a ground for reversing the proceedings.

Therefore, where a Judge does not follow the procedure but arrives at his conclusion of guilt of an insolvent not on evidence but substantially on the report of the Receiver of his property, the conviction of the insolvent cannot be sustained. **C.** HARIHAR SINGH *v.* MOHESHWAR PROSHAD, 18 C. W. N. 692; 16 Cr. L. J. 135 **199**

——————————**ss. 43 (2) (b), 46 (1)**—*Order refusing to take action against insolvent—Creditor, whether an aggrieved person—Appeal.*

A creditor is not a person aggrieved, within the meaning of section 46 (1) of the Provincial Insol-

Provincial Insolvency Act—concld.

vency Act, by an order refusing to take action against an insolvent under section 43 (2) (*b*) and he has, therefore, no right of appeal. **M.** IYAPPA NAINER *v.* MANIKKA ASARI 241

——— s. 46 (1) 241

Provincial Small Causes Courts Act (IX of 1887), s. 23—*Jurisdiction—Bengal, Agra and N.-W. P. Civil Courts Act (XII of 1887), s. 13.*

In absence of the second Munsif on leave, the District Judge assigned the Small Cause Court cases of the second Munsif's jurisdiction to the 3rd Munsif. In one of those cases the 3rd Munsif made an order under section 23 of the Small Cause Courts Act, that the case involved complicated questions of title and should be tried by the Court in its ordinary jurisdiction and that as he had not the local jurisdiction to try the case, it should go to the Court which had the local jurisdiction The second Munsif, who had by that time returned, disregarding the said order of the third Munsif tried the suit as a Small Cause Court case and decreed it.

Held, that the action of the second Munsif in trying the case as a Small Cause Court suit within his jurisdiction, notwithstanding the order under section 23 by the third Court, was incompetent and illegal. **C.** BHULU SARDAR *v.* MAYAN JAMADAR 751

——— **s. 25**, *scope of—Findings of fact—Interference in revision—Civil Procedure Code (Act V of 1908), s. 115.*

The powers conferred by section 25 of Act IX of 1887 are wider than those conferred by section 115 of the Civil Procedure Code.

Where a Small Cause Court decree is based on a finding which is clearly opposed to the evidence, resulting in grave injustice to the defendant, the High Court is not merely justified in exercising, but acts reasonably in the exercise of, its revisional jurisdiction. **S.** RUPCHAND *v.* MINHOMAL HARDASMAL, 8 S. L. R. 164 366

——— **Sch II, Art. 8**—*Suit for rent other than house rent, whether cognizable by Small Cause Court—Revenue Sale Law (Act XI of 1859), s. 37, cl. (4)—Land on which a garden stood before, sold for arrears of revenue—Incumbrance, whether void—Landlord, right of, to annul notice—Notice, how sufficient—Civil Procedure Code (Act V of 1903), s. 102—Appeal, second, whether competent*

A suit for rent (other than house rent) is not cognizable by a Small Cause Court and in the absence of a notification issued by the Local Government expressly investing a Judge of the Court of Small Causes with authority to exercise jurisdiction with respect thereto, a second appeal in such a suit, although the value thereof does not exceed Rs. 500, is not barred by section 102, Civil Procedure Code.

The mere fact that a garden was made on a piece of land a quarter of a century before it was sold for arrears of revenue, would not make it land "on which a garden has been made" for all time to come, and it does not fall within the exception to section 37 of Act XI of 1859 and is liable to be annulled.

A sale for arrears of revenue does not *ipso facto* avoid incumbrances or under-tenures, but only renders them voidable at the option of the purchaser. It is, therefore, necessary that the purchaser must, by some unequivocal act, indicate his intention to avoid under-tenure if he desires to do so. A formal written notice is not essential, but the election of the purchaser to avoid must be brought to the knowledge of the tenure-holder.

Per *Beachcroft, J.*—Section 37, clause (4), of Act XI of 1859 contemplates improvements or works of a permanent character and these are protected, irrespective of whether the lease was or was not given for the purpose of the work in question. But to afford protection the work must still be in existence or the land be used for the purpose of the work. **C.** SAHODORA MUDIALI *v.* SARBOSOBHA DASI, 20 C. L. J 494 258

——— **Sch. II, Art. 13**—*Suit to recover sums payable by a khatedar to an inamdar in respect of immoveable property—Jurisdiction of Small Cause Court—Civil Procedure Code (Act V of 1908), O. VIII, r. 6.*

A suit for the recovery by an *inamdar* of sums payable by a *khatedar* in respect of certain immoveable property held by him under the *inamdar* as his superior holder, is not cognisable by a Court of Small Causes. In such a suit the claim of the defendant to set off the stipend payable by the plaintiff to certain *pujaris* of a temple, of whom defendant was one, could not be allowed, as he was claiming in a different capacity, a different category to that in which he held as tenant or *khatedar* of the plaintiff. **B.** MADHAVRAO MORESHWAR *v.* RAMA KALU GHANI, 16 Bom. L. R 746; 39 Bom. 131 350

——— ——— ——— **Art. 28**, *interpretation and scope of—Suit by heir of deceased to recover moveables of deceased detained by defendant, whether cognizable by Small Cause Court—Defendant's denial of plaintiff's title, effect of.*

The suits contemplated by the words in Article 28 of Schedule II of Act IX of 1887, are suits for the recovery of the property of an intestate, between rival claimants to the estate or against persons administering the estate.

Therefore a Small Cause Court has jurisdiction to entertain a suit by the heir of a deceased to recover from the defendant certain moveable property of the deceased detained by him. The fact that the defendant denies the title of the plaintiff does not oust the jurisdiction of the Court. **C.** TIKA SHAHU *v.* CHIRKAT SHAHU, 19 C. W. N. 614 773

——— ——— ——— **Art. 29**—*Suit for dissolution of partnership and account—Jurisdiction—Material irregularity—Revision.*

A Judge acts with material irregularity if he misapprehends the nature of the plaintiff's claim and the provisions of Article 29 of Act IX of 1887, and in such a case the High Court has jurisdiction to entertain an application for revision.

A suit for partnership accounts with an allegation that the partnership has been dissolved and containing also an alternative prayer for the dissolution of the partnership if it has not been dissolved, is triable by a Munsif and not by a Small Cause Court. **A.** INDAR MAL *v.* BUDHA, 13 A. L. J. 58 629

Provincial Small Causes Courts Act—concld.

——————— **Sch. II, Art. 38**—*Maintenance—Suit based on agreement—Claim not made by maintenance-holder—Jurisdiction.*

In a division between two Hindu brothers, *S* and *V*, it was agreed that their mother would live with *S* and that *V* would pay *S* therefor a certain quantity of paddy by way of maintenance. *V* fell into arrears. On the death of both *S* and *V*, the sons of *S* sued the sons of *V* for the arrears due in the Small Cause Court:

Held, that the suit, not being by the maintenance-holder or for maintenance, but being based on a contract was not one 'relating to maintenance' within the meaning of Article 38, Schedule II, of the Provincial Small Cause Courts Act and that it was, therefore, cognisable by the said Court. M. ANNASAMI SASTRIGAL *v.* RAMASAMI SASTRIGAL, 15 M. L. T. 352 **824**

——————— **Art. 41** **56**

Public Gambling Act (III of 1867), ss. 3 and 4—*Keeping gaming house and being present in it—Offence—Joint trial, whether illegal.*

The joint trial of a person accused of keeping a gaming house and others for being present in it at the time of a Police raid, is not warranted by the provisions of section 239 of the Criminal Procedure Code, and thus being illegal must be set aside. P. EMPEROR *v.* FAZAL DIN, 35 P. R. 1914 Cr.; 16 Cr. L. J. 220 **844**

——————— **s. 4** **844**

Public Prosecutor, duty of, in murder case—All available eye-witnesses, production of—Witnesses not called without sufficient reason, whether raises inference adverse to prosecution **554**

Public purpose—Contract—Lease and *sanad* by Government—Resumption for public purposes—"Public purpose," meaning of—Erection of dwelling houses for Government officials, whether public purpose **26**

Punjab Courts Act (I of 1912), s. 40—*Appeal, Second—Application for certificate to appeal made after 30 days—Question of custom mixed with law—Certificate refused—Second appeal, whether lies to Chief Court.*

Where a certificate to appeal on the question of custom is not granted, no second appeal lies to the Chief Court and it is immaterial on what ground the same is refused. P. MULA *v.* MOSHIARA, 24 P. W. R. 1915; 85 P. L. R. 1915 **723**

——————— **s. 70** **561**

Punjab Courts (Amendment) Act (IV of 1912), s. 70 **589**

Punjab Courts Act (III of 1914), s. 38—*Court of District Judge, power of—Original and Appellate jurisdiction—Enactments regulating procedure—Interpretation.*

It was the intention of the Legislature to substitute in the Punjab, for all general purposes, the present Court of the District Judge for the former Court of the Divisional Judge as a Court of Appeal from decrees or orders of Subordinate Judges and Munsifs; but the Court of the present District Judge is essentially a new Court and not merely the successor or transferee of the business of the Court of the former Divisional Judge, within the meaning of section 150 of the Civil Procedure Code.

Distinctive features of the present Court of the District Judge and the former Court of the Divisional Judge explained and illustrated.

Where, therefore, on the 18th July 1914, the then District Judge of Lahore passed certain orders in liquidation proceedings connected with the winding-up of certain banks and the Official Liquidators filed appeals under section 169 of the Indian Companies Act, 1882, on the 29th July 1914, in the Court of the Divisional Judge, Lahore, and while the appeals were still pending the new Punjab Courts Act came into force and abolished the Court of the Divisional Judge; on a reference whether the present District Judge of Lahore was competent to hear and determine the appeals:

Held, that as the appeals in question were preferred from orders passed by a District Judge, the Court which had jurisdiction to hear and determine them was the Chief Court and not the present District Judge.

Acts of the Legislature which regulate procedure, though in general retrospective in their effect, must not be interpreted so as to affect prejudicially the vested rights of the parties to a suit. P. MESSRS. MEUGENS *v.* SUTLEJ FLOUR MILLS, FEROZEPORE, 42 P. L. R. 1915; 25 P. W. R. 1915; 30 P. R. 1915 **625**

——————— **s. 40 (3)**—*Refusal to grant certificate on insufficient grounds—Revision.*

Ordinarily no revision lies from an order of lower Appellate Court refusing to grant a certificate under section 40 (3) of Act III of 1914, but where it has been refused on the ground that no general question of custom etc. is involved, the Chief Court can exercise its revisional power and remand the application to obtain the certificate for re-decision. P. SAHAB DIN *v.* DASWANDHI BEG, 23 P. W. R. 1915; 86 P. L. R. 1915 **722**

——————— **s. 41** **620**

——————— **s. 44** **589, 593**

Punjab Land Revenue Act (XVII of 1887), ss. 115, 117 (2)—*Order by Revenue Officer—Partition—Discretion—Civil Procedure Code (Act V of 1908), s. 11.*

When a Revenue Officer is acting, not as a Court under section 117 (2) of Act XVII of 1887, but merely as a Revenue Officer dealing with an application for partition, the proceeding is an administrative adjustment, to which the principle of *res judicata*, as embodied in section 11 of the Civil Procedure Code, does not apply. But it does not mean that the orders passed by a Revenue Officer have no legal finality.

Under section 115 of the Punjab Land Revenue Act, a Revenue Officer has discretionary authority absolutely to disallow an application for partition, and he ought to use this authority in every instance in which the same question has been previously decided, unless it is shown that the circumstances which made the previous order appropriate have changed. P. NATHU *v.* BISHNA, 5 P. R. 1915 Rev. **417**

Punjab Laws Act (IV of 1872), s. 5 542

Punjab Limitation (Ancestral Land Alienation) Act (I of 1900) 574

——— ——— ——— *Sale of equity of redemption of land by sonless male proprietor—Declaratory suit by reversioner to protect his right—Limitation Act (IX of 1908), Sch. I, Art* 120.

A person is entitled to the benefit of the new Law of Limitation extending the period, if on the date of its coming into force his right to sue subsists. Therefore, where an alienor died before the Punjab Limitation Act I of 1900 came into force and the right of his reversioner to sue for his land still survived the suit is governed by Act I of 1900, even if it extends the period of limitation.

The Punjab Limitation (Ancestral Land Alienation) Act I of 1900 applies also to the sale of the equity of redemption by the alienor.

After the death of an alienor, his reversioner is entitled to maintain merely a suit to declare that the sale is not binding upon him. **P.** MAHIA MAL *v.* GHULAM KADIR, 11 P. W. R. 1915; 61 P. L. R. 1915 **607**

Punjab Pre-emption Act (II of 1905), s. 11—*'Member of agricultural tribe'—Government Notification—'Holding land'—Tenant-at-will—Right should also be subsisting at date of suit.*

Under section 11 of the Punjab Pre-emption Act, 1905, the expression 'member of an agricultural tribe' means, according to the Government notification on the subject, a person (*i*) belonging to any one of the tribes notified as agricultural tribes for the district in which he claims that status, and (*ii*) either holding land or residing in that district.

It is very doubtful whether a person who occupies land as a tenant-at-will can be said to 'hold land' within the meaning of the notification.

To maintain a suit for pre-emption, the plaintiff must show, not only that he had a right of pre-emption at the time of the sale, but also that his right subsisted at the date of the institution of the suit. **P.** FATEH SINGH *v.* SANT SINGH, 47 P. W. R. 1915; 125 P. L. R. 1915, 43 P. R. 1915 **29**

——— ——— **s. 12 (a)**—*Pre-emption—Occupancy holding—Rival claimants—Landlord—Deceased tenant's heirs—Res judicata—Same parties.*

A decision is not *res judicata* when the parties to the litigation are not the same.

The heirs of an occupancy tenant have a preferential right of pre-emption to the landlord in respect of sale of the occupancy holding. **P.** MUHAMMAD HASAN *v.* YUSAF, 11 P. L. R. 1915 **642**

Punjab Pre-emption Act (I of 1913), s. 5—*Shop—Building situate in a lane—Part used as shop and part as residential quarters—House or shop.*

Where in a pre-emption suit it appeared that the building in suit was situated in a lane not a Bazar and was originally purely residential, but that there had been some subsequent alterations in the structure with the result that the three rooms abutting on the lane could be used as shops, and in fact had been used as such for some time, while the upper storey had been used as residential quarters by different persons including the owner.

Punjab Pre-emption Act—(1913)—concld.

Held, that as there was no evidence that at the time of the sale or at any time shortly before it the building was used for commercial purposes, it was not a shop and the plaintiff was entitled to pre-empt. **P.** HANKU MAL *v.* ATMA RAM, 47 P. L. R. 1915 **799**

Punjab Tenancy Act (XVI of 1887), s. 8—*Occupancy rights, butamari per se does not confer—Criterion.*

In the Sirsa Tahsil Settlement papers of 1883 and 1882, the clause giving the right to break up waste cannot be construed to import that *butamari per se* confers an occupancy right As to whether it does or not, must turn on the question whether at the time when the land was first broken up and occupied, the competition for land was such that the tenant could dictate his own terms, or such that the landlord could do so. **P.** NAWAB ALI *v.* LAL SINGH, 6 P. R. 1915 Rev. **791**

——— ——— **s. 8**—*Sirsa Tahsil—Wajib-ul-arz—Occupancy-tenant — Butamari, whether confers per se occupancy rights—Principle.*

Section 6 of the *Wajib-ul-arz* of *Mouza* Rampura, Sirsa Tahsil, prepared in 1883 and revised in 1882, cannot be construed to imply that *butamari per se* confers an occupancy right. But as the village was *barani* and the demand for tenants great, up to 1882, at all events, land *personally* broken up in or before 1882, and since cultivated by occupancy-tenants, must be held to rest in them as occupancy-tenants under section 8 of the Punjab Tenancy Act. **P.** ARJAN *v.* MANDAS, 6 P. R. 1914. Rev. **745**

——— **ss. 77, 100** **89**

Purchaser for value without notice—Purchase under involuntary alienation—Inquiry **261**

Putni, *purchaser of—Merger—New tenancy, creation of—Transferee, right of—Bengal Rent Act (X of 1859)*—Khudkasht *right, nature of, before and after the passing of Act X of 1859.*

A purchaser under the Putni Regulation (VIII of 1819) is entitled to eject tenants from their holdings when they have no protected right.

There is no merger where the purchaser possesses the land as a third person wholly distinct from the *putnidars*, although he happens to be the son of one of them.

The purchaser cannot obtain the original holding before the *putni* was created, though he is in possession of the same holding.

The effect of a transfer of such a holding with the consent of the landlord under Act X of 1859 can only be that the original tenant is considered to have relinquished the holding altogether and that a new tenancy is created in the transferee.

After the enactment of Act X of 1859 the original *khudkasht raiyats* continued to hold the same rights as they held before, but the *khudkasht* right ceased to exist as a right that can be acquired after the passing of the Act. **C.** MALAGHI *v.* AHALAD MAHATO **928**

Putni Regulation (VIII of 1819)—Putni *tenure, sale of—Irregularity in service and publication of notice of sale, effect of.*

A due publication of the notices prescribed by Regulation VIII of 1819 forms an essential portion of the foundation on which the summary power of sale is exercised and makes the *zemindar* who institutes the proceedings exclusively responsible for its regularity.

The provision for the advertisement of sale in the Collectorate is very material and is not directory but mandatory, and failure to duly observe it is a sufficient ground for setting aside a sale. **C.** RUNJIT SINGH v. JNANENDRA NATH SEN GUPTA **825**

Razinama. *See* MORTGAGE.

Receiver. *See* CIVIL PROCEDURE CODE, O. XL, R. 1, O. XLIII.

———— appointment of under Civil Rules of Practice (Madras), r. 189 **812**

Record of Rights. *See* BENGAL TENANCY ACT (VIII OF 1885), s. 103A.

———— ———— ————, entry in—Presumption **478**

Redemption. *See* MORTGAGE.

———— **and foreclosure,** *rights of, whether co-extensive—Mortgage-deed containing onerous and one-sided conditions—Mortgagor authorised to recover his money at any time he liked—Redemption, right of postponed to 60 years—Equity of redemption, fetter on effect of—Consideration, want of, allegation as to—Burden of proof, mitigation of—Loans, oral*—Lekha bahi, *entries in, whether reliable by themselves—Intrinsic evidence, necessity of.*

As a general rule, the right of foreclosure and the right of redemption should be co-extensive, and every agreement by which the right of redemption is fettered for the benefit of the mortgagee without any corresponding advantage to the mortgagor must be examined with close scrutiny.

Thus, where a mortgage-deed contained onerous and one-sided conditions, the effect of some of which was to permit the mortgagee to call in the mortgage-money together with the money spent by him in making improvements on the mortgaged property at any time he liked, and to postpone redemption till the expiry of 60 years from the date when the mortgage would be converted from simple into usufructuary:

Held, that the covenant postponing redemption was an unreasonable fetter on the equity of redemption and could not be enforced, so that the mortgagor was entitled to redeem irrespective of that fetter.

The onus of proving want of consideration lies heavily on the party alleging it, but where it is found that he is a man weak in intellect and hard of hearing, who played the part of an irresponsible puppet in the hands of the opposite party, the onus is mitigated to some extent in this way that the Court may for its own satisfaction demand from the opposite party, if it thinks proper under the circumstances of the case, reliable evidence of the fact that there was no want of consideration as alleged.

Redemption—*contd.*

In the absence of corroborative evidence, no reliance can be placed on the entries of oral loans as appearing in a *lekha bahi*, inasmuch as it is not a regular account-book kept in the ordinary course of business from day to day. **O.** LAL BAHADUR v. ZALIM SINGH, 2 O. L. J. 1 **581**

———— **suit**—Reliefs inconsistent and contradictory—Possession, claimed as owner—Redemption, alternative relief for—Fresh suit for redemption, maintainability of—*Res integra* **575**

Reference to High Court—Discretion—Decision on merits **972**

Reformatory Schools Act (VIII of 1897), ss. 5, 10 **198**

Registration—Mutation proceedings—Family arrangement **497**

———— *object and effect of—Execution—Admission by legal representative—Who is legal representative—Validity of registration.*

Registration is intended to be a contemporaneous publication of a transaction as a guard against subsequent fraud and alteration. It is not in the least necessary for the purposes of registration that the legal representative should be the heir of the deceased executant. It is sufficient if he has authority, express or implied, to admit execution of the deed.

Registration of a deed is something different from the validity thereof, and from the value of the title of the executant to the property affected by the deed.

Documents are not registered against any person in the same way as a decree may be given against one person and not against another.

T, the executant of a deed, left two children a boy and a girl, both under the guardianship of her husband. *T* having died before registration, her husband as guardian of the boy, erroneously believed to be the heir, admitted execution at the time of registration. The legal heir of *T* was the girl.

Held, that the deed was duly presented by a person authorized to present it and the registration was valid. **N.** BHIKRAJ v. NARAYAN, 11 N. L. R. 4 **861**

Registration Act (III of 1877), s. 17—*Simple mortgage converted into usufructuary mortgage by subsequent arrangement—Mortgagee put in possession—Registration—Mortgage, right of, to sue on original mortgage.*

A simple mortgage of three groves and a house was made in favour of the plaintiff in 1874. In 1877 a part of the mortgage-money was paid by the sale of one of the groves, and it was mutually arranged that the mortgagees should be put in possession of the other two groves for 10 years and receive the profits thereof in lieu of interest upon the amount remaining due and should be entitled to foreclose if the mortgagors should fail to redeem within one year after the expiry of the ten years. The mortgage sued for recovery of the amount on the basis of an original simple mortgage.

Held, that in order to effect a usufructuary mortgage the proceedings of 1877 ought to have been registered, but not having been registered, they took

Registration Act—(1877)—concld.

effect only as an arrangement for the payment of interest and the mortgagee was entitled to sue upon the original simple mortgage. **A.** DEOCHAND *v.* PHARAY, 12 A. L. J. 1183 **430**

Registration Act (XVI of 1908), s. 17 *—Document creating immediate interest in grantee, whether compulsorily registrable—Payment of rent—Proof of tenancy—Rent suit at request of defendant, when not collusive.*

A document specifying the boundaries of a certain plot of land, fixing the rent and the terms of the tenancy and stating that a lease is granted to the grantee who undertakes to execute a *kabuliat* within a specified period, is in substance a lease purporting to create an immediate interest in the grantee in the land demised and is, therefore, compulsorily registrable.

It is open to a party to establish a tenancy by proof of the payment of rent to the landlord.

If there is a real contract of tenancy and rent is really due, a rent suit cannot be said to be collusive, though instituted by the landlord at the instance or request of the defendant. **C.** BHUBAN MOHAN *v.* EDAN SARDAR **91**

——— ——— ——— **s. 17**—Documents evidencing family settlement—Petition of compromise declaring interests of parties in property exceeding Rs. 100 in value—Compromise not to minor's benefit, validity of **97**

——— ——— ——— **s. 17**—*Title, fresh, not conferred by document—Document declaring antecedent title by way of inheritance—Mutation proceedings—Compromise-deed, unregistered, filed in mutation case, whether enforceable.*

Section 17 of the Registration Act, which renders compulsory the registration of certain documents, is aimed at those documents which operate by themselves to confer a fresh title, and not at those in which no new interest is created but simply a declaration is made as to an antecedent title of certain persons by way of inheritance.

Hence, where certain persons claim mutation by right of inheritance as heirs to the deceased and eventually a compromise is arrived at between them, under which they agree as to the respective shares of the deceased's property to be allotted to each of them, the deed of compromise does not amount to a transfer from one of them to the other, but merely to declaration by them that each of them has a right by way of inheritance and that by virtue of that right they are entitled to be put in possession of the said shares, and the agreement is binding upon them and enforceable as such, even though unregistered. **O.** RAM SARUP *v.* BINDESHURI, 2 O. L. J. 67; 18 O. C. 51 **938**

——— ——— ——— **s. 17**—Transfer of landed property by wife in lieu of *sharai* dower, validity of—Sale—Registration **562**

——— ——— ——— **s. 17 (1) (b)**—*Reversionary rights, surrender of—Adverse possession—Possession of third person with consent of widow—Mutation of names in favour of manager of widow's property—Presumption.*

An agreement whereby a reversioner surrenders his reversionary rights in immoveable property of the value of Rs. 100 or upwards is compulsorily registrable, for the surrender amounts to an extinguishment of the right in immoveable property.

When a widow in possession of land agrees to mutation in favour of another person, who manages property of the widow, his possession cannot be considered adverse to the next heir from the mere fact of the mutation having taken place in his favour. **P.** HAKAM SINGH *v.* INDAR, 12 P. L. R. 1915; 18 P. W. R. 1915 **699**

Registration Act—(1908)—concld.

——— ——— ——— **ss. 17 (c), 49**—*Document extinguishing rights, whether compulsorily registrable.*

A document which purports to extinguish the executant's right in immoveable property of the value of more than Rs. 100, in respect of the mortgage rights held by his grandfather in the land in suit, is compulsorily registrable, and if not registered, cannot be received in evidence of any transaction affecting that property. **P.** DYAL SINGH *v.* GIAN SINGH, 55 P. W. R. 1915; 142 P. L. R. 1915 **769**

——— ——— ——— **s. 47**—*Execution and Registration—Operation, date of.*

Under section 47 of the Registration Act a registered deed operates from the date of its execution and not of registration. **L. B.** MAUNG SAN MIN *v.* SANNA **802**

——— ——— ——— **s. 49** **769**

——— ——— ——— **s. 60** **478**

——— ——— ——— **s. 82** **208**

——— ——— ——— **s. 82**—*Thumb impression as executant while presenting document for registration—Similarity of thumb impression, how far sufficient for conviction.*

The identity of a person as the executant or presenter of a document for registration though not conclusively proved by similarity of the thumb impression taken at the time of presentation, is sufficient for conviction when supported also by other evidence in the case. **M.** SINGRI BHIMA, *In re.* 16 CR. L. J. 228 **900**

Regulation VIII of 1793, s. 54 **470**

Regulation V of 1799 **821**

Regulation V of 1812, s. 13 **470**

Reliefs *inconsistent and contradictory—Possession, claimed as owner—Redemption, alternative relief for—Fresh suit for redemption, maintainability of—Res integra.*

In a suit for recovery of possession as owner, an alternative relief for redemption cannot be asked, inasmuch as the two reliefs are inconsistent and contradictory. And if the relief for possession is refused on merits and that for redemption owing to the said defect of misjoinder of reliefs, the plaintiff can bring a fresh suit for redemption as *res integra*. **O.** *Mussammat* CHOTTI BEGAM *v.* RAM PRASAD **575**

Religious office—*Women, right of, to inherit and get services performed by proxy—Custom—Legality.*

A custom allowing women to succeed as heirs to a religious office and getting the duties thereof performed by proxy is not illegal. **M.** RAMASUNDARAM PILLAI *v.* SAVUNDARATHA AMMAL, 1 L. W. 900; 16 M. L. T. 423; (1914) M. W. N. 919 **440**

Relinquishment. *See* EX-PROPRIETARY RIGHTS.

Remand, evidence taken on—Appellate Court, power of, to interfere in second appeal **827**

Rent. *See* LANDLORD AND TENANT.

———, assessment of—*Ijara*—Possession without payment after expiry of lease **31**

———, distribution of—Enhancement **49**

Rent-decree, *setting aside of—Fraud, allegation of—Rent, exaggeration of—Burden of proof—Entry in Record of Rights, mistake due to, effect of.*

A rent-decree cannot be set aside on the ground of an act of fraud which is not clearly and precisely alleged in the plaint at all.

In a suit to set aside a rent-decree on the ground that the rent claimed was greatly exaggerated, it is for the plaintiff to prove affirmatively that the rent sued for was more than the rent due and he must also prove that the exaggerated rent was claimed in order to defraud him.

A mistake on the part of the claimant arising out of an entry in the Record-of-Rights will not be fraud. **C.** BIBI SALIMAN *v.* UDHORAM SAHI **890**

———— ———, *when executed as money decree—Purchaser of right, title and interest of usufructuary mortgagee, position of—Right of re-entry—Second appeal—Party, whether entitled to make a new case.*

Where several different holdings are included in one rent decree, the decree can only be executed as a money decree and nothing but the right, title and interest, if any, of the judgment-debtor in the holdings can pass to a purchaser on sale of the holdings in execution of that decree.

Therefore, a purchaser of the right, title and interest of a mortgagee is not entitled to *khas* possession if before his suit for possession the mortgage is redeemed.

A party is not entitled to make a new case in second appeal. **C.** CHUNI AHIR *v.* KHEM CHAND DUSADH **810**

Res judicata. *See* CIVIL PROCEDURE CODE, 1908, s. 11.

———— ———— Adoption, validity of—Question involved in suit to recover immoveable property not raised **109**

————————Compromise decree not relating to suit, whether operates as *res judicata* **640**

————————Dispossession of tenant by *zemindar* through another tenant—Limitation—Rival claimants to tenancy, suit between—Jurisdiction of Civil or Revenue Court **914**

————————Estoppel—Malabar Law—Redemption of *kanom* mortgage, suit for—Previous suit against mortgagor and mortgagee deciding title to property—Covenant for title, breach of—Damages, measure of—Transfer of Property Act (IV of 1882), s 72 (c)—Expenses incurred in supporting title of mortgagor, re-imbursement for—Compensation for trees of spontaneous growth **989**

————————Execution—Judgment-debtor not raising an objection which he ought to have raised—Objection, whether can be raised subsequently **950**

Res judicata—contd.

————————Finding adverse to defendant—Appeal **861**

———— ———— *Incorrect specification in plaint—Decree accordingly—Acquiescence by plaintiff—Further suit on same cause of action, whether maintainable*

Where a litigant, who is fully aware of the facts which constituted his cause of action, mismanages his litigation and fails through his own mismanagement to obtain from the Courts the full reliefs to which he is entitled, neither he nor his transferees are entitled to maintain any further suit upon the same cause of action.

Therefore neither a reversioner to the estate of a deceased, who brought a suit to set aside a sale made by the widow of the deceased and wrongly described the extent of the property claimed by him and on a decree being passed acquiesced in that decree and also in its interpretation, nor the transferee of that property is entitled to maintain a further suit for the property. **A.** RAMJIAGAR PANDE *v.* BHAGIRATHI **808**

———— ———— *Issues not framed, effect of—Miscellaneous proceedings, order passed in, force of—Decision, exhaustive, effect of—*Jamabandi, *correction of, case as to—U. P. Land Revenue Act (III of 1901), ss. 42, 44.*

Where in a correction of *jamabandi* case, a Court does not frame specific issues for trial as provided by section 42 of the U. P. Land Revenue Act, but clearly and definitely understands those issues, and pronounces its decision after hearing the pleadings and arguments and consulting the rulings advanced on behalf of both the parties, that decision, although passed in a miscellaneous proceeding and without a formal drawing up of issues, does, in view of the provisions of section 44 of the U. P. Land Revenue Act, operate as *res judicata* in a subsequent case for declaration of tenure between those parties as regards the kind of tenure already determined in the *jamabandi* case. **U. P. B. R.** HARJAS BRAHMAN *v.* MAKUND SARUP, 1 O. L. J. 745 **73**

————————Civil Procedure Code (Act V of 1908), s. 10, scope of—Jurisdiction—Title—Issue—Parties—Charter Act, 1861, s. 15 **917**

———— ————Landlord and tenant—Eviction of tenant from part of demised lands—Abatement of rent—Cause of action—Finding of fact not to be questioned in second appeal even if based upon evidence on remand **265**

————————Same parties **642**

———— ————Suit between rival claimants to tenancy—Cognizable by Civil Court—Agra Tenancy Act (II of 1901), s. 95—Jurisdiction **913**

———— ———— *Suit for partition—Compromise—Agreement not carried out—Second suit for partition, if barred—Continuing right.*

Where a suit for partition is dismissed upon a compromise whereby the defendants promise to sell their entire interest in the property for consideration to the plaintiff, a second suit for partition is not barred by *res judicata* if the agreement is not carried out.

Res judicata—concld.

The right to bring a suit for partition, unlike other suits, is a continuing right incidental to the ownership of joint property. A. T. C. MUKERJI v. AZIAL BEG, 18 A. L. J. 98 **694**

———————, temporary **525**

——————— as to title—Bengal Tenancy Act (VIII of 1885), s 49—Under-*raiyat*—Suit for rent by *raiyat* dismissed—Under-*raiyat* claiming to hold directly under landlord and paying rent to plaintiff as *gomastah*—Notice to quit necessary **273**

Restraint of trade. *See* CONTRACT ACT, s. 27.

Resulting trust—Composition deed—Absolute transfer of property by debtor to trustees—Suit for surplus moneys **332**

Retracted confession. *See* EVIDENCE ACT, s. 30.

Revenue sale—*Residuary* taluq—*Suit for possession by purchaser—Burden of proof.*

Where separate accounts were opened with different share-holders of a certain *taluq* in respect of specified portions thereof, and ultimately a residuary *taluq* was left in the hands of a person who defaulted in the payment of the Government revenue with the result that the estate was sold up and purchased by the plaintiff, who sued for possession.

Held, that the plaintiff must succeed on the strength of his own title, and it lay on him to prove that the lands in suit formed part of the residuary *taluq*. C. MOHAMED FAIZ CHOWDHURY v. KASHI NATH, 20 C. L. J. 310 **13**

Revenue Surveyor's report not signed by transferors, probative value of **777**

Reversioners. *See* HINDU LAW.

Review—Fraudulent decree—Court, power of, to set aside **628**

——————*by subordinate Revenue Courts in Oudh, power of—Board and other Revenue Courts, powers of review of, difference between—Oudh Rent Act (XXII of 1886), s. 120A—Decree, when considered as nullity—Fraud of party to case, effect of.*

Every Revenue Court in Oudh has the power of review—the Courts subordinate to the Board having only a limited power in that respect, as provided by section 114 and Order XLVII, Civil Procedure Code, while the Board having a special and wider power as provided by section 120A of the Oudh Rent Act.

A decree which is based on and solely due to fraud by a party can be held to be a nullity, even though it cannot be said to have the effect of preventing an opposite party from placing his case properly before the Court. U. P. B. R. TRIBHUWAN DAT v. BALAK RAM MISRA, 2 O. L. J. 14 **587**

Revision. *See* CIVIL PROCEDURE CODE, (V of 1908), ss. 115, 152; CRIMINAL PROCEDURE CODE, s. 439.

——————Amendment of decree—Mistake as to costs—Pleader's fee—Arithmetical or clerical error **922**

Revision—concld.

——————Application for permission to sue as pauper, how framed—Omission of one item in schedule—Dismissal of application **891**

——————Dispute likely to cause breach of the peace not mentioned in notice—Parties aware—Magistrate—Jurisdiction **848**

——————Finding of fact based on inadmissible evidence **762**

——————*Finding of fact without fully considering evidence of parties—Punjab Courts Act (III of 1914), s. 44.*

A finding of fact arrived at by an Appellate Court without fully considering and discussing the evidence of the parties is liable to be set aside in revision under section 44 of the Punjab Courts Act III of 1914. P. KARM ILAHI v. NUR MAHI, 7 P. W. R. 1915; 120 P. L. R. 1915 **593**

——————*Interlocutory order.*

In the absence of special circumstances the Chief Court would decline to revise an interlocutory order passed by a subordinate Court. P. MISRI v. CHAULI, 10 P. L. R. 1915 **640**

——————Kidnapping, when completed question of, whether can be raised in revision for first time **553**

——————*Material irregularity in assessing damages—Contract Act (IX of 1872), s. 74, disregarding provisions of.*

To disregard the provisions of section 74 of the Indian Contract Act in assessing the damages is a material irregularity within the meaning of section 115, Civil Procedure Code. L. B. MAUNG THA v. SHWE ZAN **885**

——————*Material irregularity—Judgment without considering whole evidence—Punjab Courts Act (IV of 1912), s. 70—Civil Procedure Code (Act V of 1908), O. XLI, r. 31—Post card with post mark.*

Where a Court passes a judgment in following words:

"In view of the post mark of November 7th, 1908, Post of Sasoli, I do not consider the signature of Muhurram Din on the deed as proved."

Held, that the judgment does not show that the evidence on the record has been fully weighed and considered, and, therefore, does not fulfil the requirements of Order XLI, rule 31, of Civil Procedure Code, 1908, and is liable to be set aside on revision. P. MATHRA DASS v. MUHARRAM DIN, 4 P. W. R. 1915; 36 P. L. R. 1915 **561**

——————Material irregularity—Jurisdiction **629**

——————Non-compliance with provisions of s. 145, Criminal Procedure Code—Fatal defect **766**

——————Principal and agent—Objection as to right of agent, whether can be taken for first time in High Court—Procedure **607**

——————Refusal to grant certificate to appeal on insufficient grounds **722**

Right of private defence of property. *See* PENAL CODE, s. 105.

Sadelwar and Madiri Kasuvu, whether illegal cesses **688**

Sale—*Consideration—Full consideration not paid—Vendee not entitled to possession without payment of whole consideration—Civil Procedure Code (Act V of 1908), O. XLI, r. 33—Power of High Court*

In a suit for possession of the property purchased, the vendee who has not paid the full consideration cannot be allowed in a Court of Equity to recover possession except on the condition of his paying the balance of the purchase-money.

Under Order XLI, rule 33, of the Code of Civil Procedure the High Court is entitled to pass any decree which is in accordance with justice, whatever the decision of the first Court or the lower Appellate Court may have been. **M.** RAMA AIYAR *v.* VANAMAMALAI AIYAR **336**

Sanction to prosecute. *See* CRIMINAL PROCEDURE CODE, S. 195 **551**

——— ——— ——— Guiding principle **545**

——— ——— ——— ——— *Suing wrong person on genuine pro-note—Penal Code (Act XLV of 1860), ss. 193, 209.*

Where on a genuine promissory note a plaintiff sues a wrong person of the same name, but not dishonestly and intentionally, a sanction to prosecute him under sections 193 and 209, Indian Penal Code, cannot be granted. **L. B.** SUBRAMANIA PILLAY *v.* NACHIAPPA CHETTY, 16 Cr. L. J. 154 **218**

Search under Gambling Act—*Mashirs*, absence of, effect of—Accused pleading guilty—Magistrate, duty of, to convict **910**

——— **warrant,** Magistrate, power of, to issue **897**

Security bond, forfeiture of, in a separate proceeding, when not allowed **754**

Sentence—*Hurt caused to complainant—Conviction of accused—Defence story believed by Appellate Court—Reduction of sentence.*

The accused were convicted of having trespassed into the *haveli* of the complainant and beaten him, causing severe injuries, and then having carried him to a house of one of the accused, where they charged him of having entered the house to commit theft. The accused were sentenced to rigorous imprisonment for eight months, including one month's solitary confinement. The Sessions Judge in appeal believed the version of the accused and disbelieved all the witnesses for the prosecution, but maintained the sentence.

Held, that under the circumstances the sentence originally imposed should not have been maintained, as the accused met with great provocation and could hardly be blamed for giving the would-be thief a sound beating **P.** GANDA SINGH *v.* EMPEROR, 17 P. L. R. 1915; 16 Cr. L. J. 175 **559**

Set-off—Cross-debt **320**

Share-holder. *See* COMPANIES ACT (VI OF 1882), S. 45; COMPANY.

Slander—*Repetition of rumour, whether actionable—Suit for damages for slander—Law applicable—Defence—Truth of slander.*

Repetition of slanders heard from others is ... unless privileged.

... suit for damages for slander, the criminal ... mation has no application. The suit must be decided according to justice, equity and good conscience.

The proof of the truth of the slander is a complete defence in a civil suit for damages. **U. B.** MI NGWE HMON *v.* MI PWA SU, 7 BUR. L. T. 253 **979**

Sonthal Parganas Settlement Regulation (III of 1872), ss. 25, 25A—*Record of Rights, when to be questioned in Civil Court—Zemindar or other proprietor—Suit for declaration of title in a share of a shikmi ghatwali khorposh grant, whether cognizable by Civil Court.*

The provisions of Regulation III of 1872 make the Record of Rights conclusive proof of the rights and customs therein recorded and prohibit the record from being re-opened, until a fresh Settlement is made, without the previous sanction of the Local Government. The jurisdiction of the Civil Courts is absolutely excluded, except, in cases specially provided for in section 25A of the Regulation, which applies only in the case of a '*zemindar* or other proprietor.'

A suit for declaration of title and for registration of the plaintiff's name in the Settlement Records, in a share of a *shikmi ghatwali khorposh* grant, where rent is payable to the Ghatwals and no land revenue is payable direct to the Government, though the land is not free from the Government revenue, is not cognizable by a Civil Court. **C.** NEMO DEO *v.* PARBATI KUMARI, 20 C. L. 103; 19 C. W. N. 540 **5**

——— ——— ——— **ss. 25, 25A,** *scope of—"Proprietor"—Ownership of* maurasi mokarari *tenure—Decision of Settlement Court, whether final.*

Section 25A of the Sonthal Parganas Settlement Regulation III of 1872 is strictly limited to suits where only the rights of *zemindars* and other proprietors as between themselves are in controversy.

A person who holds a derivative title under a *zemindar* cannot rightly be classed as a proprietor within the meaning of that word as used in the expression "*zemindars* and other proprietors" in section 25A of Regulation III of 1872.

The decision of a Settlement Court under section 25, sub-section (1) of Regulation III of 1872 is conclusive, till it has been set aside by some method known to law at the instance of any person prejudicially affected thereby. **C.** SIB NARAYAN MOOKERJEE *v.* S. P. CHATTERJEE, 20 C. L. J. 220 **89**

Specific Relief Act (I of 1877), s. 9, *scope of — Illegal dispossession—Evidence Act (I of 1872), s. 110—Nature of possession—Presumption.*

Section 9 of the Specific Relief Act in no way controls the operation of section 110 of the Evidence Act. It has no concern whatever with title, but is merely a law for restoring a possession which has been disturbed otherwise than in due course of law, and may properly be used to eject even a true owner who has disturbed a peaceful possession

The possession which attracts the presumption of ownership is a juridical possession obtained *nec vi, nec clam, nec precario, ab adversario*, and stands valid against all the world except the person legally entitled. **N.** SAMBHASHEO *v.* MAHADEO, 10 N. L. R. 188 **506**

——— ——— ——— **s. 12** **732**

Specific Relief Act—concld.

——— ——— ——— **s. 14**—*Covenant for title—Impossibility of assessing compensation in money—Contract, whether enforceable.*

Where a contract to sell lands is coupled with a security undertaken against a claim to be set up by reversioners in future, it cannot be specifically enforced as the portion of it relating to security, cannot be compensated for in money within the meaning of section 14 of the Specific Relief Act. **M.** NARAYANA PILLAI *v.* ALAMELU AGHI **449**

——— ——— ——— **s. 42** **354**

——— ——— ——— **ss. 42, 52**—*Declaration—Injunction—Mortgagor and mortgagee, right and liability of—Mortgagor, right of, to enhance rent of tenant—Reduction of mortgage-debt—Suit for declaration and injunction, maintainability of.*

M usufructuarily mortgaged certain shops to *R*. The tenants of the shops paid Rs. 30-8 per mensem as rent, which the mortgagee had to realize in lieu of interest. The mortgage-deed provided that in the event of the tenants paying less amount, the mortgagor would make good the deficiency, and in the case of enhancement he would take the excess. The mortgagor served a notice on two of the tenants to vacate the shops in their occupation and to the mortgagee to compel them to do so, on the ground that there was a man who was willing to pay Rs. 4-12 in excess of what was being paid by them. Both the tenants and the mortgagee failed to comply with the requisition. The mortgagor then sued both the tenants and the mortgagee for (1) an injunction to direct the mortgagee to enhance the rent payable by the tenants to the extent of Rs. 4-12 per mensem and (2) a declaration that in the event of his failing to do so the mortgagor would be entitled to have the excess credited in reduction of the mortgage-debt:

Held, that the suit as brought was not maintainable as there was no allegation that over a specified period of time the mortgagee had persistently and without reasonable cause been letting the shops for less than their fair letting value. **A.** ROSHAN LAL *v.* MOOL CHAND, 13 A. L. J. 85 **697**

——— ——— ——— **s. 52** **697**

Stamp Act (I of 1879), s. 2, sub-sec. (11)—*Stamp Act (II of 1899), s. 2, sub-sec (15)—Instrument of partition—Award—Evidence Act (I of 1872), s. 91—Secondary evidence of partition—Details of partition not allowed—Hindu Law—Partial partition proved—Onus probandi as to jointness—Mortgage-decree, form of—Civil Procedure Code (Act V of 1908), O. XXXIV, rr 4, 5, 6.*

Under the Stamp Act of 1879 an award of arbitrators directing a partition was not included in the definition of "instrumentof partition" and, therefore, if such an award was executed before the present Stamp Act came into force, and the Court is satisfied that it was not put in the form of an award merely for the purpose of avoiding stamp duty, it will be received in evidence if it bears a stamp of Rs. 5 only.

The mere fact that the parties have signed an award does not necessarily constitute it a deed of partition.

Where an award effecting partition is lost, there is nothing in section 91 of the Indian Evidence Act to prevent one of the parties from proving *aliunde* that a partition did take place, but no secondary evidence of the details of such partition can be given.

Where a Hindu family consisted of a father and a son and the whole of its property was originally joint, but subsequently the father dealt with various properties as if he were their sole owner, the fact of his so dealing would not amount to proof of his right to do so as against his son. But when we find him actually selling certain properties to the son himself, the inference is obvious and conclusive that some sort of partition of the property must previously have taken place. Under these circumstances, the burden of proof as to jointness is shifted and the party alleging jointness has to prove that a particular property still remained joint ancestral property.

In mortgage-decrees the provisions of Order XXXIV, rules 4, 5 and 6 should not be overlooked. **P.** SUKH DIAL *v.* MANI RAM, 29 P. R. 1915 **489**

——— ——— **s. 2 (15)** **489**

Stamp Act (II of 1899), s. 4—*Instrument of partition—Full duty paid—Second instrument affirming first with minor alterations—Duty payable—Interpretation of Statute—Fiscal enactment.*

Act No. II of 1899 is a fiscal enactment and its provisions should be construed in favour of the subject.

S and *B* executed an instrument setting forth a family arrangement regarding their joint property. The deed was stamped as a deed of partition. Subsequently the two brothers executed another instrument, providing *inter alia* that the original deed of agreement should remain in force after certain alterations entered into later on and that both of them were to remain equally binding:

Held, that the principal deed having been charged with the full duty prescribed in Schedule I for settlement of property, the later instrument was chargeable with a duty of one rupee only. **A.** SHAMBHU DIYAL, *In the matter of*, 13 A. L. J. 96; 37 A. 159 **731**

——— ——— **ss. 56, 57**—*Document not in existence—High Court, power of, to give opinion—Jurisdiction.*

Under section 56 of the Stamp Act, the High Court can deal only with those instruments which are already in existence and which have been made the subject of action by the Collector, and not with such instruments as are not in existence. **A.** STAMP REFERENCE, *In re*, 13 A. L. J. 47 **501**

——— ——— **s. 57** **501**

Statute, construction of **235**

——— ——, interpretation of **921**

——— ———, interpretation of—One Act repealed and another enacted—Applicability of provisions of old and new Acts—Madras General Clauses Act (I of 1891), s. 18—Madras Estates Land Act (I of 1908), s. 61—Custom, if can be proved by a single witness—Contract Act (IX of 1872), s 78, applicability

———, interpretation of—Punctuation taken into consideration

Step-in-aid of execution. S
TION ACT (IX OF 1908), SCH. I, ART. 182

Succession. *See* KORA TENAKOY ACT (II OF 1901), s. 22; CUSTOM; HINDU LAW; MUHAMMADAN LAW; *Mutt.*

——————, expectancy of—Transfer, validity of 407

Succession Act (X of 1865), s. 46 276

—————— **s. 50, cl. (3)**—*Interpretation—"Direction," meaning of—Attestation by witnesses, when legally made—Indian Law contrasted with English Law.*

In order to constitute a direction it is not necessary that anything should be said. If a testator in making his mark is assisted by some other person and acquiesces and adopts it, it is just the same as if he had made it without any assistance.

It is sufficient for the purposes of section 50 of the Succession Act if each of the two or more witnesses to a Will speaks either to the signature, or to the fixing of the mark, or to the signature by another person, or to the personal acknowledgment.

The Indian Law does not require that the witnesses to a Will must be present at the same time as the English Law does. **C.** MUKTA NATH ROY *v.* JITENDRA NATH ROY 677

—————————— **s. 62**—*Bequest in favour of a person not named—Secret instructions to trustee—Admissibility of oral evidence to prove trust.*

A legatee who undertakes to carry out the wishes of a testator, will be treated as a trustee and compelled to carry out the instructions of the testator.

Where a testator directed that a certain pecuniary legacy be entrusted to one *H* to be disposed of by him in accordance with instructions given by the testator to one of his trustees and that his shares in a certain Company be transferred to the person whose name will be disclosed by *H*, and the intended beneficiary (who was admittedly the person in whose favour the instructions were given) filed a suit praying that *H* might be ordered to disclose the secret trust and that the bequest might be declared to be for her benefit:

Held, (1) that parol evidence was admissible to prove the trust;

(2) that the shares must be transferred to a person whose name was given by the testator to *H*, the power given to *H* being not a general one but a special one. **B.** BAYABAI SAKALKAR *v.* HARIDAS 946

—————— **s. 111** 53, 239

—————————— **s. 187**—*Hindu Wills Act (XXI of 1870), s. 2—Will not proved in Probate Court, when can be used as evidence—Evidence Act (I of 1872), s. 32 (5)—Relationship, existence of—Adoption—*Mutt, *kinds of—Succession.*

Notwithstanding section 187 of the Succession Act, which is incorporated in the Hindu Wills Act, a Will not proved in the Probate Court may be cited in evidence for a purpose other than the establishment of a right as executor or legatee.

The relationship between a *mohunt* and his *chela* is a relationship by adoption within the meaning of clause (5), section 32, of the Indian Evidence Act (I of 1872). A statement in a Will that the testator has one *chela* and has no other *chela* is a statement relating to the existence of a relationship and is admissible in evidence under that clause.

Mutts are of three descriptions, *viz.*, *nirvani*, *panchayati* and *hakimi*. In the first the office of the chief *Mohunt* is hereditary and devolves upon the chief disciple of the existing *Mohunt* who, moreover, usually nominates him as his successor; in the second the office is elective, the presiding *Mohunt* being selected by an assembly of *Mohunts*; in the third the appointment of the presiding *Mohunt* is vested in the Ruling Power or in the party who has endowed the temple.

Obiter dictum.—A statement as to the time of commencement of a relationship is so indissolubly associated with the existence itself of the relationship that it may be rightly regarded, without undue stretch of language, as a statement which relates to the existence of that relationship under clause (5), section 32, of the Indian Evidence Act. **C.** ACHUTANANDA DAS *v.* JAGANNATH DAS, 21 C. L. J. 96 739

Succession Certificate Act (VII of 1889), s. 4—*Practice—Suit by representative of deceased—Probate or Letters of Administration obtained—Succession certificate, whether necessary—Suit, whether to be dismissed if certificate not previously obtained.*

Where Probate or Letters of Administration have been obtained as regards the estate of a deceased, a Succession Certificate is not necessary under section 4 of Act VII of 1889 to entitle a person to sue.

Where a Succession Certificate is necessary to entitle a plaintiff to maintain a suit, it should be allowed to be produced before a decree is passed and the suit should not be dismissed because the Succession Certificate has not been obtained previously. **C.** RAMANUGRAH NARAYAN SINGH *v.* OHUNI LAL 822

——————————, **ss. 18, 26**—*Succession certificate, revocation of—Jurisdiction—Succession certificate granted by Subordinate Judge—District Judge, whether can revoke—Regulation V of 1799—Intestate—Succession—District Judge, power of.*

Ordinarily the revocation of a succession certificate must be made by the Court which granted it, if it still exercises jurisdiction in that district.

Therefore, a certificate granted by a Subordinate Judge invested with the powers of a District Court in certificate cases under section 26 of the Succession Certificate Act cannot be revoked by a District Judge if the former is still exercising jurisdiction.

The jurisdiction of a District Judge under Regulation V of 1799 is of a limited character and is more administrative than judicial. He can act thereunder only if there is no claimant.

Therefore, a District Judge has no jurisdiction in an intestate case to ignore the claim of one who has obtained a certificate, until it is revoked by a competent Court. **C.** SUKHIA BEWA *v.* SECRETARY OF STATE, 21 C. L. J. 154; 19 C. W. N. 551 821

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Sufficient Cause. *See* LIMITATION ACT (IX OF 1908), s. 5.

Suit, *abatement of—Minor suing to recover certain property as his by survivorship despite a Will of his father—Death of minor—Legal representative, right of, to continue suit.*

A minor sued through his guardian for possession of certain property as his by survivorship and also challenged the validity of his father's Will, which vested the property in the defendant in trust for the minor in case he should attain majority and in trust for a temple in case of his failure to do so. The minor died and his legal representative was placed on the record as plaintiff.

Held, (1) that as the minor had sued for possession of the suit property despite the Will, his legal representative was entitled to prosecute the suit;

(2) that the cause of action was not personal to the minor on the ground that it would be open to him to repudiate his guardian's action on attaining majority and that, therefore, the suit did not abate. M. NARAYANA REDDI v. KAMAKSHI AMMAL, 27 M. L. J. 674 **396**

——— for accounts—Jurisdiction—Consent of parties **803**

———, whether to be dismissed if succession certificate not previously obtained **822**

——— *for possession—Hindu widow suing in representative capacity—Death of plaintiff—Suit, whether abates—Reversioners of last male owner—Legal representative—Civil Procedure Code (Act V of 1908), s. 2 (11)—Survival of right to sue.*

A suit for possession brought by a Hindu widow in a representative capacity as representing the estate does not abate on her death. The right to sue survives to the reversioners of the last male owner, who are her legal representatives within the meaning of section 2 (11) of the Civil Procedure Code and as such are entitled to be brought on the record. M. GANDI RAMASWAMI v. PURAMSETTI PEDAMUNAYYA, 17 M. L. T. 186 **1001**

——— *for recovery of possession—Person entitled to half share, whether can eject one from whole—Decree, nature of—Partition, right of.*

A person entitled to an undivided half share of a piece of land cannot sue to eject anybody from the whole of it.

Where the proprietor of an eight-annas share sued the proprietors of the other eight-annas share and joined the tenants admitted by the latter to the whole land as parties and prayed for joint possession with the tenants, if joint possession with the other proprietors could not be granted.

Held, that the plaintiff was entitled to a decree against all the defendants for recovery of joint possession of the eight-annas share and that he was entitled to enforce his right by a suit for partition, if he was not satisfied with delivery of possession of an undivided half share. C. GAJADHAR AHIR v. BHIKARI LAL, 18 C. W. N. 1011 **228**

——— against Secretary of State—Tort—Negligence of servants, liability for—Acts done by Sovereign in his Sovereign capacity—Maintenance of roads, whether function of Government—Government of India Act, 1833, 3 and 4 William IV, Ch. 85, s. 4 **723**

Surety. *See* CRIMINAL PROCEDURE CODE, s. 112

——— ———, liability of **251**

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Surrender. *See* BENGAL TENANCY ACT, s. 86 (6).

Taluk. *See* BENGAL LAND REVENUE SALES ACT.

Temporary Injunction. *See* INJUNCTION.

Thumb Impression. *See* EVIDENCE; REGISTRATION ACT, s. 82 **800**

Tort—*Suit against Secretary of State—Negligence of servants, liability for—Acts done by Sovereign in his Sovereign capacity—Maintenance of roads, whether function of Government—Government of India Act, 1833, 3 and 4 William IV, Ch. 85, s. 4.*

The maintenance of roads is one of the functions of Government and though that function may be delegated to Municipalities and Local Boards still it is a Sovereign function, especially where the road is maintained for military purposes, and the Secretary of State for India in Council exercising such Sovereign function will not be made liable for injuries sustained by a person coming against a heap of gravel stored on the road by a contractor, as it cannot be said to have been done in the conduct by Government of undertakings which might have been carried on by private persons.

Per *Wallis, C. J.*—A distinction exists between acts done by Government in the exercise of its Sovereign powers and conduct by Government of undertakings which might have been carried on by private persons.

Per *Seshagiri Aiyar, J.*—The maintenance of highways is one of the Sovereign functions of Government and where the injury caused is not due to negligence resulting from the exercise of other than Sovereign or Administrative functions, the Government are not liable.

Obiter dicta.—(1) The ordinary rule that States and Sovereigns are liable for damages occasioned by the negligence of their officers, does not apply to the Secretary of State who is subject to the same liability as the East India Company was.

(2) The rule that actions against the Sovereign must be limited only to such actions for which a remedy exists by the petition of right does not apply to subjects residing out of the United Kingdom, to whom the general rule as to liability for torts dependent upon the particular dominion applies.

(3) The Government departments and public officers and servants are liable for the wrongful acts of their servants in all cases where satisfaction can be had out of the revenues of the State.

(4) By section 4 of 3 and 4 William IV, Chapter 85, the right to carry on business for the benefit of the State was recognized.

Where the East India Company exercised Sovereign rights, they were generally exempt from liability to be sued in the Municipal Courts, but with reference to transactions which, though carried on for public purposes and for the public benefit, were of such a nature as could have been undertaken by private

Tort—concld.

individuals or by a trading corporation, they were governed by laws regulating private rights.

(5) The line of demarcation between Sovereign powers and powers exercisable by private individuals is that in the one case no question of consideration comes, whereas the essence of the other is that some profit is secured or some special injury is inflicted in the exercise of individual rights.

(6) Where the sole object of Government in carrying out a project is the public good and no idea of profits is in contemplation, *prima facie* the business cannot be said to have been done in the discharge of private duties, but only in the exercise of administrative powers vested in the State or Sovereign. **M.** SECRETARY OF STATE *v.* A. COCKCRAFT, (1915) M. W. N. 39 **723**

Track evidence, value of **846**

Trade-mark, *law of—Trade-mark, whether can be assigned or can descend in gross—Originator of trade-mark, right of—Good-will, meaning of—Good-will, transferee of, right of—Evidence Act (I of 1872), s. 117—Licensee—Estoppel.*

In India the law of trade-marks is not governed by Statute: there is no Statutory system of registration, and the rights and liabilities in connection with trade-marks are determined by reference to the principles of the Common Law of England.

It is in the inherent nature of a trade-mark that it cannot be assigned or descend in gross, for it is a mode of representing the origin of the goods to which it is attached, or their trade association.

The representation of a trade-mark may perhaps only be true of its originator, but usage has sanctioned a more liberal treatment based on the principle of identification by succession and, therefore, successors in business have been allowed to use their predecessors' trade-marks where the representation still continues to be substantially true.

An originator of a trade-mark of a natural product, who certifies to their good quality, is entitled to it and has a right to alienate it.

A trade-mark can only be assigned together with the good-will of the business to which it relates.

Where, therefore, the trade-marks of jute-balers were assigned together with the business of jute-balers, the transfer was held to be valid.

Good-will is the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old established business from a new business at its first start

A transferee of the good-will is entitled to use the name in which the business was carried on and to represent himself as carrying on that business.

Under section 117 of the Evidence Act a licensee of a trade-mark shall not be permitted to deny that his licensor had, at the time when the license commenced, authority to grant such license. **C.** HANNAH *v* JAGANNATH & Co, 19 C. W. N. 1 **483**

— — and property mark, distinction between—"National Bank of India" stamped on gold bars, whether trade-mark or property mark—Counterfeit trade-mark—Interference in revision—Criminal Procedure Code (Act V of 1898), s. 439 **902**

Transfer. *See* FRAUDULENT TRANSFER.

— — —, admission of, by defendant, effect of **704**

— — —Necessity of trying Magistrate's evidence —Burden of proof **846**

— — — of case—*Dispute about mosque between Hindus and Muhammadans—Criminal Procedure Code (Act V of 1898), s 528.*

It is desirable that a suit relating to a mosque between Hindus and Muhammadans should be tried by some European Magistrate. **P.** KADIR BAKHSH *v.* SUNDAR LAL, 1 P. W. R. 1915 Cr.; 127 P. L. R. 1915; 16 Cr. L. J. 213 **837**

Transfer of Property Act (IV of 1882), ss. 3, 6 (e), 130—*Breach of contract—Damages—Insolvent estate, transferee from purchaser of, right of, to sue for damages—Transfer of right to sue—Actionable claim.*

A transferee from the purchaser of rights in an insolvent estate from the Receiver, cannot enforce a claim for damages on an unfulfilled contract in favour of the insolvent.

A right to sue for damages for breach of contract is not an actionable claim and cannot be transferred **P.** JANGLI MAL *v.* PIONEER FLOUR MILLS, 106 P. R. 1914 **115.**

— — — — — — **s. 6**—*Contract not to claim property by inheritance in future for good consideration, legality of.*

There is nothing illegal in a person, for good consideration, contracting not to claim a share in a property in the event of his becoming entitled to it on the decease of a living person. **A.** MOHAMMAD HASHMAT ALI *v.* KANIZ FATIMA, 13 A. L. J. 110 **701**

— — — — — — **s. 6 (e)** **115**

— — — — — — **s. 8**—*Assignment of debt whether arrears of interest on debt are included in assignment.*

The arrears of interest of an assigned debt form part of the interest which the transferor is capable of passing by assignment and must be held to have been transferred in the absence of any words restricting the interest transferred. **L. B** MAUNG THA *v.* N. C. CHATTERJEE **896**

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— — — — — — **s. 43**—*Landlord and tenant—Land belonging to Government transferred by lease—Government declaring its right and granting it to lessor—Determination of tenancy—Estoppel between lessor and lessee—Erroneous representation to create estoppel must be believed in good faith and after due inquiry—Privies, rights and liabilities of—Classes of privies.*

Where land belonging to Government is included in a lease and the Government, subsequently having declared the land at its disposal, grants it to the lessor, the tenancy is determined by the declaration and the lessee cannot take the benefit of section 43 of the Transfer of Property Act.

In the absence of any allegation or proof to the effect that in taking the lease the lessee believed in good faith and after due inquiry the erroneous representation regarding the title to the land made by the lessor, the lessee is not en title detorly—

Transfer of Property Act—contd.

upon the principle embodied in section 43 of the Transfer of Property Act.

Section 43 of the Transfer of Property Act applies also to the privies of the original transferor and the original transferee.

Unless a Statute expressly or by necessary implication precludes the application of provisions awarding rights to or imposing civil liabilities on the privies of the person to whom the rights are given or on whom the liabilities are imposed, the privies are entitled or are bound, as the case may be, to the extent to which the original parties are so entitled or are so bound. The extent of privy's liability, however, is not always co-equal with the extent of the liability of the person through whom he claims.

Privies are of three classes (1) in blood (as heirs), (2) by estate (as lessees, assignees, etc.); (3) in law (as the lord by escheat, the tenant by courtesy, executors and administrators). M. HATTIKUDUR NARAIN RAO v. ANDAR SAYAD ABBAS SAHIB, 28 M. L. J. 44 785

——— ——— s. 43, scope of 982

——— ——— ——— s. 52, *applicability of—Partition proceedings—Subsequent agricultural lease void.*

Section 52 of the Transfer of Property Act applies to an agricultural lease as well as to partition proceedings when they are contentious.

An agricultural lease granted during the pendency of partition proceedings which are contentious in their origin and nature is void, even though summons had not been served on the opposite party at the time of the grant. N. CHANDAN SINGH v. FAKIRGIR, 11 N. L. R. 21 940

——— ——— ——— s. 53—*Remission of debt to defeat creditors—Voidable—Evidence Act (I of 1872), s. 92—Registered deed—Rescission or cancellation cannot be proved by oral agreement or unregistered document—Agreement to pay lesser amount in full discharge or fixing different period—Variation in terms—Endorsement on mortgage-deed, when admissible and when not*

Under section 53 of the Transfer of Property Act 1882, it is not necessary that the transferor should reserve a benefit to himself, as gifts to a third party are as much voidable as other transfers. Though the section does not apply in terms, the principle on which it is based will apply to a creditor voluntarily remitting, with a view to defeat his creditors, the whole or a portion of a debt due to him.

Section 92, clause 4, of the Evidence Act precludes evidence of an oral agreement to rescind a registered contract.

Where it is sought to prove that though the parties provided in the registered-deed for performance in a particular way, *e. g.*, by re-payment of the debt in a particular manner, an agreement whereby a lesser amount was agreed to be taken in full discharge or a different period was fixed, would be a variation of the terms and would fall within section 92.

A mortgage having been created by a registered document cannot be cancelled or rescinded either orally or by an unregistered endorsement on the mortgage-deed, reciting that the bond was cancelled and returned as the amount due was paid. M. NAMAGIRI LAKSHMI AMMAL v. SRINIVASA AIYANGAR 269

Transfer of Property Act—concld.

——— ——— ——— s. 55 (2)—*Implied covenant for title—Vendee's knowledge of defect in vendor's title—Difference between cases of conveyances of full title and conveyances of qualified title—Karamkari tenure.*

The rule that in spite of his knowledge of a defect in the title of the vendor, a vendee is in case of dispossession entitled to sue his vendor on the implied covenant for title under section 55 (2) of the Transfer of Property Act, applies only to cases of conveyances of absolute or full title. If, however, what is conveyed is not an absolute title, as in the case of a conveyance of lands held on *karamkari* tenure (which, by their very nature, are inalienable) and the vendee is evicted by the superior landlord, the vendor is not liable to the vendee on any implied covenant for title. M. VATAKKA CHATHILINGATH TAVAZHI v. RAMASWAMI PATTER, 2 L. W. 155 889

——— ——— ——— s. 58 162

——— ——— ——— s. 58 (c)—*Sale or mortgage—Sale-deed by mortgagor—Agreement to reconvey by mortgagee within a limited period.*

Where a mortgagor executed a deed of absolute sale in favour of his mortgagee who was about to sue on his mortgage, and ten days later the mortgagee executed an agreement to re-convey the property within 18 months if the mortgagor paid the mortgage money:

Held, that under the circumstances of the case the transaction amounted only to an absolute sale with an agreement to re-convey, and not to a mortgage by conditional sale. M. SWAMINATHA AIYAR v. APPARAMI AIYAR, 27 M. L. J. 686; (1914) M. W. N. 906 305

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——— ——— ——— ss. 60, 62 427

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——— ——— ——— s. 92—*Civil Procedure Code (Act V of 1908), O. XXXIV, r. 14—Sale held in contravention of section 99, Transfer of Property Act, whether void or voidable—Objection, if not taken before confirmation of sale, effect of—Hindu Law—Joint family—Managing member, representation by, whether on behalf of family.*

Section 99 of the Transfer of Property Act does not render a sale in violation of the section absolutely null and void, it is only voidable.

If no objection is taken to such a sale before confirmation, such objection cannot be taken later.

Per *Banerji, J.*—In the case of a joint Hindu family the manager of the family represents the whole family. A. LAL BAHADUR SINGH v. ABHARAN SINGH, 18 A. L. J. 188 795

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Under-proprietary tenure—*Oudh Rent Act (XXII of 1886), Chap. VIIA—U. P. Land Revenue Act (III of 1901), s. 79.*

Under-proprietary tenures paying no rent at all fall under the operation of the Resumption Chapter of the Oudh Rent Act, those paying rent must be dealt with under section 79 of the U. P. Land Revenue Act. **U. P. B. R.** LACHHMAN SINGH *v.* MADHO PRASAD, 2 O. L. J. 41 **552**

Undue influence. *See* CONTRACT, s. 16.

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—Decree, interpretation of—Village, entire, division of—Jurisdiction of Revenue Courts—Petition of house—Objection as to jurisdiction not taken, effect of.

Ordinarily a decree for the division of an entire village means that the land of the village together with all the buildings appurtenant thereto is to be divided.

Revenue Courts, however, while making a partition, have no jurisdiction to make the actual division of a house or building or the materials thereof.

Section 111 of the U. P. Land Revenue Act is confined to objections raising a question of title only and does not contemplate those relating to the jurisdiction of Revenue Courts.

If, as a matter of law, a Court has no jurisdiction to do something, such a jurisdiction cannot be conferred upon it by a failure on the part of the parties interested to raise an objection in bar of the jurisdiction. **O.** IQBAL NARAIN *v.* SURAJ NARAIN, 2 O. L. J. 51; 18 O. C. 80 **543**

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Vendor and purchaser—Condition not to partition property, whether against public policy—Breach of contract—Compensation—Damages, measure of **503**

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———Muhammadan dedicating properties for expenses of mosque and maintenance of family, how far valid—Musalmans Waqf Validating Act (VI of 1913), retrospective effect of.

Where a Muhammadan made a *waqf* of his properties for the expenses of a mosque and for the maintenance of his children

Waqf—*contd.*

Held, that the *waqf* so far as it related to the expenses of the mosque was valid, but not for the maintenance of the children, as it was not properly endowed for religious purposes.

The Musalmans Waqf Validating Act, 1913, has not a retrospective effect. **C.** RAHIMUNISSA BIBI *v.* MANIK JAN, 19 C. W. N. 76 **96**

Water, *flow of—Right ancillary to property—Lands adjoining each other on different levels.*

Where *A* owns land adjoining that of *B* on a higher level and the water falling on the land of *A* naturally flows on to the land of *B*, it is the duty of *B* to allow the water from *A*'s land to pass on through his land, and then to dispose of it as *B* thinks best.

The question is not one of easement, but of a right ancillary to property. **C.** RAMADHIN SINGH *v.* JADUNANDAN SINGH, 19 C. W. N. 54 **268**

Widow. *See* HINDU LAW.

Will. *See* SUCCESSION ACT (X of 1865), s. 187.

———Bequest in favour of unborn persons—Hindu Transfers and Bequests Act (Mad. Act I of 1914) retrospective effect of—Gift to daughter with a gift over, whether valid.

A bequest to persons who are not born at the date of the testator's death is invalid.

The Hindu Transfers and Bequests Act (Madras Act I of 1914), has no application where the testator died long before the Act came into force and has retrospective effect only to the extent that it applies to Wills made before the passing of the Act where the dispositions made are intended to come into operation at a time which is subsequent to the passing of the Act.

Where a Will made no gift in favour of the testator's children, but directed that they should enjoy his properties without having any right to them and that the executors should collect the rents, etc., and after meeting all expenses should add up the surplus for the benefit of the grand-children, who should take the properties on the death of the testator's children, the grand-children not having been born at the testator's death.

Held, that the disposition in favour of the grand-children was invalid and the properties vested in the heirs of the testator as an intestacy, the grand-children taking no interest except as members of an undivided family who by birth acquire a right to the grandfather's properties.

Where a gift made in favour of the daughter also provides that after her the property should be enjoyed by her descendants, the fact that the gift over is invalid does not defeat the estate given to her. **M.** VARADARAJA MUDALIAR *v.* NARAYANASAMI MUDALIAR, 27 M. L. J. 681 **298**

———Construction—Disposition with power to sell—Absolute interest—Absolute gift to legatee with a gift over simpliciter on contingency of death refers only to period of distribution—Succession Act (X of 1865), s. 111—Statutory rule of construction must be followed.

Where property is given to a person with power to sell, make a gift or *hiba*, etc., he takes thereby an absolute interest in the property.

The ordinary rule of construction where the testator has given an absolute gift to a legatee and then has

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made a gift over *simpliciter* on a contingency of death is that he was referring to death before the period of distribution.

The rule laid down in section 111 of the Indian Succession Act (X of 1865) is a statutory rule of construction which the Courts are bound to follow. **C.** NISTARINI DEBYA *v.* BEHARI LAL MOKHOPADHYA, 19 C. W. N. 52 **239**

———*Mohunt*—Document appointing successor to *gaddi*, whether Will—Property held in capacity of *mohunt*—Letters of Administration—Probate—Question of title **24**

———Occupancy holding—Custom **352**

———, *Parsi, construction of—Succession Act (X of 1865), s. 111, applicability of.*

A Parsi made a Will of his property in favour of his two sons, stating: "The.....two sons are proprietors, half and half alike, and in equal (shares) of my whole 'estate'....At present my elder son has no male issue of his body therefore, if my elder son gets a male issue half of the estate is to be made over to him, on his attaining full age. If my son (elder) does not get a son, my son (younger) is to give away his son as .. *palak*." After his death the elder son died leaving no male issue and then his heirs under the Parsi Intestate Succession Act sued for his share:

Held, that on the general principles applicable to the construction of such a Will as well as on the principle of section 111 of the Indian Succession Act, the estate got divided on the testator's death into two portions and each portion became the absolute property of one of the two sons. **P. C.** JEHANGIR DADABHOY *v.* KAIKHUSHRU KAVASHA, 28 M. L. J. 167; 2 L. W. 208; 18 A. L. J. 217; 19 C. W. N. 426; 21 C. L. J. 210; 17 Bom. L. R. 197; 17 M. L. T. 203; 39 B. 296 **53**

———*Succession Act (X of 1865), s. 46—Testamentary capacity, meaning of—Burden of proof—Opinions of witnesses as to competency, value of—Extraordinary terms—Requisites of valid Will—Testator of sound mind at time of giving instructions for Will—Subsequent execution, whether valid—Facts, finding of, by trial Court—Appellate Court, power of, to disturb.*

It is the duty of the propounders of a Will to show that the testator had testamentary capacity, *i. e.*, capacity to comprehend the nature and effect of his act; to discharge the burden of proof, it must be shown that he was able to dispose of his property with understanding and reason, that he was able to realise his position, to appreciate his property and to form a judgment with respect to the parties whom he decided to benefit.

The opinions of witnesses as to competency of a testator are entitled to little regard, unless supported by good reasons founded on facts which warrant them.

Mere ability to sign one's name does not necessarily imply the possession of the full mental powers requisite for a valid disposition of property. Nor is it sufficient to show that the testator was conscious when he executed the instrument.

A Court will not reject a Will merely because its terms appear extraordinary, against clear evidence of due execution by a competent testator. But where the terms are unusual and the evidence of testamentary capacity doubtful, the vigilance of the Court will be roused and, before pronouncing for the Will, the Court will require to be satisfied beyond all reasonable doubt that the testator was fully cognizant of its contents and in a condition to exercise and did exercise thought, judgment and reflection respecting the act he was doing.

Will—concld.

When a testator is of sound mind when he gives instructions for a Will but at the time of signature accepts the instrument drawn in pursuance thereof, even though not able to follow its provisions then, he must be deemed to be of sound mind when it is executed.

The proof eminently lies on him who sets up a Will, and it is more fatal to him than to his adversary if he leaves difficulties entirely without explanations.

Where, therefore, a Will was executed by a man about two hours before his death, when his condition was critical and when he was restless with pain, and there was no information whatsoever either as to instructions, if any, given by him, or the time when and the person to whom the directions were given and there was no evidence to show that the Will, as prepared, was, before execution read over to and approved by him:

Held, (1) that the propounders had failed to establish that the testator had sound disposing mind when he affixed his signature to the Will;

(2) that the propounders could not be given any further opportunity of filling up the deficiencies in the proof, offered by them as there was a real danger of manufacture and manipulation of evidence if witnesses were allowed to speak to events which happened many years ago.

The principle that "it is always difficult for Judges who have not seen and heard the witnesses to refuse to adopt the conclusion of fact of those who have," is not of universal application. Where the case is one not so much of estimate of credibility of witnesses who have been believed by the trial Court, as of the effect of their statements, on the assumption that they have spoken the truth, the Appellate Court will refuse to adopt the conclusion of the trial Court if good grounds are shown. **C.** SUSIL KUMAR BANERJEE *v.* APSARI DEBI, 20 C. L. J. 501; 19 C. W. N. 826 **276**

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Workman's Breach of Contract Act (XIII of 1859)—*Contract—Payment of advance by deduction from wages—Suit for breach of contract, whether within the Act.*

A case in which the contract is that the workman shall work for wages, deducting from his wages a certain sum periodically to make good an advance, is within Act XIII of 1859. M. JELAGAN SUBRAMANIA NAIDU v. K. SINGARA MUDALI, 27 M. L. J. 616, 16 CR. L. J. 112 160

——————— *Contract to perform agricultural service, whether within the Act—Provision of penalty for its breach.*

The Workman's Breach of Contract Act (XIII of 1859) was not intended to apply to a contract to perform agricultural service.

Where a contract prescribes a penalty for its breach, the remedy prescribed by the Act cannot be availed of. P. EMPEROR v. KHUDA BAKHSH, 38 P. R. 1914 CR., 16 CR. L. J. 229 901

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